

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

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FCC Mail Room

In the Matter of)	
)	
IConnect Wholesale, Inc., d/b/a TeleCuba)	IB Docket No. 10-95
)	
Petition for Waiver of the International Settlements)	FCC File No. ISP-WAV-20100412-00007
Policy and Benchmark Rate for Facilities-Based)	
Telecommunications Services with Cuba)	

MEMORANDUM OPINION AND ORDER

Adopted: April 8, 2011

Released: April 8, 2011

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider a petition filed by IConnect Wholesale, Inc., d/b/a TeleCuba ("TeleCuba" or "Petitioner")¹ for a waiver of the International Settlements Policy ("ISP")² and a waiver of the benchmark rate applicable to Cuba under the Commission's 1997 Benchmarks Order ("*Benchmarks Order*")³ for the purpose of reestablishing direct communications services with Cuba. Specifically, TeleCuba requests that the Commission waive the ISP and the applicable FCC benchmark rate (\$0.19 per minute) for U.S. carrier settlements of telephone traffic in order to pay the Cuban carrier, Empresa de Telecomunicaciones de Cuba S.A. ("ETECSA"), a \$0.84 per minute settlement rate for a period of three years. Based on the record established in this proceeding, we find that a grant of TeleCuba's unopposed request to waive the benchmark rate subject to conditions specified below will serve the public interest, convenience, and necessity. We dismiss, without prejudice, TeleCuba's request for a waiver of the ISP.

II. BACKGROUND

A. Authorization of Services to Cuba

2. Telecommunications services between the United States and Cuba have been subject to historically unique circumstances, impacting the process by which the Commission has authorized

¹ Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba, ISP-WAV-20100412-00007 (filed Mar. 22, 2010) (Petition).

² *International Settlements Policy Reform: International Settlement Rates*, IB Docket Nos. 02-234 and 96-21, First Report and Order, 19 FCC Rcd 5709 (2004 *ISP Reform Order*). The ISP is a Commission policy applicable to certain international routes that governs how U.S. carriers negotiate with foreign carriers for the exchange of international traffic. See *infra* ¶ 16.

³ *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC Rcd 19806 (1997) (*Benchmarks Order*). The Commission's *Benchmarks Order* established benchmark rates for U.S.-international routes that provide a ceiling on rates that U.S. carriers are permitted to pay foreign carriers for terminating traffic. See *infra* ¶ 19.

services to Cuba. Commission authorization of services to Cuba has been coordinated with the U.S. Department of State ("State Department") and other agencies to ensure consistency with U.S. policy with respect to Cuba. Prior to 1993, this coordination of applications for service between the United States and Cuba was on an ad hoc basis. In 1992, Congress passed the Cuban Democracy Act of 1992 ("CDA"), which permits telecommunications services between the United States and Cuba and allows telecommunications facilities to be authorized in such quantity and of such quality as may be necessary to provide efficient and adequate telecommunications services between the two countries.⁴

3. After passage of the CDA, the Commission and the State Department coordinated more formally on applications for service between the United States and Cuba. In 1993, the State Department sent a letter to the Commission setting forth the Executive Branch's general policy guidelines for implementing the telecommunications provisions of the CDA.⁵ That guidance provided for continued coordination between the agencies of applications to provide services to Cuba, and placed restrictions on facilities that could be used for direct service to Cuba and the rates U.S. carriers paid for termination of traffic to Cuba. The 1993 guidelines permitted U.S. carriers to pay no more than \$0.60 per minute to terminate traffic in Cuba. The guidelines also asked the Commission to obtain State Department approval prior to action upon applications. The FCC issued a Public Notice in 1993 announcing this guidance, and thereafter acted upon applications based on State Department guidance.⁶

4. In 2009, the White House announced changes to U.S. policy regarding telecommunications services with Cuba.⁷ The President directed the Secretaries of Treasury and Commerce, in consultation with the Secretary of State, to increase the flow of information to the Cuban people, including through greater telecommunications links.⁸ In September 2009, the Departments of Treasury and Commerce published new regulations to implement the President's directive.⁹

5. On January 12, 2010, the State Department provided revised policy guidance to the Commission regarding Commission review of proposals for telecommunications service between the United States and Cuba.¹⁰ The guidance replaces the 1993 guidance, eliminating previous restrictions on

⁴ 22 U.S.C. S. § 6001 et seq. (1992) ("Cuban Democracy Act" ("CDA")). Sec. 6004 (e) of the CDA covers telecommunications services between the United States and Cuba.

⁵ Letter from Richard C. Beard, Acting U.S. Coordinator and Director for Bureau of International Communications and Information Policy, U.S. Department of State, to James A. Quello, [Acting] FCC Chairman, dated July 22, 1993 ("1993 State Department Letter"). The letter was made publicly available as an attachment to an FCC Public Notice, *FCC to Accept Applications for Service to Cuba*, Public Notice, Report No. I-6831 (rel. July 27, 1993) (Int'l Bur. 1993).

⁶ *Id.*

⁷ See Memorandum for the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce; Subject: Promoting Democracy and Human Rights in Cuba (available at <http://www.whitehouse.gov/the-press-office/memorandum-promoting-democracy-and-human-rights-cuba>). See also Fact Sheet: Reaching Out to the Cuban People (available at <http://www.whitehouse.gov/the-press-office/fact-sheet-reaching-out-cuban-people>).

⁸ *Id.*

⁹ See Office of Foreign Assets Control, Cuban Assets Control Regulations, 74 Fed. Reg. 46000 (Sep. 8, 2009); see also Bureau of Industry and Security, Cuba: Revisions to Gift Parcel and Baggage Restrictions, Creation of License Exemption for Donated Consumer Communications Devices and Expansion of Licensing Policy Regarding Telecommunications, 74 Fed. Reg. 45985 (Sep. 8, 2009).

¹⁰ Letter from Ambassador Philip Verveer, U.S. Coordinator for International Communications and Information Policy, U.S. Department of State, to Julius Genachowski, FCC Chairman, dated January 12, 2010 ("2010 State Department Letter").

facilities and settlement rates. The revised State Department guidance provides:

- (a) The Commission should apply its International Settlements Policy and the appropriate benchmark settlement rate with respect to proposals for the provision of telecommunications services to Cuba; however, in implementing this recommendation, the Commission should be prepared, to the extent necessary, to grant waivers reasonably limited in duration to enable carriers within its jurisdiction to provide telecommunications service between the United States and Cuba.
- (b) The Commission should send applications for the provision of telecommunications services between the United States and Cuba to the State Department for review. If the State Department does not object within 30 days of receipt, the Commission should assume that the State Department does not object to the grant of the application on foreign policy grounds.¹¹

6. On January 21, 2010, the International Bureau released a Public Notice with the 2010 State Department letter attached describing the process for continued coordination of applications filed with the FCC to provide service to Cuba.¹² In order to implement the new guidance, the Bureau said that it would process section 214 applications for the provision of services to Cuba on a non-streamlined basis and coordinate with the State Department prior to action as provided in the 2010 State Department letter.¹³ In addition, the Bureau explained that the Commission would continue to apply the Commission's ISP and the 1997 benchmarks policy to Cuba, and that U.S. carriers could request that the Commission waive either policy for a limited duration based on unique circumstances.¹⁴

B. Services to Cuba

7. *History and Present Circumstances.* In 1994, the Commission approved the applications of six U.S. carriers to provide direct satellite telecommunications services, including both switched voice and private line services, between the United States and Cuba.¹⁵ In 1996, the Commission authorized AT&T Corp. to provide direct telecommunications services between the United States and Cuba via satellite facilities and an earth station in Cuba.¹⁶ Then, in 1997, the Commission authorized Sprint Communications Company L.P. to lease and operate one additional digital satellite circuit to provide direct service between the United States and Cuba.¹⁷

¹¹ 2010 State Department Letter.

¹² *Modification of Process To Accept Applications for Service to Cuba and Related Matters*, Public Notice, DA 10-112, 25 FCC Rcd 436 (Int'l Bur. 2010) ("2010 Cuba PN").

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Memorandum Opinion, Order, Authorization & Certificate, File Nos: I-T-C-94-227, I-T-C-94-228, I-T-C-94-229, I-T-C-94-247, and I-T-C-94-260, DA 94-1098, 9 FCC Rcd 5806 (Int'l Bur. 1994). The companies whose applications were granted were WilTel International, Inc., MCI Telecommunications Corp., LDDS Communications, Inc., Sprint Communications Company L.P. and IDB WorldCom Services, Inc. See also Memorandum Opinion, Order and Authorization, File No. I-T-C-94-272, DA 94-863, 9 FCC Rcd 4037 (Int'l Bur. 1994) (authorizing Comsat Corporation to provide switched voice and private line services, on a direct basis, between the United States and Cuba). These were the first applications to be granted for direct voice service to Cuba after enactment of the CDA.

¹⁶ See Order and Authorization, File No. I-T-C-96-009, DA 96-518, 11 FCC Rcd 4149 (Int'l Bur. 1996).

¹⁷ See Order and Authorization, File No. ITC-214-19990316-00141, DA 99-903, 14 FCC Rcd 7659 (Int'l Bur. 1999).

8. There are currently no telecommunications services provided by U.S. carriers on a direct basis between the United States and Cuba. In 2000, Cuba cut off all direct links with U.S. carriers because U.S. policy prevented U.S. carriers from paying a \$0.24 per minute surcharge demanded by Cuba on top of the then-\$0.60 per minute settlement rate allowed by the 1993 State Department guidelines to terminate telephone calls to Cuba.¹⁸ In addition, there are no commercial submarine cables directly connecting the United States and Cuba. The Commission, however, permits satellite services to Cuba, which are occasionally used for video and data services.

9. While U.S. carriers provide no direct service between the United States and Cuba, U.S. carriers route calls on an *indirect* basis between the United States and Cuba, using a process called reorigination. Under reorigination, U.S. carriers route traffic from the United States destined for termination in Cuba to a carrier located in an intermediate country. The intermediate country carrier accepts the U.S. traffic and terminates it with the Cuban carrier as its own traffic under settlement arrangements it has with Cuba. The U.S. carrier makes a settlement payment to the intermediate country carrier to arrange for the termination of its traffic, but does not make a settlement payment to any carrier in Cuba. According to the most recent published reports filed by U.S. carriers, 18 U.S. carriers report providing service between the United States and Cuba on a reorigination basis.¹⁹

10. *TeleCuba's Service to Cuba.* In 1999, the Commission authorized TeleCuba to provide facilities-based and resale telecommunications services between the United States and particular international points.²⁰ In 2003, the Commission further authorized TeleCuba to provide services directly to Cuba via satellite circuits.²¹ TeleCuba provided direct service under that authorization for a short period of time in 2003. TeleCuba states that it "ceased all direct and indirect telecommunications services to Cuba when the rate increased and it has not engaged in transit agreements with any intermediate countries for the purpose of transmitting telecommunications service to Cuba."²² It has not since

¹⁸ See 1993 State Department Letter at 2. The 1993 State Department policy guidance provided that settlements more favorable to Cuba than the current 50/50 split of the \$1.20 per minute accounting rate not be permitted.

¹⁹ See 2008 International Telecommunications Data, Strategic Analysis and Negotiations Division, International Bureau, FCC (published March 2010). This report compiles data on telecommunications service between the United States and international points, based upon information submitted to the FCC by U.S. carriers pursuant to 47 C.F.R. § 43.61 of the Commission's rules. The 2008 International Telecommunications Data and the reports for previous years are available at <http://www.fcc.gov/ib/sand/mniab/traffic/>

²⁰ See Public Notice, Report No. TEL-00098, ITC-214-19990428-00255, DA 99-1152, 14 FCC Rcd 9992 (Int'l Bur. 1999). The authorization was granted to World Group, Inc., which changed its name to TeleCuba Communications, Inc. See Public Notice, Report No. TEL-00279 ITC-214-19990428-00255, DA 00-1952, 15 FCC Rcd 18905 (Int'l Bur. 2000). On April 1, 2005, TeleCuba, Inc. notified the Commission of its name change to IConnect Wholesale, Inc. See Public Notice, Report No. TEL -00910 ITC-214-19990428-00255, DA 05-1344, 20 FCC Rcd 8897 (Int'l Bur. 2005). Under this authorization, TeleCuba does not have specific authority to serve Cuba on a direct basis, as such authority must be filed as a separate section 214 application pursuant to section 63.18(e)(4) of the Commission's rules. See 47 C.F.R. § 63.22.

²¹ *Telecuba, Inc., Application for Authority to Provide Facilities-Based Services to Cuba*, Order, Authorization and Certificate, 18 FCC Rcd 9404 (2003) ("2003 TeleCuba Order"). Under the Order, the International Bureau specified that Telecuba is permitted to lease and operate a 3 Mbps satellite circuit to provide service between the United States and Cuba. Additionally, in accordance with the 1994 State Department guidance, TeleCuba was required to split 50/50 with ETECSA the \$1.20 per minute accounting rate for switched telecommunications services, and the surcharge agreed to between TeleCuba and ETECSA for received collect calls shall be no greater than \$1.00 per call.

²² See May 21 Letter at 2. By letter dated April 5, 2005, TeleCuba notified the Commission of its name change to IConnect Wholesale, Inc. See Public Notice, Report No. TEL -00910 (Int'l Bur. rel. May 12, 2005).

provided services to Cuba. On January 12, 2011, TeleCuba was granted an international section 214 authorization to provide facilities-based service to Cuba pursuant to the new State Department guidelines.²³

C. The Petition

11. TeleCuba filed its Petition on March 18, 2010, and supplemented its Petition on May 21, 2010, in response to an information request from the International Bureau.²⁴ In these documents, TeleCuba requests that the Commission, for a three-year period, waive the ISP and the applicable benchmark rate of \$0.19 per minute for direct service to Cuba in order to permit it to pay ETECSA \$0.84 per minute for termination of telephone traffic between the United States and Cuba.²⁵

12. TeleCuba indicates that a three-year waiver is necessary in order to allow a sufficient timeframe to establish direct services between the United States and Cuba.²⁶ TeleCuba believes that traffic would increase over the course of the three-year period, which would enable TeleCuba to negotiate a lower rate with ETECSA.²⁷ TeleCuba asserts that a waiver of the proposed settlement and accounting rates is in the public interest since it will allow TeleCuba to reestablish its working relationship with ETECSA and therefore allow for an expansion of telecommunications services between the United States and Cuba.²⁸ Finally, TeleCuba contends that the provision of direct service to Cuba will minimize the influence of intermediate country carriers.²⁹

13. The Petition was placed on Public Notice on April 26, 2010.³⁰ On May 26, 2010, AT&T Inc. ("AT&T") filed comments,³¹ and on June 10, 2010, Verizon filed reply comments.³²

14. Both AT&T and Verizon support TeleCuba's request for a waiver of the benchmark rate. AT&T and Verizon state that a waiver of the ISP should be granted to the extent necessary to allow the \$0.84 per minute settlement rate.³³ Additionally, Verizon emphasizes that any waiver must apply to all

²³ See ITC-214-20101119-00448 (IConnect Wholesale, Inc.), International Authorizations Granted, Public Notice, DA 11-64 (Int'l Bur. rel. Jan. 13, 2011). IConnect Wholesale, Inc. was also granted international section 214 authorization to provide global facilities-based and resale service. See ITC-214-20101119-00449, International Authorizations Granted, Public Notice, DA 10-2367 (Int'l Bur. rel. Dec. 16, 2010).

²⁴ Letter from Luis G. Coello, President, IConnect Wholesale, Inc. d/b/a TeleCuba, to the Secretary of the Commission, dated May 21, 2010 ("Petitioner's Response to Supplemental Information Request"); Letter from James L. Ball, Chief, Policy Division, International Bureau, FCC, to Mr. Luis G. Coello, President, IConnect Wholesale, Inc., d/b/a TeleCuba, (May 12, 2010) (FCC May 12 Supplemental Information Request).

²⁵ See Petition at 1.

²⁶ *Id.*

²⁷ See Petitioner's Response to Supplemental Information Request at 2.

²⁸ See Petition at 2.

²⁹ *Id.*

³⁰ *IConnect Wholesale, Inc., d/b/a TeleCuba, Requests a Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba*, Public Notice, DA-10-961, 25 FCC Rcd 5829 (Int'l Bur. 2010).

³¹ Comments of AT&T Inc., filed May 26, 2008 (AT&T Comments).

³² Reply Comments of Verizon companies (Verizon Reply Comments). The Verizon companies participating in this filing ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.

³³ AT&T Comments at 1; Verizon Reply Comments at 1.

U.S. carriers who may wish to establish direct communications between the United States and Cuba.³⁴

III. DISCUSSION

15. The Commission may waive its rules and policies where particular facts make strict compliance inconsistent with the public interest.³⁵ In doing so, the Commission may take into account more effective implementation of overall policy on an individual basis, and whether a deviation from the general rule will better serve the public interest.³⁶ In considering the TeleCuba waiver requests, we balance the policy goals of reestablishing direct telecommunications links with Cuba by U.S. carriers with promoting competition and lower international calling rates for services to Cuba, as well as other international routes. We believe that re-establishing direct links should be done in a way that benefits consumers and should not create a problematic precedent for settlement rates for other international routes. For the reasons discussed below, we dismiss, without prejudice, TeleCuba's request for a waiver of the ISP. At the same time, we grant, with conditions, TeleCuba's request for a three-year waiver of the Commission's applicable benchmark rate to Cuba. Taken together, these actions will allow TeleCuba to agree to a \$0.84 per minute settlement rate with ETECSA, subject to the ISP, in order to reestablish direct links with Cuba. This decision is based upon the unique circumstances of the U.S.-Cuba international route and should not be viewed as precedent for similar actions on other routes.

A. ISP Waiver Request

16. The Commission established the ISP to govern how U.S. carriers negotiate with foreign incumbent carriers for the exchange of international traffic. It is the policy the Commission has used to respond to concerns that foreign carriers with market power are able to take advantage of the presence of multiple U.S. carriers serving a particular market.³⁷ The policy prevents foreign carriers with market power from discriminating or using threats of discrimination or other anticompetitive actions against competing U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of international traffic, such as "whipsawing."³⁸ Specifically, the ISP requires that: (1) foreign carriers must offer all

³⁴ Verizon Reply Comments at 1.

³⁵ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (*Northeast Cellular*).

³⁶ *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT Radio*).

³⁷ See *2004 ISP Reform Order*, 19 FCC Rcd at 5715, ¶ 12. The ISP, formerly known as the Uniform Settlements Policy, or USP, initially applied to telegraph and telex services and evolved through Commission decisions and practices. The intent of the USP was to ensure that U.S. carriers were treated fairly and that U.S. customers received the benefits that result from the provision of international services on a competitive basis. Among other things, the policy required uniform accounting rates and uniform terms for sharing of tolls. See, e.g., *Mackay Radio and Telegraph Co.*, 2 FCC 592 (Telegraph Committee 1936), denying an application for Section 214 authority to serve Norway because the settlement terms would have permitted the Norwegian carrier to engage in anticompetitive behavior against U.S. carriers by manipulating traffic flows and retaining a greater percentage of the accounting rate, *aff'd sub nom. Mackay Radio v. FCC*, 97 F.2d 641 (D.C. Cir. 1938); *Modifications of Licenses in the Fixed Public and Fixed Public Press Services*, 11 FCC 1445 (1946); *Mackay Radio and Telegraph Company*, 25 FCC 690 (1951), *rev'd on other grounds sub nom. RCA Communications, Inc. v. FCC*, 210 F.2d 694 (D.C. Cir. 1952), *vacated and remanded*, 346 U.S. 86 (1953); *TRT Telecommunications Corp.*, 46 FCC 2d 1042 (1974). In 1986, the Commission renamed the USP the "ISP" and extended its application to International Message Telephone Service (IMTS) in response to significantly greater reported instances of anticompetitive behavior. The Commission also streamlined the filing of accounting rate modifications and chose not to apply the ISP to enhanced services. See *ISP Order*, 51 Fed. Reg. 4736; *modified in part on recon.*, Order on Reconsideration, 2 FCC Rcd 1118 (1987) (*ISP Recon Order*); Further Reconsideration, 3 FCC Rcd 1614 (1988) (*ISP Further Recon*).

³⁸ The term "whipsawing" generally refers to a broad range of anticompetitive behavior by foreign carriers that possess market power, in which the foreign carrier or a group of foreign carriers exploit that market power in (continued....)

U.S. carriers the same effective accounting rate and same effective date for the rate (“nondiscrimination”); (2) all U.S. carriers are entitled to a proportionate share of U.S.-inbound or return traffic based upon their proportion of U.S.-outbound traffic (“proportionate return”); and (3) the accounting rate is split evenly between U.S. and foreign carriers for U.S.-inbound and -outbound traffic so that inbound and outbound settlement rates are identical (“symmetrical settlement rates”).³⁹ In addition, the “No Special Concessions” rule and certain filing requirements serve as safeguards against non-price discrimination and reinforce the ISP conditions.⁴⁰ Although the Commission has exempted benchmark-compliant routes from the ISP,⁴¹ Cuba remains subject to the ISP because U.S. carriers never achieved benchmark-compliant rates for service to Cuba.

17. AT&T and Verizon filed comments supporting TeleCuba’s request to waive the ISP only to the extent necessary to allow a settlement rate of \$0.84 on the U.S.-Cuba route. In contending that any ISP waiver should be limited, AT&T asserts that TeleCuba offers no basis for, and does not request, any broader waiver of the ISP, which provides important protections for U.S. carriers against discriminatory conduct on routes with high settlement rates.⁴² AT&T emphasizes that the ISP should remain in force on the U.S.-Cuba route.⁴³ Verizon requests that the Commission should ensure that any waiver of the ISP is sufficiently narrow so as not to circumvent the protections the ISP provides to U.S. carriers on international routes where discriminatory conduct may be present.⁴⁴

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negotiating settlement rates with competitive U.S. telecommunications carriers. *See, e.g., AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of “Whipsawing” On the U.S.-Philippines Route*, IB Docket No. 03-38, Order on Review, 19 FCC Rcd 9993 (2004) (Philippines Order on Review); *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief and Petition of WorldCom, Inc. for Prevention of “Whipsawing” On the U.S.-Philippines Route*, IB Docket No. 03-38, Order, 18 FCC Rcd 3519 (IB 2003) (2003 Philippines Order).

³⁹ 47 C.F.R. § 43.51.

⁴⁰ 47 C.F.R. § 63.14. The “No Special Concessions” rule prohibits carriers from accepting special concessions from foreign carriers with market power. Generally, special concessions between U.S. and foreign carriers with market power pose an unacceptable risk of anticompetitive harm in the U.S.-international services market, whereas special concessions between U.S. carriers and foreign carriers that lack market power may permit carriers to offer innovative services that result in lower rates to U.S. customers. *Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 at 23957-65, ¶¶ 156-170 (1997) (*Foreign Participation Order*). The Commission narrowed the application of the “No Special Concessions” rule in the *1999 ISP Reform Order* by partially removing the rule as it applies to terms and conditions under which traffic is settled, including the allocation of return traffic or “grooming” arrangements, on a route where the Commission removes the ISP. For example, the “No Special Concessions” rule still applies to terms and conditions unrelated to the settlement of traffic, such as interconnection of international facilities, private line provisioning and maintenance, and quality of service on routes where the ISP is lifted. *See 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket 98-148 and 95-22, CC Docket 90-337 (Phase II), Report and Order and Order on Reconsideration, FCC 99-73, 14 FCC Rcd 7963, 7994-98, ¶¶ 82-94 (1999) (*1999 ISP Reform Order*). *See also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order on Reconsideration, IB Docket No. 97-142, 15 FCC Rcd 18158 (2000) (*Foreign Participation Recon Order*).

⁴¹ *2004 ISP Reform Order*, 19 FCC Rcd at 5711, ¶ 2; 47 C.F.R. § 64.1002.

⁴² AT&T Comments at 1.

⁴³ *Id.*

⁴⁴ *See Verizon Reply Comments at 1.*

18. We dismiss, without prejudice, TeleCuba's request for a waiver of the ISP. TeleCuba states that it requested a waiver of the ISP because of its concern that there is no way to verify the proportion of return traffic that ETECSA transmits to TeleCuba since telecommunications service reports are not made publicly available by ETECSA.⁴⁵ However, in its Petition, TeleCuba certified that it will comply with the elements of the ISP: The accounting rate will be divided 50-50, it has not bargained for nor is there any indication that it will receive more than its proportionate share of return traffic, and it has informed ETECSA that U.S. policy requires that competing U.S. carriers will have access to settlement and accounting rates negotiated by the filing carrier with the foreign administration on a non-discriminatory basis.⁴⁶ In view of these representations, it is not necessary to consider a waiver of the ISP because TeleCuba will comply with the ISP. While we dismiss without prejudice TeleCuba's request for a waiver of the ISP, the Commission may consider any new request for an ISP waiver upon review of the terms of a written agreement between TeleCuba and ETECSA as discussed in the conditions below. At the present time, however, we agree with AT&T and Verizon that continued application of the ISP to the U.S.-Cuba route appears necessary to avoid potential discrimination against other U.S. carriers in view of the unique circumstances presented here.

B. Benchmark Waiver Request

19. In its 1997 *Benchmarks Order*, the Commission established benchmarks that govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic from the United States.⁴⁷ The Commission established the benchmarks policy because settlement rates for the exchange of telephone traffic remained substantially above cost despite efforts to promote competition and lower settlement rates through application of the ISP. The benchmarks policy requires U.S. carriers to negotiate settlement rates at or below benchmark levels established by the Commission.⁴⁸ The Commission established the policy with the goal of reducing above-cost settlement rates paid by U.S. carriers to foreign carriers for the termination of international traffic, where market forces had not led to cost-based settlement rates.⁴⁹ The Commission's intent has been that U.S. customers receive the benefit of settlement rate savings by carriers.⁵⁰ Under the *Benchmarks Order*, Cuba is classified as a lower middle income country, for which the Commission established a benchmark termination rate of \$0.19 effective January 1, 2001, the end of a three-year transition period.

20. The *Benchmarks Order* provides for two limited exceptions to enforcement of the benchmark rate and transition periods for a particular international route.⁵¹ First, any interested party may ask the Commission to reconsider rates on the grounds that they do not permit the recovery of total

⁴⁵ See Petitioner's Response to Supplemental Information Request at 3 (answer in response to question 9).

⁴⁶ Petition at 1 and 4 (Notarized Statement of Luis Coello, President and CEO, IConnect Wholesale, Inc. d/b/a TeleCuba).

⁴⁷ See, e.g., *Benchmarks Order*, 12 FCC Rcd 19806; Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

⁴⁸ See, e.g., *Benchmarks Order*, 12 FCC Rcd at 19860, ¶ 111.

⁴⁹ *Benchmarks Order*, 12 FCC Rcd at 19862-63, ¶ 115. The Commission concluded that the benchmark rates are necessary because, under the current international accounting rate system, the settlement rates U.S. carriers pay foreign carriers to terminate U.S.-originated traffic are, in most cases, substantially above the costs foreign carriers incur to terminate that traffic. *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9256, ¶ 3.

⁵⁰ *Benchmarks Order*, 12 FCC Rcd at 19930-32, ¶¶ 270-74.

⁵¹ *Id.* at 19842-43 & 19888-89, ¶¶ 74 & 174.

service long run incremental costs incurred to receive, transmit, and terminate international service.⁵² Second, a U.S. carrier can request additional transition time for a route if annual reductions in settlement rates would entail a loss of greater than 20 percent of a country's annual telecommunications revenues.⁵³

21. TeleCuba did not attempt to support its waiver request before us now in terms of either standard. Rather, TeleCuba's waiver request is based upon the premise that it can re-introduce direct services to Cuba only by agreement to pay ETECSA an \$0.84 per minute rate for termination of all traffic including roaming services. TeleCuba seeks to establish a working relationship with ETECSA that would enable it to provide a direct "single path" to Cuba in order to offer customers improved call quality (in terms of reduced latency and post-dial delay) and an alternative to currently available indirect services involving multiple hops at higher cost and lower quality.⁵⁴ TeleCuba states that its contacts at the Cuban Ministry of Communications frequently ask about the status of TeleCuba's ability to pay \$0.84 per minute for termination of traffic on a direct basis⁵⁵ and that ETECSA has indicated that it did not want to meet with TeleCuba until TeleCuba could commit to the \$0.84 per minute rate.⁵⁶ TeleCuba anticipates the ability to negotiate lower rates in the future as it increases direct traffic.⁵⁷

22. No commenters opposed TeleCuba's request for a waiver of the benchmark rate. Both AT&T and Verizon support granting a benchmark waiver. Both carriers believe that supporting the Administration's policy of fostering greater communications between the United States and Cuba and promoting contacts between Cuban-Americans and their relatives in Cuba will serve the public interest.⁵⁸ AT&T believes that re-establishment of direct communications between the United States and Cuba presents a "unique situation" in the context of TeleCuba's waiver requests, and agrees that "it may be necessary to allow some additional temporary flexibility in U.S. carrier settlement rates as a predicate to the re-establishment of bilateral international traffic arrangements with the U.S.-Cuba route."⁵⁹ Verizon believes that a narrow waiver to permit a temporary increase in settlement and benchmark rates would allow U.S. carriers "to investigate the re-establishment of relationships with Cuban providers and/or the construction of potential facilities on the U.S.-Cuba route."⁶⁰ Verizon supports TeleCuba's requested three-year benchmark waiver period as reasonable, given that a shorter period of time might not allow sufficient opportunity for carriers to explore the most efficient relationships or to complete the amount of work required to establish services between the United States and Cuba.⁶¹ Additionally, Verizon emphasizes that any waiver must apply to all U.S. carriers who may wish to establish direct communications between the United States and Cuba.⁶²

23. We find that the public interest would be served by granting TeleCuba a waiver of the

⁵² *Id.* at 19842-43, ¶ 74.

⁵³ *Id.*

⁵⁴ See Petition at 2; see also Petitioner's Response to Supplemental Information Request at 2.

⁵⁵ See Petitioner's Response to Supplemental Information Request at 2.

⁵⁶ *Id.* at 3.

⁵⁷ *Id.* at 2.

⁵⁸ See AT&T Comments at 1-2; Verizon Reply Comments at 1-2.

⁵⁹ See AT&T Comments at 2-3.

⁶⁰ See Verizon Reply Comments at 3.

⁶¹ *Id.*

⁶² *Id.*

Commission's benchmarks policy, subject to the conditions discussed below. Such a waiver would be consistent with the State Department's January 2010 policy guidance on licensing the provision of telecommunications services to Cuba. That policy guidance implements changes made by the Executive Branch in 2009 to the U.S.-Cuba policy that are designed to facilitate greater contact between separated family members in the United States and Cuba and increase the flow of information to the Cuban people, including greater telecommunications links.⁶³ In issuing this policy guidance, the State Department sought to authorize fiber optic cable and satellite links between the United States and Cuba, and to permit international roaming arrangements with Cuban telecommunications service providers.⁶⁴ As noted above, the State Department advised that "the Commission should be prepared, to the extent necessary, to grant waivers reasonably limited in duration to enable carriers within its jurisdiction to provide telecommunications service between the United States and Cuba."⁶⁵ Given the unique circumstances of the U.S.-Cuba route, as discussed above,⁶⁶ we agree with the parties in this proceeding that waiving the benchmarks policy as it applies to Cuba is reasonable and necessary to re-establish direct links to Cuba with the expectation of improving telecommunications services between the United States and Cuba. A waiver of the benchmark rates will give U.S. carriers greater flexibility in their discussions with Cuban service providers. We also agree with the parties that a three-year waiver is reasonable and that a shorter period may not provide sufficient opportunity for progress.

24. While we believe that a conditional waiver of the Commission's benchmarks policy would serve the public interest, we also seek to ensure that progress in re-establishment of business relations and direct links will lower rates for consumers. We do not intend our waiver to foster continuation of the high consumer rates that exist for services now provided on an indirect basis between the United States and Cuba.

25. First, we note that the settlement rate for terminating traffic on the U.S.-Cuba route are well above those rates that U.S. carriers pay to carriers in other countries, including Cuba's neighbors. As a general matter, settlement costs for terminating telephone calls internationally are an important component of charges paid by consumers on an international route. Based on calculations from the most recent compilation of international traffic and revenue data published by the Commission, the average U.S. carrier settlement payout per minute on the U.S.-Cuba route was \$0.77, extraordinarily high in comparison to the average U.S. carrier settlement payout per minute of \$0.06 for all international points⁶⁷ and \$0.10 for other countries in the Caribbean region.⁶⁸

⁶³ See 2010 State Department Letter at 1; See also *supra* n.7.

⁶⁴ *Id.*

⁶⁵ See 2010 State Department Letter at 2.

⁶⁶ See *supra* ¶¶ 2-6.

⁶⁷ The average U.S. carrier settlement payout per minute for termination of all U.S.-originated traffic to all international points reported by U.S. carriers was \$0.058 per minute in 2008. In comparison, the average U.S. carrier settlement payout per minute for termination of U.S.-Cuba traffic was \$0.774. See 2008 International Telecommunications Data, Table A1. Even though Cuba accounted for only 0.34% of the world's total U.S. billed minutes of traffic in 2008, U.S. carrier settlement payouts to Cuba were 4.62% of all U.S. carrier settlement payouts for termination of telephone traffic to foreign countries. *Id.*, Table A1.

⁶⁸ For the Caribbean region exclusive of Cuba (25 countries), the average U.S. carrier settlement payout per minute for termination of U.S.-originated traffic was \$0.098. See 2008 International Telecommunications Data, Table A1. The percentage of U.S. carriers' settlements payments on the U.S.-Cuba route was 32.81% of total U.S. carriers' settlement payments to the entire Caribbean region, although U.S. carrier-billed minutes to Cuba accounted for only 5.80% of the total U.S. carrier-billed minutes to that region. See *id.*, Table A1.

26. These higher settlement rates correlate to higher calling rates for making telephone calls from the United States to Cuba. The 2008 data filed by U.S. carriers with the FCC shows that the average U.S. calling rate (*i.e.*, U.S. carriers' revenue per minute) to Cuba was \$0.83 per minute, compared to an average U.S. calling rate of \$0.09 per minute for all international points and \$0.11 per minute to the rest of the Caribbean region.⁶⁹

27. The fact that U.S. calling to Cuba is much more expensive than U.S. calling to other Caribbean countries is confirmed by information on U.S. carriers' websites. Typically, charges paid by U.S. consumers for calls to Cuba and other countries in the Caribbean region vary depending on customer usage and options offered by U.S. carriers. Basic rates are the default calling option offered by traditional telephone carriers to customers who are not subscribed to a discount calling plan. Although basic rate calling is generally expensive on all U.S. international routes, basic rate calling to Cuba is especially expensive. For example, Verizon's basic rate to Cuba is \$5.12 per minute, compared to its basic rates to other major Caribbean countries ranging from a low of \$3.14 per minute to the Bahamas to \$4.83 per minute to Haiti.⁷⁰ AT&T's basic rate to Cuba is \$5.84 per minute, compared to its basic rates to other major Caribbean countries ranging from a low of \$3.47 per minute to the Bahamas to \$5.23 per minute to Haiti.⁷¹ U.S. consumers taking advantage of calling plans and prepaid calling cards generally pay lower per minute calling rates on all international routes, compared to basic rates. Even with calling plans and prepaid calling cards, however, U.S. consumers pay a much higher rate per minute for calls to Cuba than for calls to other Caribbean countries. As an example of calling plan rates, AT&T's Worldwide Value rate to Cuba is \$0.92 per minute, compared to its rates to other major Caribbean countries ranging from a low of \$0.17 per minute to the Dominican Republic to \$0.49 per minute to Haiti.⁷² An example of prepaid calling card rates is IDT's Super Clean calling card rate to Cuba at \$1.25 per minute, compared to its rates to other major Caribbean countries ranging from a low of \$0.08 per minute to Bahamas and the Dominican Republic to \$0.23 per minute to Haiti.⁷³

28. Whether under a calling plan or not, U.S. consumers pay rates to call Cuba that are high, and in many cases extremely high, in comparison to the rates to call other Caribbean region countries. High settlement rates paid by U.S. carriers to route traffic indirectly to Cuba appear to be a significant factor in the high rates U.S. consumers pay to U.S. carriers to call Cuba.

29. TeleCuba requests that we approve on a temporary basis a settlement rate of \$0.84 per

⁶⁹ See 2008 International Telecommunications Data, Table A1. As with U.S. carrier settlement payouts, U.S. IMTS carriers' customer revenues for calls to Cuba comprised 31.55% of U.S. IMTS carriers' customer revenues for calls to the entire Caribbean region, although U.S. carrier-billed minutes to Cuba accounted for only 5.80% of the total U.S. carrier-billed minutes in that region.

⁷⁰ For Verizon's basic rates, see <http://www22.verizon.com/Residential/Phone/International/BasicInternationalRates/> (accessed on February 1, 2011). The countries selected for comparison – the Bahamas, Dominican Republic, Haiti, Jamaica, and Trinidad and Tobago – consist of the countries with the most reported U.S. IMTS minutes of traffic for the Caribbean region, with minutes to Cuba within the range of these countries. See 2008 International Telecommunications Data, Table A1.

⁷¹ For AT&T's basic rates, see <http://serviceguide.att.com/ACS/ext/od.cfm?OID=863&menu=102> (accessed on February 1, 2011).

⁷² For AT&T's Worldwide Value Calling rates, see https://www.shop.att.com/offer.jsp?service=international&offer=shop_worldwide_value&portal=shopatt (accessed on February 1, 2011). The countries selected for comparison are the same as for basic rates, above.

⁷³ For IDT's "Super-Clean" prepaid calling card rates, see <http://www.uniontelecard.com/phonecards/2124/super-clean/rates/> (accessed on February 1, 2011). The countries selected for comparison are the same as for basic rates and calling plan rates, above.

minute for direct service to Cuba. TeleCuba contends that the requested three-year waiver will allow it to negotiate a lower settlement rate with ETECSA as it increases the volume of traffic to Cuba that it handles over that period.⁷⁴ Similarly, Verizon believes that during the waiver period, U.S. carriers may be able to negotiate lower rates as the volume of traffic between the United States and Cuba increases.⁷⁵

30. Given the high calling rates paid by U.S. consumers, however, we believe that any grant of the requested waiver must be done with the reasonable expectation that settlement rates will be reduced in order to allow U.S. carriers to offer reasonable calling rates to U.S. consumers. We will therefore grant TeleCuba a three-year waiver of benchmark rates applicable to Cuba, subject to the conditions we identify below. The objective of the conditions is to achieve, over time, a reduction of the requested settlement rate to or below the current benchmark level, which should in turn lead to lower rates for U.S. consumers commensurate with other destinations in the Caribbean region. Lower rates will achieve the U.S. policy goal “to promote greater contact between separated family members in the United States and Cuba and increase the flow of . . . information to the Cuban people.”⁷⁶

31. Conditions. We grant TeleCuba a three-year waiver of the benchmarks policy in order to pay the Cuban carrier a \$0.84 settlement rate subject to the following conditions:

(1) TeleCuba must negotiate a written agreement with ETECSA, which it must file with the Commission pursuant to section 43.51 of the rules.⁷⁷ TeleCuba must report to the International Bureau the status of its negotiations every 90 days after the effective date of this Order.

(2) The written agreement must comply with the ISP. TeleCuba must seek an ISP waiver for any specific terms not in compliance with the ISP.

(3) The terms and conditions of the agreement may not be exclusive. Other U.S. carriers seeking to provide direct service to Cuba must be able to do so on the same terms and conditions as those agreed to between TeleCuba and ETECSA.

(4) TeleCuba may not enter into any oral agreement or understanding with ETECSA that gives exclusive rights to TeleCuba or is otherwise inconsistent with the written agreement.

(5) The agreement must state that the intention of the parties to the agreement is to reduce the termination rates toward or below the benchmark rate over time. Progress toward this goal must entail at least one significant, commercially negotiated reduction in rates during the three-year period of the waiver granted in this Order. The agreement should provide for a subsequent downward glidepath to achieve reductions in settlement rates toward or below the benchmark rate after the initial three-year waiver period. The glidepath should reflect negotiated reductions in settlement rates and include target dates with anticipated reductions.

(6) The Commission will have ten (10) days to review the agreement after TeleCuba has filed it with the Commission. The agreement will be effective, and TeleCuba may commence service under the

⁷⁴ See Petitioner’s Response to Supplemental Information Request at 2.

⁷⁵ Verizon Reply Comments at 3.

⁷⁶ Fact Sheet: Reaching Out to the Cuban People (available at <http://www.whitehouse.gov/the-press-office/fact-sheet-reaching-out-cuban-people>). See also 2010 State Department Letter at 1.

⁷⁷ See 47 C.F.R. § 43.51. TeleCuba states that in previously providing service to Cuba, it “never had a written agreement with ETECSA for the exchange of telephone traffic or for the establishment of a direct circuit between the U.S. and Cuba.” See Petitioner’s Response to Supplemental Information Request at 1.

agreement, on the eleventh (11th) day after the agreement is filed with the Commission, unless the International Bureau informs TeleCuba in writing that the agreement is not consistent with the conditions of this Order or that the Commission requires additional time to review the agreement. If additional time is necessary to review the agreement, TeleCuba thereafter may commence service, under the waiver, only upon written notification from the International Bureau. The Commission will coordinate review of the agreement with the State Department, as appropriate.

(7) The three-year period of this waiver will commence on the effective date of the agreement, either the eleventh (11th) day after the date TeleCuba files the agreement with the Commission, or, if Commission review extends beyond that date, from the date of the International Bureau's written notification to TeleCuba that the agreement satisfies the conditions of this Order.

32. Finally, TeleCuba may request an extension of the initial three-year period of the waiver. Commission confidence that progress is being made toward a reduction of termination rates will be an important factor in considering any request for extension of the waiver after the initial three-year period.

C. Extension of the Waiver to Other U.S. Carriers

33. We will extend this waiver to any U.S. carrier seeking to provide direct services between the United States and Cuba, provided that the carrier first notifies the Commission that it agrees to accept the terms and conditions of the waiver as specified in this Memorandum Opinion and Order.⁷⁸ Carriers may do so by letter to the Chief, International Bureau. The Bureau will reflect the carrier's notification of acceptance of the conditions and extend the waiver to the carrier in an "Informative" as part of its Public Notice of actions taken on international telecommunications applications.⁷⁹

IV. CONCLUSION

34. Upon review of the TeleCuba Petition for a waiver of the ISP and a waiver of the benchmark rate that applies to Cuba under the benchmarks policy, we conclude that approval of the waiver of the benchmark rate, subject to the conditions set forth herein, is in the public interest. We dismiss TeleCuba's request for waiver of the ISP without prejudice to future consideration, if necessary, based upon specific terms of a written agreement between TeleCuba and ETECSA. Otherwise, all aspects of the ISP continue to be in full force and effect.

V. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i) and (j), 201, 202, 210, 211, and 214 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and (j), 201, 202, 210, 211, 214 and sections 0.51, 0.261, 43.51, 43.61, 43.82, 63.14, 64.1001 and 64.1002, 47 C.F.R. §§ 0.51, 0.261, 43.51, 43.61, 43.82, 63.14, 64.1001 and 64.1002, the Petition for Waiver filed by IConnect Wholesale, Inc., d/b/a/ TeleCuba for a three-year waiver of the applicable benchmark rate to the U.S.-Cuba route IS GRANTED to the extent specified and as conditioned in this Memorandum Opinion and Order.

36. IT IS FURTHER ORDERED that this waiver shall expire three years from either the eleventh day after TeleCuba files its agreement with the Commission, or, if Commission review of the agreement extends beyond that day, the date of the International Bureau's written notification that the agreement satisfies the conditions of this Memorandum Opinion and Order.

⁷⁸ See *supra* at ¶ 31.

⁷⁹ The requirement to report status of negotiations (paragraph 39) shall commence on the date of release of the Public Notice. U.S. carriers currently authorized to provide services to Cuba, on a direct basis, will need to modify their section 214 authorizations to pay above the \$0.60 per minute rate granted under those authorizations.

37. IT IS FURTHER ORDERED that TeleCuba's Petition for Waiver insofar as it seeks waiver of the International Settlements Policy applicable to agreements and arrangements for the exchange of traffic with Cuban carriers IS DISMISSED without prejudice to future consideration, if necessary, based upon specific terms of a written agreement between TeleCuba and ETECSA.

38. IT IS FURTHER ORDERED that TeleCuba's provision of services under this waiver is subject to compliance with the provisions of the United States Department of State revised guidelines on telecommunications services between the United States and Cuba, issued January 12, 2010.⁸⁰

39. IT IS FURTHER ORDERED that TeleCuba must file a negotiated, written agreement entered into with ETECSA pursuant to section 43.51 of the Commission's rules.

40. IT IS FURTHER ORDERED that TeleCuba shall report to the International Bureau the status of its negotiations every 90 days after the effective date of this Memorandum Opinion and Order.

41. IT IS FURTHER ORDERED that TeleCuba shall file annual reports of overseas telecommunications traffic required by section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

42. IT IS FURTHER ORDERED that TeleCuba shall file annual international circuit status reports of overseas telecommunications traffic required by section 43.82 of the Commission's Rules, 47 C.F.R. § 43.82.

43. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, may be filed within thirty days of the date of release of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION



Mindel De La Torre
Chief, International Bureau

⁸⁰ See 2010 State Department Letter, *supra* n.10.