

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: International Settlements Policy Reform, IB Docket No. 11-80; Joint Petition for Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon, RM-11322; IConnect Wholesale, Inc. d/b/a TeleCuba, Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba, IB Docket No. 10-95; Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct, IB Docket No. 05-254

On the surface, this item appears straightforward but it is really a complex intersection of technology, trade and international relations policies. As a strong proponent of removing barriers to free trade and a faithful believer in the power of communications to improve worldwide conditions, I can see one vision of what might occur someday in Cuba. At the same time, eliminating the nondiscrimination requirement risks opening the door to a corrupt, totalitarian regime to extract funding that may further its morally-bankrupt, communist activities. In the end, I can only concur with this proceeding.

Generally, U.S. trade policy over the last few decades has sought to increase overall trade by reducing or removing barriers, even with countries that don't come near to sharing America's values, freedoms or economic beliefs. A sound justification for this is that greater economic ties and interactions are in our national interest and can provide the impetus for political and economic changes, including free market and democratic tendencies, to take hold in those countries. The extent that this approach can work in Cuba is unclear, given the longstanding desire of its despot leaders to suppress progress and the wellbeing of its people.

Along the same lines, expanding communications capabilities between the U.S. and other countries may have similar effects. It's one reason that certain nations around the world try to limit the availability of communications technologies, whether through making international phone calls prohibitively expensive or restricting access to the Internet¹ and the free flow of information. It's also why certain foreign governments try to control journalism and the media. Both of these conditions exist today in Cuba.

The good news is that one of the realities of the Internet is that it was originally designed to counteract the efforts of any one entity from curtailing its operations, thereby decreasing the ability to censor users' activity. Try as these countries may to prevent access to certain information, people and technology will eventually find a way. Although this is ultimately a losing battle, some governments have repeatedly advocated for the international regulation of the Internet as a means to place additional hurdles in the way of an informed citizenry. Such efforts must be swiftly and soundly defeated. As such, selling communications equipment, allowing greater communications between U.S. citizens and residents in Cuba, and expanding the amount of information available could be beneficial to the Cuban people and others living under oppressive regimes, to the extent that they ever get to use it.

In terms of the particulars of this item, proposing the elimination of the nondiscrimination requirement applicable to voice communications is an extremely questionable move, even at this Further Notice of Proposed Rulemaking stage. Except for political moves by this Administration, I am at a loss to see any "changed circumstances"² that would warrant relaxing our 2011 *TeleCuba Waiver Order*,³ to the extent that was even a sound decision.

¹ My use of the Internet in this document as an example of a communications technology does not mean to suggest that I believe that it is a telecommunications service.

² See Further Notice of Proposed Rulemaking, *supra* ¶ 6.

The *TeleCuba Waiver Order* specifically imposed nondiscrimination requirements in exchange for the right to charge significantly above the benchmark rate.⁴ During consideration of the 2011 item, the record indicates that Cuba demanded higher benchmark rates than were permitted and necessary to provide service.⁵ In fact, the Commission was told, at the time, by TeleCuba that the Cuban Ministry of Communications and Empresa de Telecomunicaciones de Cuba, S.A. (ETECSA), the nationalized carrier, consistently sought a rate of \$0.84 per minute,⁶ which far exceeded that of any neighboring country.⁷ The only reason to seek such a rate would have been to fund some other activity in Cuba since it was not about the cost of operations or a sensible profit.⁸

To help prevent abuses of the higher-than-necessary rate, the Commission authorized a *temporary, limited waiver* of its benchmark policy while retaining the nondiscrimination requirement of the international settlements policy (ISP),⁹ which has since been mostly eliminated,¹⁰ and adopting additional nondiscrimination conditions applicable to the waiver circumstances.¹¹ This position was consistent with *this Administration's* State Department Cuba policy,¹² as well as supported by communications providers seeking to directly serve the Cuban people.¹³

(Continued from previous page) _____

³ *IConnect Wholesale, Inc., d/b/a TeleCuba; Petition for Waiver of the International Settlements Policy and Benchmark Rate for Facilities-Based Telecommunications Services with Cuba*, IB Docket No. 10-95, Memorandum Opinion and Order, 26 FCC Rcd 5217 (2011) (“*TeleCuba Waiver Order*”).

⁴ *Id.* at 5228 ¶ 31.

⁵ *Id.* at 5221, 5224 ¶¶ 11, 19 (stating that the applicable benchmark termination rate for direct service to Cuba is \$0.19 per minute).

⁶ *Id.* at 5225 ¶ 21.

⁷ *Id.* at 5226 ¶ 25.

⁸ I note that two other benchmark waivers have been granted since the *TeleCuba Waiver Order*. The rates are not publicly available, but they clearly exceed the \$0.19 per minute benchmark rate. See Letter from Maria Cattafesta, Senior Counsel, Government Affairs, Sprint Communications Company, L.P., to Mindel De La Torre, Chief, International Bureau, Federal Communications Commission, IB Docket No. 10-95 (Aug. 7, 2015); Letter from Douglas W. Everette, Counsel, IDT Domestic Telecom, Inc., to Mindel De La Torre, Chief, International Bureau, Federal Communications Commission, IB Docket No. 10-95 (Feb. 12, 2015).

⁹ *TeleCuba Waiver Order*, 26 FCC Rcd at 5224, 5228 ¶¶ 18, 30-31.

¹⁰ *International Settlements Policy Reform Joint Petition for the Rulemaking of AT&T Inc., Sprint Nextel Corporation and Verizon Modifying the Commission's Process to Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct Petition of AT&T for Settlements Stop Payment Order on the U.S.-Tonga Route*, IB Docket Nos. 11-80, 05-254, 09-10, Report and Order, 27 FCC Rcd 15521 (2012) (“*ISP Order*”). In fact, the only provision of the ISP currently in effect is the nondiscrimination policy on the U.S.-Cuba route. See *id.* at 15530-32, ¶¶ 17-20; see also Further Notice of Proposed Rulemaking, *supra* ¶ 4.

¹¹ *TeleCuba Waiver Order*, 26 FCC Rcd at 5225-26, 5228 ¶¶ 23, 31.

¹² See Further Notice of Proposed Rulemaking, *supra* ¶ 3 (citing *Modification of Process to Accept Applications for Service to Cuba and Related Matters*, Public Notice, 25 FCC Rcd 436 (IB 2010)); *TeleCuba Waiver Order*, 26 FCC Rcd at 5226 ¶ 23. The State Department, however, practically endorsed this process in the proceeding that resulted in the *ISP Order*. See Letter from Ambassador Philip L. Verveer, U.S. Coordinator for International Communications & Information Policy, U.S. Department of State, to Julius Genachowski, Chairman, Federal Communications Commission, IB Docket No. 11-80 (Oct. 16, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7022037398> (“The Department recommends that the FCC continue to apply at least some aspects of the ISP to ensure that Cuba does not disfavor or discriminate against some U.S. carriers with regard to the accounting rate for terminating traffic on the U.S.-Cuba route. The Department, therefore, supports continued application of the nondiscrimination requirement.... In addition, the Department

(continued....)

The Cuban Democracy Act of 1992,¹⁴ which has not been repealed by Congress, contains two important components that appear to be applicable but seem to have been forgotten. First, section 1705(e)(4) states that “[n]othing in this subsection shall be construed to supersede the authority of the Federal Communications Commission.”¹⁵ This savings clause means that the Commission is not beholden to the Administration for implementation of the Act, and we retain our authority to execute policy in this area as we see necessary, including preventing outrageous international rate gouging for ulterior purposes. Second, section 1710(a) requires the Secretary of the Treasury to “take the necessary steps to ensure that activities permitted under section 1705 are carried out for the purposes set forth in this title and not for purposes of the accumulation by the Cuban Government of excessive amounts of United States currency or the accumulation of excessive profits by any person or entity.”¹⁶ This language highlights that Congress specifically did not want Cuba to extract higher telecommunications rates for its own gain. How does allowing, by waiver, exceedingly higher rates than the benchmark rates combined with the right to freely discriminate against any U.S. provider not lead us to a place where the Cuban Government could accumulate excessive profits?

Current policy was designed, in part, to keep U.S. telecommunications ratepayers from being used as piggy banks to fund the unscrupulous agendas of corrupt regimes. In essence, the Cuban Government sought to extract extra payments from U.S. residents who were able to escape communism and now seek to talk to those relatives or friends still stuck in Cuba. Although the benchmark settlement rate will remain, we are starting a process by which Cuba may be able to collect even more money from the right to enact discriminatory practices against some U.S. providers.

(Continued from previous page) _____
supports the current policy of continuing the application of the benchmark rate to the U.S.-Cuba route as well as the waiver process available for the application of the benchmark rate to that route.”).

¹³ *Id.* at 5221-22, 5223, 5225 ¶¶ 13-14, 17, 22.

¹⁴ Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C. § 6001 *et seq.*).

¹⁵ 22 U.S.C. § 6004(e)(4).

¹⁶ *Id.* § 6009(a).