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Gloria Blue
Executive Secretary
Trade Policy Staff Committee
ATTN: Section 1377 Comments
Office of the United States Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508

Re: USTR Section 1377 Request for Comments Concerning Compliance with Telecommunications Trade Agreements

Dear Ms. Blue:

Pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. § 3106) ("Section 1377"), NII Holdings, Inc. hereby responds to the request of the Office of the United States Trade Representative ("USTR") for comments regarding compliance with U.S. telecommunications trade agreements.[1]

NII Holdings is a publicly traded U.S. company, providing mobile communications services to consumers in Latin America. Headquartered in Reston, Virginia, NII Holdings operates in Argentina, Brazil, Chile, Mexico, and Peru, and currently serves more than 3 million customers in the region.

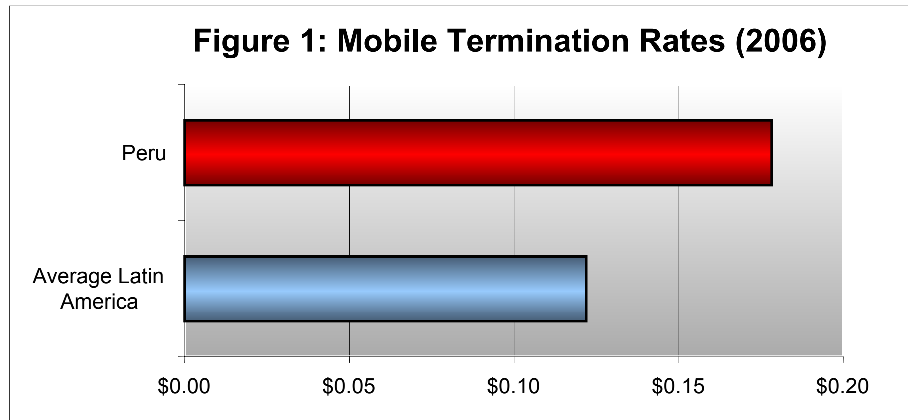
As the main U.S. mobile investor in the region, NII Holdings firmly believes that USTR's actions in encouraging compliance with international trade commitments in the area of telecommunications have been an invaluable tool to improve the investment conditions of U.S. companies in Latin America.

In these Section 1377 comments, NII Holdings focuses on the difficulties its subsidiary, Nextel Peru, has encountered in competing in the mobile services market in Peru in 2007 due to the imposition of significantly above-cost mobile termination rates by the regulator, Organismo Supervisor de la Inversión Privada en Telecomunicaciones (OSIPTEL). In addition, NII Holdings highlights the market entry barriers it has faced in attempting to enter the Uruguay mobile market.

[1] *See* 71 Fed. Reg. 66,563 (Nov. 15, 2006).

Mobile Termination Rates in Peru

Mobile termination rates in Peru remain significantly above-cost. Peru's mobile termination rate is US$ 0.18, considerably higher than the average rate for the Latin American region. Charges in Peru are more than US$0.05 higher than the regional average (see Figure 1 below). The issue of Peru's high mobile termination rates is well known to USTR as USTR expressed concern over such rates in its 1377 Report issued on March 31, 2005 ("2005 Section 1377 Report") and in its Section 1377 Report issued on March 31, 2006 ("2006 Section 1377 Report).[2]



Source: Telecommunications Management Group, Inc.

On November 21, 2005, OSIPTEL issued Resolution No. 070-2005-CD/OSIPTEL, ("Resolution No. 70") which establishes a cap on mobile termination rates for calls originating from (i) pay phones; (ii) mobile phones; and (iii) long distance users. The Resolution establishes new mobile termination rates for each operator **based on their 2004 costs**. For 2006, Resolution No. 70 reduced the existing rate of US$ 0.2053 by merely US$ 0.025-0.028 (depending on the mobile operator). Between 2006-2009, the rate is gradually reduced (as noted in Table 1 below), reaching an average "cost-oriented" rate (based on 2004 cost data) of US$ 0.0969 on January 1, 2009.

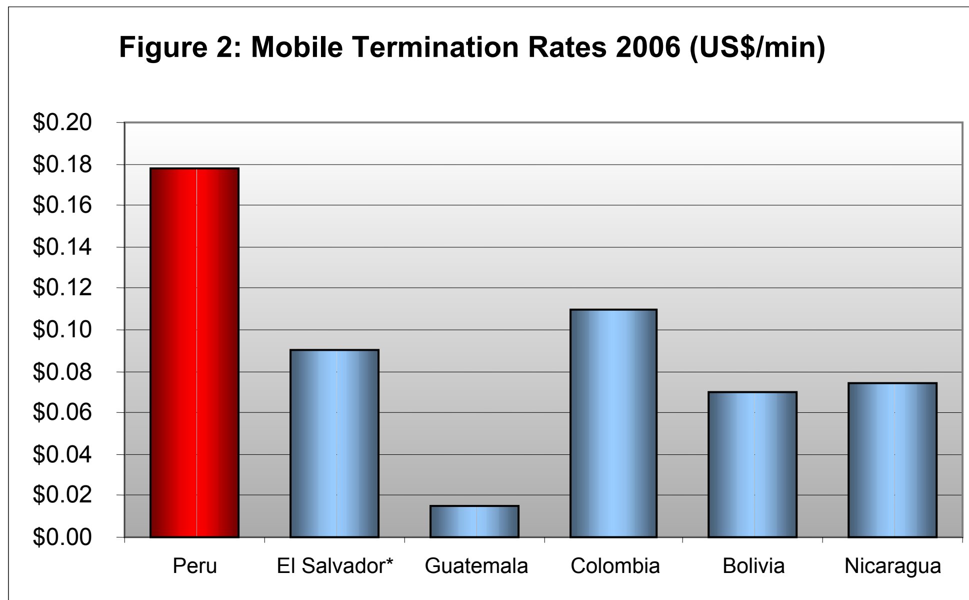
Table 1. Res. No. 70 – Reduction of MTRs Based on 2004 Cost Data (2006-2009)

Mobile Operators	Jan. 1– Dec. 31, 2006	Jan. 1– Dec. 31, 2007	Jan. 1 – Dec. 31, 2008	Jan. 1 – Dec.31, 2009
América Móvil	0.1804	0.1555	0.1305	0.1056
Nextel	0.1772	0.1491	0.1210	0.0929
Telefónica	0.1770	0.1487	0.1204	0.0922
Simple Average	0.1782	0.1511	0.1240	0.0969

Source: OSIPTEL Resolution No. 70

[2] In its 2006 Section 1377 Report, USTR noted that OSIPTEL had adopted a decision to move mobile termination rates "closer to cost" and that it urged OSIPTEL to remain vigilant to pressures to increase rates, and to assess whether technological developments may further lower such rates and hence warrant accelerated rate reductions over the following years.

NII Holdings views OSIPTEL's decision to order the reduction of mobile termination rates as a positive small step. However, the new rates are not consistent with Peru's WTO commitments, its obligations under the U.S.-Peru Trade Promotion Agreement, and its own legislation. Termination rates in Peru remain excessive and are ***not based on current costs***, particularly in light of regulatory action in the region. Between 2005 and 2006 mobile termination rates in Latin America have been reduced, on average, to US$ 0.1240. The rates currently in force in Peru exceed this average by more than 46%. As shown in Figure 2 below, countries such as El Salvador, Guatemala, Colombia, Bolivia and Nicaragua have significantly lower mobile termination rates than Peru: US$ 0.09 in El Salvador; US$ 0.015 in Guatemala, US$ 0.11 in Colombia, US$ 0.07 in Bolivia and US$ 0.074 in Nicaragua, compared to US$ 0.18 in Peru.



** 2005 data*
Source: Telecommunications Management Group, Inc.

WTO Commitments

Resolution No. 70 gradually lowers mobile termination rates over a four-year period, falling short of its intended objective: to introduce cost-oriented rates by June 2005.

Under its WTO Reference Paper commitment, Peru agreed to ensure that major suppliers would provide interconnection on terms, conditions, and cost-oriented rates that are non-

discriminatory.[3] The WTO has determined that cost-oriented rates are "defined in relation to known costs or cost principles" and should be "founded on cost."[4]

Resolution No. 70 does not comply with the WTO obligation for major suppliers such as Telefónica Móviles S.A.[5] to maintain cost-oriented rates. In the documents in which OSIPTEL explained the rationale for Resolution No. 70, it fully acknowledged that then existing mobile termination rates in Peru were not cost-oriented.

However, instead of immediately introducing cost-oriented rates calculated to be an average of US$ 0.0969, OSIPTEL adopted a three year glide path to implement "cost-oriented" rates by 2009. In fact, based on OSIPTEL's own cost findings, the average proposed cap interconnection rate for 2006 is 83.9% higher than the average "cost-oriented" rate to be implemented in 2009, which is based on 2004 data (see Table 2 below). Moreover, by 2009, the 2004 cost data will be outdated and the actual costs of terminating a call on a mobile network will be much lower as a result of increased subscribers and technological efficiency.

Table 2. Difference between Yearly Average MTR and 2009 MTR

Mobile Operators	Jan. 1 – Dec. 31, 2006	Jan. 1 – Dec. 31, 2007	Jan. 1 – Dec. 31, 2008	Jan. 1 – Dec. 31, 2009
América Móvil	0.1804	0.1555	0.1305	0.1056
Nextel	0.1772	0.1491	0.121	0.0929
Telefónica	0.1770	0.1487	0.1204	0.0922
Average Rate	0.1782	0.1511	0.1239	0.0969
Difference between yearly average rate and 2009 average "cost-oriented" rate of US$ 0.0969 (calculated based on 2004 data)	83.90%	55.93%	27.93%	0.00%

Source: Telecommunications Management Group, Inc.

U.S.-Peru Trade Promotion Agreement

Under the Telecommunications Chapter (Chapter 14) of the United States–Peru Trade Promotion Agreement, signed on April 12, 2006, Article 14.3 specifically provides under subsection 1.(a) that "[e]ach Party shall ensure that suppliers of public telecommunications services in its

[3] WTO, Fourth Protocol of the GATS, "Telecommunications Services: Reference Paper" [hereinafter WTO Reference Paper], at § 2.2 (Apr. 2, 1996), http://www.wto.org/english/news_e/pres97_e/refpap-e.htm. A "major supplier" is one "which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market."

[4] See WTO, Report of Panel "Mexico – Measures Affecting Telecommunications Services" at 178 (April 2, 2004).

[5] Telefónica Móviles, S.A. is a major supplier in the Peruvian mobile communications market. According to OSIPTEL data, in September 2006 it had a share of 59% of the mobile market in Peru.

territory provide, directly or indirectly, interconnection with the suppliers of public telecommunications services of another Party at reasonable rates."

The mobile termination rates implemented by OSIPTEL under the glide path are not reasonable. As determined by OSIPTEL and noted above, the proposed 2006 rates are 83.9% higher than the average "cost-oriented" rate to be implemented in 2009. Such a significant percentage above-cost cannot be considered reasonable, particularly when countries in the region have rates today that are significantly below the rates in place in Peru (e.g., Bolivia, Colombia, the Dominican Republic, El Salvador, Guatemala, and Nicaragua, Panama, and Paraguay) and even lower today than those proposed by OSIPTEL for 2009 (e.g., Bolivia, the Dominican Republic, El Salvador, Guatemala, and Nicaragua).

Peruvian Domestic Legislation

OSIPTEL's failure to immediately implement cost-oriented rates also violates Peru's own domestic regulation, which requires that interconnection charges comprise: (i) the costs of interconnection; (ii) the cost contribution of the local service provider; and (iii) a reasonable margin of profit.[6]

Regulators tend to establish glide path measures for mobile termination rate decreases that are as short as possible, with reductions generally occurring in periods of one to three years. Among countries that have recently adopted glide paths, Peru's is one of the longest at 36 months. Even three years is considered too long by the European Commission (EC). The EC expressed to Greece its disapproval of a proposed three-year glide path for the reduction of mobile termination rates given Greece's high mobile termination rates.[7] Because of this, Greece reduced its proposed glide path to one year.[8]

Lengthy Glide Path Negatively Impacts Nextel to Benefit of Larger Mobile Carriers

The lengthy timeframe within which OSIPTEL would introduce cost-based rates – not until 2009 and based on 2004 figures – significantly affects NII Holdings and its business. As the smallest mobile carrier in Peru, with a 4 % market share, the high mobile termination rate negatively impacts Nextel Peru's ability to compete with the other mobile carriers.

This prolonged glide path also raised concerns from the U.S. Government. When originally proposed by OSIPTEL, Ambassador David Gross, United States Coordinator for International Communications and Information Policy, U.S. Department of State, issued a letter on August 29, 2005 on behalf of the U.S. Government to OSIPTEL noting that "[g]iven that OSIPTEL has concluded that current mobile termination rates are far above market rates, the proposed three

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[6] OSIPTEL Resolution No. 001-98-CD/OSIPTEL. See also, Supreme Decree No. 020-98-MTC, Lineamientos de Políticas de Apertura del Mercado de Telecomunicaciones en Peru ("Telecommunications Market Opening Policy Guidelines for Peru"), ¶ 48 (Aug. 4, 1998).

[7] SG-Greffe (2004) D/203427.

[8] SG-Greffe (2006) D/203020.

and a half year transition to the OSIPTEL goal rates appears unusually long." In addition, Ambassador Gross "urges OSIPTEL to accelerate the introduction of lower rates and shorten the proposed transition period in order to bring the benefits of lower, more reasonable mobile termination rates to consumers more quickly and reduce distortions in the Peruvian economy."

NII Holdings appreciates OSIPTEL's steps towards addressing its high mobile termination rates. We recognize these efforts; however, in order to comply with Peru's WTO commitments and the U.S.-Peru Trade Promotion Agreement, OSIPTEL should modify Resolution No. 70 to introduce its calculated "cost-oriented" rates immediately rather than in 2009. As stated in article 6 of Resolution No. 70, such a modification is within OSIPTEL's authority. Moreover, pursuant to applicable interconnection regulations in Peru, OSIPTEL may not only revise mobile termination rates but also modify the conditions for their application, such as eliminating the existing glide path. We encourage USTR to work with OSIPTEL and the Peruvian Government to achieve this result.

Foreclosure from the Mobile Market in Uruguay

In line with its investment strategy in Latin America, NII Holdings has been attempting to enter the Uruguayan mobile market for the past seven years. Despite its best efforts, however, NII Holdings has been unsuccessful in entering the Uruguayan mobile market due to the Government's failure to issue NII Holdings a spectrum license to offer its services.

We find such market entry barriers to be inconsistent with the trade commitments made by Uruguay under the newly adopted U.S.-Uruguay Bilateral Investment Treaty (U.S.-Uruguay BIT) and more generally with objectives set forth in the BIT to promote U.S. investment in Uruguay and protect U.S. investors.

Background on the Mobile Market and NII Holdings Attempts to Enter It

During the past four years, the Uruguayan regulatory authority, the "Unidad Reguladora de Servicios de Comunicaciones" (URSEC), has conducted two spectrum auctions in the 1800 and 1900 MHz bands. In 2002, ABIATAR, S.A. (which later was purchased by Telefónica Móviles) was granted 2 x 5 MHz of spectrum in the 1800 and 1900 MHz bands. As a result of the auction conducted in 2004, AM Wireless Uruguay, S.A.[9] and Telefónica Móviles Uruguay, S.A.[10] were again assigned spectrum licenses in the same bands. In addition, mobile services are offered by the incumbent operator ANTEL, through its mobile subsidiary, ANCEL. Thus, there are three mobile operators in Uruguay – Telefónica Móviles, América Móvil, and ANCEL.

NII Holdings initiated its efforts to enter the Uruguayan market in 1999, and in 2000 received assurances from the Government that an auction for the 800 MHz band would be forthcoming. The regulatory body at the time – the Dirección Nacional de Comunicaciones (DNC) – initiated a bid process for frequencies in the 800 MHz band and NII Holdings proceeded to prepare its bid

[9] A subsidiary of Mexican mobile provider América Móvil, which operates under the brand name CTI Móvil.

[10] Formerly ABIATAR, S.A.

package, going so far as to establish a local company in Uruguay. However, in late 2000 (after two earlier postponements) NII Holdings was notified that the auction was suspended indefinitely.

In 2004, NII Holdings again initiated discussions with the Uruguayan Government, including the President of Uruguay at that time, and was told that the next auction would award licenses for the 800 MHz band. When the auctions were conducted, however, the bid was limited to spectrum assignments in the 1800 and 1900 MHz bands.[11] Thus, NII Holdings was excluded from participation in such auctions and, as a consequence, was precluded from entering the Uruguayan mobile market. Subsequently, additional contacts with the current Government were initiated, starting late 2004 and lasting until mid 2006, but no satisfactory conclusion was reached.

In June 2006, NII Holdings sent a letter to the Government reiterating its interest in entering the Uruguayan mobile market. A negative response was issued stating that, (i) the legal framework bars entry; and (ii) that an additional mobile provider would not be justifiable in the context of the Uruguayan market, as it would harm competitors and consumers. Both of these reasons are unfounded, as (i) there are no relevant legal provisions that, to the knowledge of NII Holdings, bar entry to the market and (ii) increased competition in the mobile market in the region has proven to increase consumer welfare.

NII Holdings' legitimate attempts to enter the Uruguayan mobile market have been unsuccessful due to the lack of transparency in the Uruguayan Government's spectrum and market entry policy, specifically regarding trunked mobile services in the 800 MHz band. Spectrum in this band is not only ripe for assignment,[12] but currently is predominantly idle as no commercial services in this band have been launched.[13] The Government's refusal to assign rights over such spectrum (e.g., via an auction or any other means or process of assignment), constitutes a market entry barrier affecting NII Holdings in breach of existing trade commitments.

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[11] *See* the terms of the bid at: http://www.ursec.gub.uy/S_telecom/s_telecom.htm

[12] It should be noted that, in an effort to achieve spectrum harmonization among the MERCOSUR countries, the Common Market Group - the executive body of MERCOSUR - adopted Article 1 of Resolution 70/97 of December 13, 1997 which specifies the use of the 806-824/851-869 MHz band within MERCOSUR for ***trunking services***. This Resolution 70/97 was later adopted by the Uruguayan Executive, thus being enforceable within its internal legal framework, via Decree No. 115/98 of April 28, 1998. In light of this, under its national regulations the 806-824/851-869 MHz band is to be assigned for trunking services, precisely the services NII Holdings intends to provide in Uruguay using its iDEN-based platform.

[13] NII Holdings understands that only certain channels of the 806-824/851-869 MHz band are currently assigned to government-military use.

Applicable International Trade Commitment: U.S.-Uruguay BIT

Uruguay recently entered into a BIT with the United States, approved by the U.S. Senate on September 12, 2006. The U.S.-Uruguay BIT was subsequently launched in Washington, D.C. on November 1, 2006 and is currently in force between the parties.[14]

This Treaty, and the protection it affords U.S. investors, is fully applicable to the mobile communications sector in Uruguay, as non-conforming measures listed in Annexes I, II and III of the BIT do not expressly or implicitly exclude the communications sector in general nor the mobile sector in particular.

Thus, the U.S.-Uruguay BIT clearly protects U.S. investors like NII Holdings which have the intention to enter the Uruguayan mobile market, particularly if the specific market has been liberalized and Uruguayan investors (i.e., ANTEL), as well as investors from third countries (i.e., Mexico and Spain) have been allowed to freely enter the market.

Indeed, as derived from the plain reading of Article 2, the U.S.-Uruguay BIT applies to measures adopted or maintained by a Party relating to ***investors of the other Party***; which Article 1 defines to mean **"**a Party or state enterprise thereof, or a national or an enterprise of a Party, **that attempts to make**, is making, or has made an **investment** in the territory of the other Party" (emphasis added). Furthermore, Article 1 specifically includes licenses, authorizations, and similar rights conferred pursuant to domestic law as investments under the BIT.[15]

Pursuant to the above mentioned provisions, NII Holdings is an investor under the U.S.-Uruguay BIT, in light of its constant attempts to enter the mobile market by obtaining the relevant spectrum license. The fact that NII Holdings has not been able to make its intended investments in Uruguay - due to the barriers to entry erected by the Uruguayan Government regarding the assignment of spectrum in the 800 MHz band - does not exclude Uruguay's obligation to comply with its commitments under the U.S.-Uruguay BIT.

Breach of Most Favored Nation (MFN) and National Treatment Provisions

As a U.S. investor, NII Holdings is thus entitled to MFN and national treatment within the Uruguayan mobile market pursuant to the provisions of Articles 3 and 4 of the U.S.-Uruguay

[14] U.S.-Uruguay Bilateral Investment Treaty Enters into Force, Press Release, November 1, 2006, available at http://www.ustr.gov/Document_Library/Press_Releases/2006/November/US-Uruguay_Bilateral_Investment_Treaty_Enters_into_Force.html

[15] "Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment." U.S.-Uruguay BIT, at ft. 3.

BIT. The Government of Uruguay, however, has breached these commitments by foreclosing NII Holdings from entry into the mobile market.

Of the three mobile service providers authorized to provide mobile services in Uruguay, ANCEL, is the mobile branch of state-owned national telecom provider ANTEL. The other two are respectively subsidiaries of Mexican mobile provider América Móvil,[16] and of the Spanish mobile provider, Telefónica Móviles.

The exclusion of NII Holdings from the Uruguayan mobile market vis-à-vis the unfettered access to the market granted both to national as well as Mexican and Spanish investors constitutes a breach of MFN and national treatment recognized in the U.S.-Uruguay BIT, and as such must be promptly remedied. We encourage USTR to work with URSEC and the Uruguayan Government to achieve this result.

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NII Holdings would be pleased to provide any further information that would be helpful to USTR.

Respectfully submitted,
Robert Gilker
Vice President and General Counsel

[16] It is worth noting that despite the provisions of Annex II – Uruguay – 9 of the U.S.-Uruguay BIT, the Bilateral Free Trade Agreement entered into between Mexico and Uruguay does not provide for more favorable market entry conditions into the Uruguayan market by Mexican investors. On the contrary, such agreement is completely neutral to market entry commitments. *See* Chapter XI, Article 11-02 3 (a) of the Mexico-Uruguay Bilateral Free Trade Agreement, available at http://www.mrree.gub.uy/Tratados/MenuInicial/UruguayMexico/ROU_Mexico/11%20 Telecomunicaciones.pdf