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January 25, 2007

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 Reply 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 reply comments regarding compliance with U.S. telecommunications trade agreements.¹

In these Section 1377 reply comments, NII Holdings presents certain additional issues its subsidiary in Peru, Nextel del Perú, S.A. (“Nextel Peru”), has encountered since the filing of its comments on December 19, 2007. These issues impact its ability to compete in the Peruvian mobile services market, and are contrary to Peru’s recently acquired telecommunications trade commitments under the US-Peru Trade Promotion Agreement (“TPA”).

Specifically, we comment on the Peruvian Ministry of Transport and Communications’ (“MTC”) failure to adhere to the principles of objectivity, transparency, and non-discrimination in exercising its spectrum management authority, contrary to the commitments under Article 14.10 of the TPA. In addition, we comment on the lack of transparency in the administrative proceedings of the Peruvian telecommunications regulator, Organismo Supervisor de la Inversión Privada en Telecomunicaciones (“OSIPTEL”), in contravention of Articles 14.13(c)(i) and 19.2 of the TPA.

¹ See 72 Fed. Reg. 222, 65109 (Nov. 19, 2007).

1. The MTC has failed to manage the radio spectrum in an objective, transparent, and non-discriminatory manner

On January 2, 2008 the MTC initiated a sanction proceeding against Nextel Peru for allegedly causing harmful interference to the proposed network deployments of América Móvil del Perú S.A.C. (“America Movil”).² Sanctions that could be imposed by MTC in the proceeding include fines and can be as severe as the permanent revocation of Nextel Peru’s spectrum concession.

Field tests conducted jointly by the MTC and America Movil in November and December of 2007 – most of which took place without the presence of Nextel Peru – purportedly show that newcomer America Movil is experiencing harmful interference and that Nextel Peru is the source of that interference. The MTC has relied on such tests to charge Nextel Peru with breaching its duty under its concession contract to operate within the technical standards for emissions adopted by the International Telecommunication Union (“ITU”). On this basis, on two occasions the MTC has issued orders mandating that Nextel Peru take all necessary actions to prevent and resolve any interference problem that could affect its competitor’s planned network deployment.³ These actions have been taken by the MTC, despite the fact that Nextel Peru has been operating since 1998 and has continually complied with the terms and conditions of its concession including its obligations to operate within the ITU technical standards for emissions, and that its system previously created no interference problems.

Nextel Peru strongly opposes the results of such field tests and finds that the testing methodology employed by the MTC and the analysis and conclusions drawn from the results obtained have been skewed to favor its competitor America Movil in what appears to be an effort to shift the financial and other obligations that typically would rest with America Movil under the ITU standards to Nextel Peru. Such actions are in breach of MTC’s obligations under the TPA to administer its procedures for the allocation and use of the spectrum in an objective, transparent, and non-discriminatory manner.

First, the MTC has interpreted the tests in an inconsistent and confusing manner. For example, it relied on readings from different types of equipment on different dates to impose two different standards for the technical requirements that Nextel Peru was required to meet at the same location.⁴ It imposed yet another standard for three other locations.⁵ Finally, the MTC then

² Resolución Directoral No. 001-2008-MTC-29 of January 2, 2008. The Ministry argues that Nextel Peru’s transmissions (downlink) in the 851-869 MHz band generate out-of-band and spurious emissions, which cause harmful interference to the base station receivers (uplink) that America Movil is testing for its planned deployment of a UMTS network in the 835-845 MHz range.

³ See Oficio No. 3261-2007- MTC/29 of November 19, 2007 and Oficio No. 107-2008- MTC/29 of January 9, 2008.

⁴ See Oficio No. 3261-2007- MTC/29 of November 19, 2007; Informe No. 365-2007-MTC/29.02 of December 6, 2007. [Requiring that Nextel Peru adopt all necessary actions to guarantee that the noise floor level for the same America Movil site be initially at -100 dBm and later at a more stringent -112 dBm level, in order to accommodate America Movil’s operations.]

⁵ See Oficio No. 107-2008- MTC/29 of January 9, 2008. [Requiring that Nextel Peru adopt all necessary actions to guarantee that the noise floor level for the three other America Movil sites be at -106 dBm, in order to accommodate America Movil’s operations.]

predicted, with no additional empirical evidence that similar harmful interference would occur at “other” America Movil locations throughout Lima, Peru.⁶

Second, using the data from the MTC’s own field tests, Nextel Peru has shown that its transmitters comply with the standards currently prescribed by the ITU relating to spurious emissions. In fact, its transmitters meet ITU standards that will not come into effect until the year 2012. As such, Nextel Peru is operating within the terms of its concession contract and has not breached its duties either under Peruvian domestic regulations or international standards.

Nonetheless, the MTC has decided that Nextel Peru’s stations are the source of America Movil’s harmful interference. Furthermore, the MTC is using the results of the tests to set ad-hoc benchmarks for the permissible level of Nextel Peru transmissions. In essence, the MTC is requiring Nextel Peru to operate at the levels that America Movil deems adequate to allow America Movil to avoid bearing the costs of addressing the intermodulation problem caused by America Movil’s decision to locate its sites near the ones operated by Nextel Peru.⁷

This is contrary to generally accepted spectrum management principles. Under the ITU Radio Regulations, it is the responsibility of any party installing receiving equipment to ensure that they do not suffer from interference due to transmitters situated at a reasonable distance and which operate in accordance with such regulations.⁸ This ensures that existing operators, such as Nextel Peru, do not have to continually change their legal and appropriately operating systems in order to reduce potential interference to new entrants which are better positioned to avoid these potential interference problems by either changing the placement of their transmitters or installing the required filters.

To resolve the possible issues that could occur, regulators generally allow the parties involved ample time to reach agreements and adopt the necessary mitigation techniques. This has not occurred in the case of Peru. To date, the MTC has proposed no equitable solution to the alleged interference, nor has it demanded any changes from America Movil. It has imposed obligations only on Nextel Peru, limiting the parties’ ability to reach any type of compromise. Further, on January 22, 2008, the MTC ordered the closure of one of Nextel Peru’s base stations which may significantly affect the quality and reliability of the services that Nextel Peru provides to its customers. Based on this action, other base stations operated by Nextel Peru may be vulnerable to the same measures adopted by MTC, which will have irreversible consequences to Nextel Peru’s operations.

⁶ See Informe No. 365-2007-MTC/29.02 of December 6 and Informe No. 407-2007-MTC/29.02 of December 28, 2007.

⁷ See Informe No. 365-2007-MTC/29.02 of December 6. [Indicating “it is important to point out that with this level of radio electric activity (-112 dBm (...)), the WCDMA system of America Movil is apt for operation.” The level of radio electric activity to which the MTC is referring was obtained at the time Nextel Peru’s transmitter had been switched off for the purposes of a specific test that was being conducted.]

⁸ ITU Radio Regulations, Article 3.13.

We therefore urgently request that the USTR scrutinize this issue in the context of its certification activities of Peru's compliance with its newly acquired trade commitments under the TPA.

2. OSIPTEL's lack of transparent administrative proceedings

On December 20, 2007 OSIPTEL fined Nextel Peru for purportedly violating its concession contract by not providing its service in a "continuous" manner, which it deemed to be an *essential*, albeit not express, condition of its concession contract.⁹ OSIPTEL based its decision on the supposed breach by Nextel Peru of specific quality of service ("QoS") standards that are not set forth in any publicly available law or regulation applicable in Peru. This sanctioning proceeding arose following the August 15, 2007 earthquake that severely affected the central region of Peru and is principally based on the alleged failure of the mobile operators' networks to withstand the deluge of calls in the minutes following the earthquake.

Pursuant to Article 19.2 of the TPA, "each party shall ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered under said agreement are promptly published or otherwise made available in such a manner as to enable interested persons to become acquainted with them." Article 14.13 (c)(i) of the TPA further states that measures of general application relating to public telecommunications services, such as terms and conditions of service, must be made publicly available. As such, issues pertaining QoS standards of public telecommunications services fall squarely within the terms and conditions of services that must be made publicly available under the TPA.

Despite these commitments, OSIPTEL has fined Nextel Peru based upon its failure to comply with a set of QoS standards that have not been made publicly available. In fact, to support its contention that such standards were available and applicable to Nextel Peru, OSIPTEL engaged in a convoluted and ad-hoc interpretation of a long line of documents, including: (i) three provisions of Peruvian telecommunications regulations; (ii) one provision of the Peruvian telecommunications law; (iii) one provision of the Peruvian administrative procedures act; (iv) one provision of the Peruvian Constitution, (v) two opinions from the Peruvian Constitutional Court; (vi) the opinions of four Spanish administrative law scholars; (vii) the opinion of one Colombian criminal law scholar; (viii) the opinion of one Argentine administrative law scholar; (ix) the opinion of two Peruvian legal scholars; (x) one opinion from the Spanish Supreme Court; (xi) two provisions from OSIPTEL's internal regulation; (xii) one provision of the Peruvian interconnection regulations; (xiii) an "implicit" provision of Nextel Peru's concession contract; (xiv) seven ITU-T Recommendations and (xv) one ETSI Recommendation.

Had the QoS requirement in question been publicly available (*i.e.*, published), as required by Peru's trade commitments – and its domestic legal framework – it would have sufficed for OSIPTEL to point to the specific legal or regulatory provision of general application that required Nextel Peru to comply with such obligation. As the abovementioned long list of rules, regulations, court decisions, and scholarly works shows, this was clearly not the case.

⁹ Resolución de Gerencia General No. 582-2007-GG/OSIPTEL of December 20, 2007.

Furthermore, OSIPTEL's decision openly undermines legal stability in Peru, eroding the goal of ensuring a predictable legal and commercial framework for business and investment as set forth in the Preamble of the TPA.

We therefore request that the USTR also scrutinize this issue in the context of its certification activities of Peru's compliance with its newly acquired trade commitments under the TPA.

Respectfully submitted,

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Gary Begeman
Vice President and General Counsel