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December 16, 2005

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:

I am pleased to respond on behalf of NII Holdings, Inc. ("NII Holdings"), to the November 16, 2005 Federal Register notice of the Office of the United States Trade Representative ("USTR") requesting comments pursuant to Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. Section 3106, concerning the implementation and compliance with the World Trade Organization ("WTO") Basic Telecommunications Agreement and other telecommunications trade agreements.[1]

NII Holdings is a publicly held 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 2.5 million customers in the region. Since 1998, NII Holdings operates in Peru through its subsidiary, Nextel del Perú, S.A. ("Nextel"). To date, Nextel has invested approximately US$400 million in

[1] *See* 70 Fed. Reg. 69,621 (Nov. 16, 2005); Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, *codified at* 19 U.S.C. § 3106.

the provision of high-quality mobile communications services and currently serves 240,000 subscribers in Peru. The Peruvian mobile market is currently served by three operators: Nextel (4.6% market share); Telefónica Móviles S.A. ("Telefónica") (which completed the acquisition of Bellsouth Peru S.A. in April 2005)[2] (63% market share); and América Móvil Perú S.A.C. ("América Móvil") (which acquired TIM Perú S.A.C. in August 2005) (32% market share).[3]

In its Section 1377 Report issued on March 31, 2005 ("2005 Section 1377 Report") USTR noted that Peru's mobile termination rates are "among the highest in the world" and highlighted the Peruvian telecommunications regulator's, Organismo Supervisor de la Inversión Privada en Telecomunicaciones ("OSIPTEL"), commitment to introduce cost-oriented rates by June 2005. USTR also expressed concern regarding the dominant carrier, Telefónica, and the wide disparity between the mobile termination rate charged by Telefónica in Peru versus the other Latin American markets in which it operates.

Recently, OSIPTEL issued Resolution No. 070-2005-CD/OSIPTEL, ("Resolution No. 70")[4] (as described below) which gradually lowers mobile termination rates covering a four-year period. We recognize OSIPTEL's significant efforts in undertaking the mobile termination proceeding and issuing Resolution No. 70. We applaud their commitment to issuing the Resolution and consider it a welcome step towards achieving cost-oriented rates. Unfortunately, Resolution No. 70 falls short of OSIPTEL's commitment to introduce cost-oriented rates by June 2005. Despite OSIPTEL's endeavors, the mobile termination rates that will be introduced in 2006 will continue to be among the highest in the world and significantly above cost. As such, NII Holdings finds that Peru's current regulatory environment does not fully comply with Peru's WTO commitments of ensuring cost-oriented mobile termination rates.

Proposed Mobile Termination Rates Are Not Cost-Oriented Today And Will Not Be Cost-Oriented In 2009

On November 21, 2005, OSIPTEL issued Resolution No. 70 which establishes a cap on mobile termination rates for calls originating from (i) pay phones; (ii) mobile phones; or (iii) long distance users. The Resolution establishes new mobile termination rates for each operator based on their 2004 costs. For 2006, Resolution No. 70 reduces the current rate of 0.2053 US cents by a mere 2.5-2.8 cents (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 0.0969 US cents on January 1, 2009.

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[2] Telefónica Móviles S.A. is the Peruvian mobile services subsidiary of Telefónica Móviles España S.A.

[3] Based on OSIPTEL's data. *See* http://www.osiptel.gob.pe/Index.ASP?T=P&P=2637

[4] Resolution No. 70 was the result of a regulatory process that was initiated with a proposed draft resolution on July 15, 2005. After a period of written comments and a public hearing, the draft resolution was modified to include, among other things, a reduction of the initially proposed rates.

Table 1. Resolution No. 70 – Reduction of Mobile Termination Rates 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

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.[5] The WTO has determined that cost-oriented rates are "defined in relation to known costs or cost principles" and should be "founded on cost."[6]

NII Holdings welcomes the reduction in mobile termination rates by OSIPTEL and we agree that Telefónica should be subject to the lowest mobile termination cap among the three mobile operators. However, Resolution No. 70 does not comply with the WTO obligation for major suppliers such as Telefónica to maintain cost-oriented rates. In the documents in which OSIPTEL explained the rationale for Resolution No. 70, it fully acknowledged that current mobile termination rates in Peru are not cost-oriented. However, instead of immediately introducing cost-oriented rates calculated to be an average of 0.0969 US cents, it adopted a four 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 increasing customer subscription and technological efficiency.

[5] 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."

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

Table 2. Difference between Yearly Average Mobile Termination Rate and 2009 Mobile Termination Rate				
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 0.0969 US Cents (which was calculated based on 2004 data)	83.90%	55.93%	27.93%	0.00%

Source: Telecommunications Management Group, Inc.

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.[7]

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. 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.[8]

Among the reasons cited by OSIPTEL for not establishing cost-oriented rates as of 2006 is to avoid causing financial impairment to mobile operators in a way that would interrupt ongoing investment in the expansion of coverage.[9] Given the time it has taken OSIPTEL to address

[7] 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).

[8] SG-Greffe (2004) D/203427. Greece has one of the highest termination rates in the European Union. The National Regulatory Authority is currently conducting a mobile termination rate market study.

[9] OSIPTEL Report No. 093-GPR/2005, *Procedimiento para la Fijación de Cargos de Interconexión Tope por Terminación de Llamadas en las Redes Móviles*, ("*Procedure for the Establishment of Cap Interconnection Rates for the Termination of Calls on Mobile Services Networks*") (Nov. 24, 2005).

Peru's high, non-cost-oriented rates and the structure of the market, where certain operators charge end-user rates significantly lower than their mobile termination rates, we find no reasonable justification to further delay the implementation of cost-oriented rates. Among countries that have recently adopted glide paths, Peru's is one of the longest at 36 months.[10]

The issue of high mobile termination rates has been a concern in the Peruvian mobile sector since 2000. Since then, mobile operators have been aware of OSIPTEL's process to reduce mobile termination rates, particularly during the last year. As a result, an immediate reduction of mobile termination rates should not come as an abrupt or unforeseen measure. In fact, other countries where Telefónica and América Móvil also operate have implemented immediate termination rate reductions without having prejudicial effects on their operations.

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, OSIPTEL should modify Resolution No. 70 to introduce its calculated "cost-oriented" rates immediately rather than in 2009. We encourage USTR to work with OSIPTEL and the Peruvian 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

[10] Based on a study conducted by Telecommunications Management Group, Inc.