

# U.S.-Cuba Telecommunications: Turning the Corner

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Discussion about a potential expansion in telecommunications connections and services between the United States and Cuba spiked in 2016. It started early in the year, when the FCC announced that it was removing Cuba from the Exclusion of List under Section 214 for authorizations to provide international telecommunications services—a list that only included Cuba.<sup>[1]</sup> Only one month later, the FCC released its proposal to “remove the nondiscrimination requirements on the U.S.-Cuba route.”<sup>[2]</sup> All of this preceded the announcement by two U.S. carriers in late 2015 that they were going to offer “roaming” in Cuba to their wireless customers.<sup>[3]</sup>

Many have hailed these actions as another step toward easing of regulatory requirements in U.S.-Cuba telecommunications, with some even linking them to a potential boost to broadband deployment. If enacted, the FCC proposals—when coupled with the removal of Cuba from the Exclusion List—would significantly streamline a regulatory process that is rather onerous. Before getting too carried away with predictions about their impact, however, it is important to understand the details of what these latest actions do—and what they do not.

## How We Got Here

Direct telecommunications services between the United States and Cuba essentially ended after the imposition of the embargo in the early 1960s.<sup>[4]</sup> The long process to reestablish these services began in 1992 with the enactment Cuban Democracy Act.<sup>[5]</sup> Since then, the FCC has licensed and regulated telecommunications services between the U.S. and Cuba through a complex set of rules that largely have been based on guidance from the State Department and FCC rules and policies that apply generally to international telecommunications.

The first guidance, which the State Department issued in 1993, allowed U.S. carriers to provide telecommunications services between the U.S and Cuba as long as the carriers started operations within one year, agreed to a settlement rate for terminating traffic in Cuba that did not exceed \$0.60 per minute, did not access the funds from the blocked accounts of AT&T past remittances to Cuba, and received authorization from the State Department, the Treasury Department, and the FCC.<sup>[6]</sup>

Other restrictions also applied. Payments to the state-owned Cuban telephone company (then known as EMTELCUBA, but now known as ETECSA) required a specific license from the Treasury Department’s Office of Foreign Assets Control (“OFAC”).<sup>[7]</sup> Telecommunications services between

the U.S. and Cuba also were subject to the FCC's International Settlements Policy,<sup>[8]</sup> which at the time required foreign carriers to offer U.S. carriers the same rates for termination of traffic, a proportionate share of U.S.-inbound traffic based on their proportion of U.S.-outbound traffic, and non-discriminatory treatment.<sup>[9]</sup> Settlement rates for termination of traffic were in turn subject to benchmark ranges of reasonable rates, and U.S. carriers were required to file a report on their negotiations with foreign carriers and file any agreements with the FCC.<sup>[10]</sup>

The FCC approved various applications from U.S. carriers under these guidelines.<sup>[11]</sup> As often has been the case in the history of U.S.-Cuba relations, however, unrelated events put a dent on a policy that at the time had broad support in the U.S. After the Cuban air force struck down an airplane belonging to Brothers to the Rescue, the U.S. released the long-held (and disputed) AT&T long distance escrowed funds as compensation for damages in lawsuits filed in the U.S. arising from this incident. The Cuban government responded in the early 2000s by suspending the direct telecommunications services between the U.S. and Cuba.<sup>[12]</sup> As a result, providing direct telecommunications services in the U.S.-Cuba route effectively became impossible.

## **The Ice Begins to Thaw**

The status quo remained unchanged until 2009, when the U.S. relaxed sanctions to allow U.S. telecom companies to establish fiber optic and satellite links with Cuba and enter into roaming agreements with Cuban carriers, and eliminated the specific license requirement for payments to Cuba for telecommunications services between the two countries.<sup>[13]</sup> Following up on this policy change, in 2010 the State Department issued new guidance (replacing its 1993 guidance) requesting that the FCC continue to apply both the ISP and the benchmarks policy, but also inviting the FCC to consider waivers to promote telecommunications services between the U.S. and Cuba.<sup>[14]</sup> The FCC adopted the State Department's new guidance.<sup>[15]</sup>

Consistent with the new guidance, in 2011 the FCC granted the first waiver of the benchmark settlement rates. In so doing, it held that in the future U.S. carriers would be able to agree to termination rates above the benchmark as long as they entered into an agreement with ETECSA that (1) included terms and conditions that were not exclusive; (2) did not confer exclusive rights; and (3) stated that the intention of the parties was to reduce the termination rates toward or below the benchmark rate over time, including a negotiated reduction during the waiver period.<sup>[16]</sup> Less than a year later, the FCC dramatically modified the application of the ISP to U.S.-Cuba routes by eliminating the proportionate return and symmetric rate requirements.<sup>[17]</sup>

As a result, by the end of 2012, U.S. carriers interested in providing telecommunications services in the U.S.-Cuba route no longer had to negotiate an agreement with ETECSA containing a proportional traffic termination or symmetric rate requirement. They also had a much clearer path to obtaining a waiver from the FCC if they were unable to negotiate a termination rate with ETECSA at or below the benchmark (which was likely to be the case). But these changes did not alter the dynamics of U.S.-Cuba telecommunications—or lead to a dramatic increase in the choices available to U.S. consumers. The success of the new policy depended to a large degree on the ability to negotiate with ETECSA, which was still reluctant to re-establish direct services with U.S. carriers, and the overall regulatory framework continued to impose onerous requirements on U.S. carriers. Not surprisingly, few U.S. carriers were able to negotiate agreements with ETECSA to provide direct telecommunications services between the U.S. and Cuba.<sup>[18]</sup>

## **Recent Efforts**

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2016 saw the FCC take a decidedly different—and more aggressive—approach. The decision to [remove](#) Cuba from the Exclusion List for Section 214 authorizations significantly streamlined the regulatory process by allowing carriers to rely on existing Section 214 authorizations (as opposed to requiring them to file separate, Cuba-specific authorizations) to provide service in Cuba. It also eliminated the need for coordination with, and approval by, the State Department.<sup>[19]</sup>

But the real game-changer may come if the FCC adopts the proposals it released on February 10, 2016. Having already eliminated the proportionate return and symmetrical rates prongs of the ISP, the FCC now proposes to also remove the nondiscrimination prong of the ISP and eliminate the nondiscrimination requirement that applies as a waiver condition under the *TeleCuba Waiver Order*.<sup>[20]</sup> Under this proposal, agreements between U.S. carriers and ETECSA with termination rates that exceed the benchmark (which stands at \$0.19 per minute) would still need approval on a case-by-case basis, but the FCC also is opening the door to eliminating the other conditions of the *TeleCuba Waiver Order* and eliminating the requirement to make agreements between U.S. carriers and ETECSA available for public inspection.<sup>[21]</sup> The streamlining effect of these proposals undoubtedly would be meaningful: U.S. carriers with existing Section 214 authorization could commence negotiations with ETECSA immediately, would not need to file any agreement with ETECSA, would not be bound to terms and conditions included in other agreements between ETECSA and U.S. carriers, and the FCC's assessment would be focused narrowly on the waiver of the benchmark rate (which the FCC has been open to granting).

Caution is in order, however, as the adoption of these proposals is not a foregone conclusion. Among other things, the FCC asked interested parties whether there are “any concerns that removal of the nondiscrimination requirements would cause discrimination or threats of discrimination or other anticompetitive actions against U.S. carriers as a strategy to obtain pricing concessions regarding the exchange of traffic between the United States and Cuba.”<sup>[22]</sup> Commissioner Michael O'Reilly echoed these concerns in his Concurring Statement.<sup>[23]</sup> Given the relatively short track record of negotiations between U.S. carriers and ETECSA and the apparent inability of some small carriers to reach agreement, these concerns are likely to influence the scope of whatever action the FCC eventually takes.

## Looking Forward

If enacted, these latest proposals from the FCC could very well prove to be the final steps necessary to see more U.S. carriers enter (or, in some cases, re-enter) the U.S.-Cuba route. The expansion of options would certainly be welcomed by the segment of the U.S. population that routinely makes calls to Cuba to keep in touch with family and friends, and it would bring U.S.-Cuba telecommunications closer to the Cuban Democracy Act's long-held goal of promoting efficient communications between the two countries. In the short term, it is easy to imagine increased use of cellphones to make direct calls to Cuba from the U.S., more options for traditional wireline long distance service to Cuba from the U.S., and new products sold to U.S. consumers to allow their relatives and friends in Cuba to make cheaper calls to the U.S. It is also reasonable to expect a spike in telecommunications services directed at U.S. consumers visiting Cuba, which could include expanded roaming options and telecommunications services such as calling cards for U.S. visitors to call home from Cuba.

Despite these causes for optimism, it is equally important to understand what these FCC actions would *not* accomplish. They would not put pressure on ETECSA to negotiate agreements with lower termination rates and/or roaming rates—a key step to see a significant reduction in the price of services in the U.S.-Cuba route. They would also do very little, if anything, to promote broadband

deployment in Cuba, as some have hoped. The ISP and the waiver requirements of the *TeleCuba Waiver Order* deal with termination rates for switched-access service, not broadband. While an expansion in roaming options technically could lead to increased access to mobile broadband (when and if Cuba deploys an advanced generation wireless network able to support such a service), the impact of such a move would be limited to U.S. visitors to Cuba. Ultimately, the much-talked about deployment of broadband in Cuba will depend on ETECSA's acquiescence and changes to the statutory provisions of the embargo, neither of which seem likely at this point. But in terms of promoting competition in the U.S.-Cuba route for basic telecommunications services, the FCC's proposals would be a step in the right direction.

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[1] See *In re Removing Cuba from the Exclusion List for International Section 214 Authorizations*, Order, DA-16-55, IB Docket No. 15-289 (Int'l Bur. Jan. 15, 2016).

[2] See *In re International Settlements Policy Reform*, Further Notice of Proposed Rulemaking, FCC 16-13, IB Docket Nos. 11-80, 10-95, 05-254, RM-11322 (rel. Feb. 12, 2016) (*February Order*).

[3] See, e.g., Felicia Schwartz, *Sprint Signs Deal to Offer Roaming Service in Cuba*, The Wall Street Journal, Nov. 2, 2015. <http://www.wsj.com/articles/sprint-signs-deal-to-offer-roaming-service-in-cuba-1446502533>.

[4] We emphasize "direct" because some U.S. carriers had been providing telecommunications services between the U.S. and Cuba (such as long distance voice) service before the Obama administration started to relax some of the embargo restrictions. As we explained in an earlier [article](#), AT&T

continued to provide long distance service between the U.S. and Cuba for more than two decades after the embargo was imposed (and until its

undersea cable became unusable in the 1980s). For many years after that other carriers provided service between the U.S. and Cuba, but had to do so

indirectly, *i.e.*, by sending traffic through a third-party carrier that then terminated the traffic in Cuba through its own direct connection. *Cf. IConnect Wholesale, Inc., d/b/a TeleCuba*, 26 FCC Rcd 5217, 5220 (Int'l Bur. Apr. 8, 2011) (*TeleCuba Waiver Order*).

[5] Cuban Democracy Act of 1992, 22 U.S.C. § 6004(e); see also John Spencer Nichols & Alicia M. Torres, *Cuba, in Telecommunications In Latin America* 31 (Eli M. Noam ed., 1998). ("The sponsors of the legislation were persuaded that more telephone traffic would undercut the Cuban leadership and were supported by Cuban-Americans eager to call relatives on the island. The legislation received broad, bipartisan congressional support.").

[6] See Letter from Richard C. Beaird, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State to James H. Quello, Chairman, Federal Communications Commission (July 22, 1993). When the FCC later changed its rules in

1996 to issue global authorizations to particular applicants (as opposed to country-specific or facility-specific authorizations), Cuba was added to the

exclusion list of countries as to which a specific authorization would still be necessary. See *Streamlining the International Section 214 Authorization Process and Tariff Requirements—Exclusion List*, IB Docket No. 95-118, Order, DA 96-1205 (Int'l Bur. rel. July 29, 1996).

[7] See 31 C.F.R. § 515.542(c) (effective until Sept. 7, 2009) (requiring specific license for payments to Cuba as a result of authorized telecommunications services between the U.S. and Cuba)

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[8] The ISP was adopted in response to concerns that foreign carriers with market power could take advantage of the presence of multiple U.S. carriers serving a particular market. At the time it governed how U.S. carriers could negotiate with foreign incumbent carriers for the exchange of international traffic from and to the U.S.

[9] See, e.g., order waiving . . . u issued a ureau he benchmarks policy to promote t thitimeicy and Associated Filing Requirements, *In re Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146, 3147-3148 (rel. Jan. 31, 1996). Even after the FCC relaxed the application of these requirements and lifted the application of the ISP to agreements between U.S. carriers and foreign carriers that lacked market power, it continued to apply them to routes, such as those involving Cuba, where the foreign carrier continue to possess market power. Cf. *In re 1998 Biennial Regulatory Review—Reform of the International Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd 7963 (May 6, 1999).

[10] See *In re Regulation of International Accounting Rates*, 7 FCC Rcd 8040 (Nov. 27, 1992); see also *In re International Settlement Rates*, 12 FCC Rcd 19806, 19807 (Aug. 18, 1997).

[11] See *In re WilTel International, Inc.*, Memorandum Opinion and Order, 9 FCC Rcd 5806 (rel. Oct. 5, 1994). As a result of this order various U.S. carriers were authorized to provide long distance and other services directly to Cuba via satellite. The parties had reached an agreement with the state-owned telephone company in Cuba under which the latter would have been paid \$0.60 per minute of switched traffic and a \$4.85 surcharge per call for

collect calls. The FCC approved the agreement with a modified surcharge of \$1.00 per call for collect calls. *Id.* at 5808. AT&T received a similar

authorization in 1996. See *In re: AT&T Corp.*, Order and Authorization, 11 FCC Rcd 4149 (Int'l Bur. Apr. 9, 1996).

[12] See, e.g., *TeleCuba Waiver Order*, 26 FCC Rcd at 5220. After the U.S. imposed the embargo in the early 1960s, AT&T was allowed to continue to use its undersea cable to provide service between the U.S. and Cuba, as long as it did not add new capacity. Because the embargo prohibited AT&T from making any payments to the state-owned Cuban telephone company for the termination of long distance calls, AT&T for decades deposited these

payments in an escrow account. The release of those funds became a source of contention between the U.S. and Cuba.

[13] See Cuban Assets Control Regulations, 74 Fed. Reg. 46000 (Sept. 8, 2009).

[14] See Letter from Ambassador Philip L. Verveer, U.S. Coordinator for International Communications & Information Policy, to Chairman Julius Genachowski, Federal Communications Commission (Jan. 12, 2010).

[15] See *Modification of Process to Accept Applications for Service to Cuba and Related Matters*, Public Notice, 25 FCC Rcd 436 (Int'l Bur. Jan. 21, 2010).

[16] *TeleCuba Waiver Order*, 26 FCC Rcd at 5226-28.

[17] See *In re International Settlements Policy Reform*, Report and Order, 27 FCC Rcd 15521, 15530 (Nov. 29, 2012).

[18] Between 2009 and the close of 2015, Sprint Corporation and IDT Domestic Telecom, Inc. filed with the FCC their respective agreements with ETECSA. See Letter from to Maria Cattafesta, counsel to Sprint Communications Company L.P. to Mindel De La Torre, International Bureau

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Chief, *Request for Review of Service Agreement*, IB Docket No. 10-95 (Sept. 10, 2015); Letter from Douglas W. Everett, counsel for IDT Domestic Telecom, Inc. to Mindel De La Torre, International Bureau Chief, *Request for Review of Service Agreement*, IB Docket No. 10-95 (Feb. 9, 2015).

TeleCuba and TelePuente LLC, both of which had obtained their Section 214 authorization in the early 2010s, apparently have not reached agreement with ETECSA.

[19] See *Modification of Process Regarding the Licensing of Telecommunications Services Between the United States and Cuba*, Public Notice, 30 FCC Rcd 12458, 12459 (Int'l Bur. Nov. 9, 2015).

[20] See *February Order* at 4.

[21] See *id.* at 4-5. Comments on the FCC's proposals are due on April 4, 2016.

[22] *Id.* at 4.

[23] See *February Order* at 11-13 (Concurring Statement of Commissioner Michael O'Reilly).

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