

Communications

Waylaid by Congressional Hearings, Wheeler Misses Telecom Delegation Trip to Cuba

Had it not been for an upcoming string of congressional hearings over his agency's net neutrality rules, FCC Chairman Tom Wheeler would have been talking telecommunications policy on sunnier shores.

Wheeler was invited—but won't be going—to Havana March 24-26, as part of a U.S. delegation led by Ambassador Daniel A. Sepulveda to discuss increasing Cuba's capacity for greater Internet connectivity to support better access to information by the nation's people. Sepulveda is the deputy assistant secretary of state and U.S. coordinator for international communications and information policy.

Mindel De La Torre, chief of the FCC International Bureau, will travel in Wheeler's place, an FCC spokeswoman told Bloomberg BNA by e-mail.

"As the U.S. regulatory agency in charge of communications and responsible for authorizing communications links between the United States and other countries, the FCC would like to explore where we can work with our counterparts in Cuba to improve telecommunications infrastructure and connectivity between our countries," the FCC spokeswoman said.

The Obama administration announced Dec. 17 that it would liberalize restrictions on trade and diplomatic relations with Cuba, with an emphasis on allowing telecom providers to establish the necessary infrastructure and mechanisms in Cuba to provide commercial telecommunications and Internet services (243 DER A-11, 12/18/14).

The talks represent just one in a series of meetings between government officials of both countries to help propel that policy forward, a State Department spokeswoman told Bloomberg BNA.

The trip comes just weeks after the first U.S. telephone carrier, Newark, N.J.-based IDT Domestic Telecom, Inc., struck the first long-distance calling deal in decades with Cuban government-run telecom provider Empresa de Telecomunicaciones de Cuba S.A. (ETECSA).

Since March 4, callers from the U.S. have been able to directly connect to Cuba, rather than waiting for the call to be transferred through a third party.

IDT was in contact with ETECSA for several years, but it only began to express genuine interest in the deal in the summer of 2014, Bill Ulrey, IDT vice president for investor relations and external affairs, told Bloomberg BNA. "There was no formal change in policy that allowed us to do this" on the Cuban side," he said.

"What changed was ETECSA's interest in it," he said.

Negotiations ended in February, when the FCC International Bureau accepted the company's waiver of the benchmark policy applicable to U.S. carriers seeking to provide telecom services directly to Cuba on Feb. 12.

The deal is an indicator that the decades-long chill between the U.S. and the Cuba Communist regime, first led by Fidel Castro, and later by his brother Raul Castro, may be genuinely thawing enough to allow the telecom industry to enter a new market even in small ways.

"We're the first, but there will probably be many more to come," Ulrey said. The company hopes that as the two governments continue to move toward liberalization of the market, it will be able to offer other services, such as mobile air time "top up" which allows customers to purchase minutes in the U.S. and transfer them to a mobile device overseas.

IDT already offers that service in other countries and believes that, if market conditions are right, Cuba could be ripe for a similar service. Communications costs are high in a country where the average monthly salary is just over \$17, according to the Cuban National Statistics and Information Office (ONEI).

Sanctions Scare. What sets IDT apart from many other telecom providers are its prepaid services.

Telecom providers that offer post-paid services face greater uncertainty due to banking regulations in entering what is far from a free and open market.

A key hurdle for investment is the risk-adverse nature of the American banking industry and companies' ability to remit money to ETECSA without running afoul of sanctions rules.

The mere possibility of a sanctions action by the Treasury Department Office of Foreign Assets Control (OFAC) means banks' traditionally conservative risk departments are reticent to make direct payments to Cuba, even though telecom activities are permissible, Ulises R. Pin, a telecommunications lawyer with Morgan Lewis & Brockius LLP in Washington, told Bloomberg BNA.

"It's a practical issue, not a legal issue," Pin said.

Though the Commerce Department is working on rules to implement the administration's policy to autho-

alize the export of certain types of items, including telecommunications equipment, to Cuba, sanctions remain in place, OFAC said in a Jan. 15 fact sheet related to recent changes in the Cuban Asset Control Regulations (CACR).

“Most transactions between the United States, or persons subject to U.S. jurisdiction, and Cuba continue to be prohibited, and OFAC continues to enforce the prohibitions of the CACR,” Treasury said.

Congressional Hurdle. While more U.S. carriers may begin exploring the possibility of setting up other international communications infrastructure between the two countries in addition to exports, they will be limited to such activities unless current U.S. law is changed.

The Cuba Democracy Act of 1992 restricts U.S. carriers from investing in Cuba’s domestic networks, which means American companies aren’t likely to set up a Wi-Fi network in Cuba any time soon.

“They can lay cable between Miami and Havana, but they cannot invest within Cuba,” Pin said. An act of Congress would be necessary to change that law, and with Republicans in control of both chambers, it seems unlikely that would occur, he said.

Gauging Cuban Interest. Still, investment and regulatory hurdles aren’t only on the U.S. side. With the federal government signaling its interest in promoting greater communication with the island, the Cuban government itself is the major roadblock, several telecom and international trade practitioners told Bloomberg BNA.

Industries will be watching how Cuba reacts to whatever approaches are made by the American government and businesses, said Jonathan Epstein, an international trade attorney in the Holland & Knight LLP Washington office.

“It’s potentially a huge market, very close to the U.S., but a big issue is going to be how cooperative the Cuban government is going to be in terms of allowing private development of the infrastructure and distribution of content,” said Francisco Montero, a telecommunications attorney with the Fletcher, Heald & Hildreth PLC Arlington, Va. office.

Recent Commerce Department rule changes have lifted most licensing restrictions for certain types of consumer electronics, and telecommunications and Internet backbone companies, subject to certain limits, Epstein said.

From there, the question becomes what the Cubans will allow to penetrate their markets, said fellow Holland & Knight trade partner Ronald A. Oleynik.

The very reason the telecom industry is at the forefront of the administration’s policies is because it has the capacity to bring new ideas and U.S. culture to Cubans, Oleynik said. Whether or not the government allows that door to spring open or remain closed may be heavily driven by the Cuban economy’s need for foreign investment, Epstein said.

“Part of the notion that there’s going to be this flood of imports of personal communications devices and

other tools and supplies for entrepreneurs presumes that the Cubans have the money to buy these things, and a financial system that’s going to work to get payments made,” he said.

The government’s experience in growing its tourism and hotel industry could serve as a model for encouraging American telecom investment down the road as laws and government policies in both countries evolve, he said.

Under that model, the Cuban government generally retains control over the land, real estate and infrastructure related to a hotel operation, and allows private, foreign investors to manage the property in a form of joint venture, Epstein said.

The government might consider allowing a U.S. provider to install towers and other infrastructure which would be owned by the state, but be subject to a long-term lease to the foreign provider, Epstein said. “It’s a good way for them to build infrastructure cheaply.”

Eye on Infrastructure. “U.S. opportunities cover almost the waterfront of telecom services in Cuba,” Pantelis Michalopoulos, a telecom practitioner with Steptoe & Johnson LLP in Washington told Bloomberg BNA.

“Our understanding of the state in which the Cuban infrastructure is, that it’s rather outdated in many respects,” in terms of broadband services, wireless Internet connectivity, and satellite or cable TV, Michalopoulos said.

There is a strong potential for laying fiber, which would be “huge on an island of that scale,” as well as putting up cell towers to have enough bandwidth for the delivery of enriched content via the airwaves.

“They don’t have any of that right now,” said Montero.

How quickly such an approvals process would go on the Cuban side is nearly impossible to predict, Michalopoulos said.

“To the extent that there are some services that do not require Cuban government approval,” specifically for edge providers and Internet-based services, and “to the extent they’re authorized by the U.S.—within the general U.S. license—that obstacle of receiving Cuban approval would not exist,” Michalopoulos said.

As trade and travel restrictions loosen, the Cubans will be presented with the possibility of a massive influx of tourists, leading to a further build-out of tourism-related industries: hotels, resorts and cruise ship facilities, Montero said.

All of those are going to require telecom facilities to support consumer demand for broadband, Wi-Fi and conferencing facilities, he said. If that happens, companies assume the government will loosen its restrictions, said Montero.

“Something tells me we’re a long way away from that yet,” he said.

Netflix, Google Explore Opportunities. For Cuban citizens, expensive Internet access through an outdated infrastructure is compounded by one of the world’s most

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repressive regimes when it comes to the free flow of information online.

International watchdog organization Freedom House ranks Cuba as one of the least free countries for Internet openness, and Internet penetration is estimated at about 5 percent.

Regardless of those obstacles, American edge providers are already taking steps to move in, though their efforts appear largely symbolic.

Netflix, Inc. launched its standard \$7.99/month streaming video service on Feb. 9, though few Cubans would be able to afford the service or have access to the international payment methods necessary to subscribe. Apple Inc. removed the country from its Global Trade Compliance restricted country list Feb. 17, opening up the possibility of Cubans accessing a variety of its online services, such as the iTunes store.

Several Google Inc. executives were reported to have visited with Cuban university students March 11,

though a company spokeswoman declined to confirm the details of the visit.

Edge providers and online content companies will similarly be greatly affected by the way the Cuban government opens itself up, Montero said.

“We are looking at what may be considered a generational change in the current regime. Once we see a passing of the baton from the Castro generation to the next successor, I think you could see things start to relax a little bit,” he said.

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Text of the IDT waiver is at <http://op.bna.com/der.nsf/r?Open=tbay-9ustkl>.

Text of the OFAC fact sheet is at <http://op.bna.com/der.nsf/r?Open=tbay-9ustjb>.