

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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PUERTO RICO TELEPHONE COMPANY )  
 )  
Request for Temporary Waiver )  
of the Commission's Rules to )  
Establish Competitive Service )  
Safeguards for Local Exchange )  
Carrier Provision of )  
Commercial Mobile Radio )  
Services )

WT Docket No. 96-162

To: The Commission

PETITION FOR TEMPORARY WAIVER

Puerto Rico Telephone Company ("PRTC"), by its attorneys and pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, hereby requests a temporary waiver of the Commission's requirement that incumbent local exchange carriers establish a separate affiliate for in-region broadband commercial mobile radio services ("CMRS") operations. This requirement was established in the Commission's Report and Order in the captioned proceeding<sup>1</sup> and will be effective on February 11, 1998.

I. BACKGROUND

PRTC, a Delaware corporation, is the incumbent local exchange service provider in Puerto Rico and is wholly-owned by the Puerto Rico Telephone Authority ("PRTA"), a government instrumentality of the Commonwealth of Puerto Rico. Over two

<sup>1</sup> In the Matter of Amendment to the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, FCC No. 97-352 (rel. Oct. 3, 1997) ("Report and Order").

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years ago, PRTC began internal discussion regarding the substantial restructuring of its operations. In particular, PRTC's management has explored dividing the company into several Puerto Rico affiliates along the functional lines of PRTC's current operations. The three new corporations to be created under PRTC's restructuring plan would split the former PRTC as follows: one corporation will provide competitive wireline services, a second will provide wireline network services, and a third will provide CMRS.

One significant factor in the contemplated restructuring, however, is the federal tax consequence of the plan within the unique legal and federal tax regime governing United States domestic corporations operating in Puerto Rico. (PRTC, as a Delaware corporation, is treated as a United States domestic corporation for federal tax purposes.) Under the Puerto Rico Federal Relations Act ("Federal Relations Act"), federal tax laws generally do not apply in Puerto Rico unless otherwise specified by Congress,<sup>2</sup> allowing Puerto Rico, in effect, to establish a foreign tax jurisdiction. The Internal Revenue Code of 1986, as amended ("IRC"), excludes the Puerto Rico-source income of bona fide residents of Puerto Rico for federal income tax purposes<sup>3</sup>. Furthermore, the IRC treats Puerto Rico corporations as foreign corporations<sup>4</sup> for federal income tax purposes and generally

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<sup>2</sup> 48 U.S.C. § 734.

<sup>3</sup> 26 U.S.C. § 933.

<sup>4</sup> 26 U.S.C. § 7701(a)(4); 7701(a)(5).

includes in such a corporation's gross income only income from United States sources and income which is effectively connected with the conduct of a trade or business in the United States.<sup>5</sup> Congress has also established a number of special tax provisions relating to certain United States domestic corporations operating in Puerto Rico.<sup>6</sup> Similarly, the IRC exempts from federal taxation the income accruing to the government of any possession of the United States, or any political subdivision thereof.<sup>7</sup> As part of its plan to restructure its operations, PRTC has invested substantial time during the last two years in reviewing and planning for the tax issues that arise from the proposed reorganization under the current unique and complex federal income tax environment.

In connection with that effort, on November 3, 1997, PRTC filed a Request for a Private Letter Ruling with the Internal Revenue Service ("IRS") regarding the tax effects of the proposed reorganization. In the Request for a Private Letter Ruling, PRTC described three different restructuring plans being considered by PRTC and asked the IRS to rule on the federal tax consequences for the gross income of PRTC under each plan. On December 4,

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<sup>5</sup> 26 U.S.C. §882(b).

<sup>6</sup> For example, since 1976, U.S. domestic corporations operating in Puerto Rico and other U.S. possessions have been eligible for a substantial federal income tax credit under Section 936 of the IRC. 26 U.S.C. § 936. In 1996 Congress effectively repealed this tax credit, but provided for a ten-year phase-out for Puerto Rico. See 26 U.S.C. § 30A.

<sup>7</sup> 26 U.S.C. § 115(2).

1997, the IRS Chief Counsel Office asked PRTC to designate a specific restructuring plan on which the IRS should base the private letter ruling. Accordingly, on December 24, 1997, PRTC amended the November 3, 1997, Request for a Private Letter Ruling by selecting a specific plan for consideration by the IRS.

As PRTC was preparing its November 3 Request for a Private Letter Ruling, however, the Commission released the Report and Order in this proceeding. Effective February 11, 1998, the Report and Order requires incumbent local exchange carriers to provide in-region broadband CMRS through a separate CMRS affiliate. The separate CMRS affiliate must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated local exchange carrier that the local exchange carrier uses for the provision of local exchange services in the same in-region market; and (3) acquire any services from the affiliated local exchange carrier on a compensatory arm's length basis pursuant to the Commission's affiliate transaction rules.<sup>8</sup>

As a result of the timing of the Report and Order, it is unlikely PRTC will have received a final ruling from the IRS before it must comply with the Commission's new requirement. Yet, how PRTC creates the affiliate and ultimately transfers assets to the new entity implicates the unique complex federal taxation policies that apply to Puerto Rico. This, in turn, is the subject of PRTC's already pending Request for a Private

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<sup>8</sup> See Report and Order at ¶ 5.

Letter Ruling. A temporary waiver of the Commission's separate affiliate requirement until the IRS responds to the Request for a Private Letter Ruling may help PRTC to form the very separate entity mandated in the Report and Order without incurring substantial unnecessary tax liabilities. For this reason, and as explained more fully below, PRTC requests a temporary waiver of the CMRS affiliate requirement.

**II. PRTC QUALIFIES FOR A WAIVER UNDER THE COMMISSION'S REPORT AND ORDER**

**A. PRTC is an Incumbent Local Exchange Carrier with Fewer Than 2 Percent of the Nation's Subscriber Lines**

As a threshold matter, PRTC has standing to request a waiver under the terms of the Commission's Report and Order. In the Report and Order, the Commission indicated that incumbent local exchange carriers with fewer than 2 percent of the nation's subscriber lines may petition the Commission for suspension or modification of the CMRS affiliate requirement.<sup>9</sup> In 1996, PRTC had 1,166,721 of the nation's 158,672,217 total presubscribed lines, or less than .74 percent.<sup>10</sup> PRTC does not anticipate that the percentage would be materially different for 1997. Accordingly, PRTC has standing to request a suspension or modification of the CMRS affiliate requirement under the terms of the Commission's Report and Order.

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<sup>9</sup> See Report and Order at ¶ ¶ 69-77.

<sup>10</sup> See Monitoring Report, CC Docket 87-339 (rel. May, 1997) at Table 4.19, pp. 337, 372.

**B. It Would Be Unduly Economically Burdensome to Require PRTC to Establish a Separate CMRS Affiliate Before the IRS Issues a Final Ruling**

It would be unduly economically burdensome for PRTC to establish a separate CMRS affiliate under the terms of the Report and Order prior to receiving a final ruling from the IRS. The tax liability PRTC may incur by proceeding with the reorganization prior to receiving the ruling requested from the IRS is substantial, which liability necessarily will be passed on to the consumers of PRTC's services. Moreover, it would be economically burdensome to require PRTC to establish a temporary CMRS affiliate to meet the terms of the Report and Order, which affiliate might then be dismantled in favor of a permanent CMRS affiliate in the wake of the IRS ruling.<sup>11</sup> Yet, until PRTC receives the IRS ruling, it will be unclear how best to establish the CMRS affiliate for federal tax purposes.

The potential for these economic burdens may be avoided, however, if the Commission temporarily suspends the initiation of the CMRS separate affiliate requirement as it applies to PRTC. A temporary suspension will enable PRTC to learn how the IRS will treat the proposed reorganization for federal tax purposes and may enable PRTC to avoid the undue tax burden that might result from establishing separate affiliates without the prior guidance from the IRS. In that event, the consumers of PRTC services

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<sup>11</sup> See Report and Order at ¶ 69 (noting that "for certain incumbent LECs, the costs imposed by separation may outweigh our interest in promoting competition and preventing anticompetitive conduct").

would not be forced to bear the cost of an unnecessary tax liability or duplicative reorganizations. In this regard, a waiver would be consistent with the public interest, convenience, and necessity<sup>12</sup> by helping to avoid these costs while yielding the very separate CMRS separate affiliate mandated in the Report and Order.

**C. The Waiver PRTC Requests Would be Limited in Duration and Narrow in Scope**

The waiver PRTC requests here is limited in duration because it is confined only to the period of time before PRTC receives a final IRS ruling. Indeed, in making this request, PRTC is not undertaking to avoid compliance with the Report and Order. The PRTC restructuring plan described in the Request for a Private Letter Ruling predates the Report and Order, and PRTC will comply with the requirements of the Report and Order in implementing the contemplated restructuring. PRTC asks only for additional time in which to receive the pending IRS ruling.

In addition, the waiver PRTC requested here is narrow in scope because the circumstances surrounding the request are relatively unusual. Unlike many other carriers subject to the Commission's CMRS separate affiliate requirement, PRTC must consider the special federal tax consequences of operating in Puerto Rico and the effect of federal Puerto Rico revenue policies on its operations. Embodied in the Federal Relations Act, and in Sections 7701(a)(4), 936, 30A and 115(2) of the IRC,

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<sup>12</sup> See Report and Order at ¶ 71.

is a congressional policy determination to treat Puerto Rico differently from individual states and, at times, from other United States possessions. PRTC operates within the scope of these federal policies, and the potential for conflict among its obligations under the Communications Act and under the IRC makes PRTC's compliance with the Commission's CMRS affiliate requirement by February 11, 1998, more complex than ordinarily would be the case. PRTC urges the Commission to grant the limited waiver requested here.

### **III. PRTC QUALIFIES FOR A WAIVER UNDER SECTION 1.3 OF THE COMMISSION'S RULES**

Alternatively, PRTC requests a waiver of the CMRS separate affiliate requirement under Section 1.3 of the Commission's Rules.<sup>13</sup> Under Section 1.3, the Commission has the discretion to waive its rules if there is good cause to do so<sup>14</sup> and if there exist "special circumstances" in which deviation from the rule would "serve the public interest."<sup>15</sup> As demonstrated above, this request for a temporary waiver of the Commission's CMRS affiliate requirement indeed is based on special and unusual circumstances.

Moreover, the Commission has a responsibility to minimize any conflict between its rules and other federal policies to

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<sup>13</sup> 47 C.F.R. § 1.3 ("Rule 1.3").

<sup>14</sup> Id.

<sup>15</sup> See, e.g., Petitions for Waiver of the Four-Digit Carrier Identification Code Implementation Schedule, DA 97-2614, ¶ 15 (rel. Dec. 15, 1997). See also Northeast Cellular Telephone v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972)).

ensure the public interest is served. It is well-established that:

Administrative agencies have been required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulations operate in the public interest. . . . [A]gencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized.<sup>16</sup>

The Commission itself has acknowledged that, "[t]o the extent possible under the Communications Act, we should minimize the conflict between our procedures and other federal policies."<sup>17</sup>

In this instance, the Commission will minimize any potential conflict between the February 11, 1998, implementation date of its CMRS separate affiliate requirement and the pendency of PRTC's Request for a Private Letter Ruling by granting the limited waiver requested here. To be certain, the federal tax consequences of operating in Puerto Rico are "not unique to [the Commission's] particular area of administrative expertise." PRTC

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<sup>16</sup> LaRose v. FCC, 494 F.2d 1145, 1147 n.2. (D.C. Cir. 1974). See also Storer Communications, Inc. v. F.C.C., 763 F.2d 436, 443 (D.C. Cir. 1985) (finding Commission satisfied its "duty" to implement the Communications Act "in a manner as consistent as possible with corporate and federal securities laws" concerning shareholders' rights).

<sup>17</sup> Applications of L.P. Media, Inc. and G. William Miller, Trustee For Commission Consent to a Transfer of Control of the Evening News Association, 102 FCC 2d 1276, ¶ 13 (1985). See also Dale J. Parsons, Jr., Memorandum Opinion and Order, 10 FCC Rcd 2718, 2720 (1995) ("The Commission is obliged to reconcile its policies under the Communications Act with the policies of other federal laws and statutes"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 (1994) (relying on LaRose in following federal tribal affiliation policies).

has asked the IRS to interpret a narrowly-applied provision of the IRC in connection with PRTC's contemplated restructuring, which interpretation may govern how PRTC complies with the requirements of the Commission's Report and Order as a practical matter. Granting the limited waiver requested here may permit PRTC to comply with the Commission's rules in a way that also is practical under the federal policies embodied in the IRC.

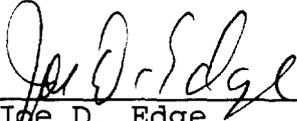
**IV. CONCLUSION**

For these reasons, PRTC requests a temporary waiver of the Commission's CMRS separate affiliate requirement until sixty days following the date on which the IRS issues a final ruling on PRTC's November 3rd Request for a Private Letter Ruling, as amended.

Respectfully submitted,

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