**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matters of | ) | |
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| Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers | ) | CC Docket No. 01-338 |
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| Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Deployment of Wireline Services Offering Advanced Telecommunications Capability | ) | CC Docket No. 98-147 |

# WAIVER PETITION OF THE TELECOMMUNICATIONS REGULATORY BOARD OF PUERTO RICO FOR ENTERPRISE MARKET SWITCHING IMPAIRMENT IN DEFINED PUERTO RICO MARKETS

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# WAIVER PETITION OF THE TELECOMMUNICATIONS REGULATORY BOARD OF PUERTO RICO FOR ENTERPRISE MARKET SWITCHING IMPAIRMENT IN DEFINED PUERTO RICO MARKETS

The Telecommunications Regulatory Board of Puerto Rico ("Board") hereby submits this Waiver Petition that rebuts the Federal Communications Commission's ("Commission") national finding of no impairment for the unbundling of local circuit switching to serve end users using DS1 capacity and above loops ("Enterprise Customers") in defined Puerto Rico markets. Said Waiver Petition is filed under Section 51.319(d) of the Commission's rules. Based on the record of an expedited proceeding before the Board these past three months, the Board requests that the Commission waive its rule exempting Puerto Rico Telephone Company, Inc. ("PRTC")[1] from unbundling circuit switching used by competitive local exchange carriers ("CLECs") to provide service to the Board-defined Enterprise Customer markets in Puerto Rico.

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[1] At present PRTC is the only incumbent local exchange carrier serving the Commonwealth of Puerto Rico.

## 1. INTRODUCTION

In its *Triennial Review Order*,[2] the Commission found that, at a nationwide level, CLECs are not impaired without access to local circuit switching to serve Enterprise Customers. The Commission also stated that state commissions may rebut this finding by showing that operational or economic barriers exist in a particular market that result in impairment for local circuit switching serving Enterprise Customers. Based on the record of an expedited proceeding, the Board finds that due to operational barriers present in the local telecommunications market in Puerto Rico, CLECs are impaired without the ability to obtain unbundled local switching to serve customers Enterprise Customers. While operational barriers impair requesting carriers serving Enterprise Customers, the record before the Board did not contain sufficient information to rebut the economic criteria identified by the Commission. Notwithstanding the lack of a specific finding regarding economic criteria, the Board's findings rebut the Commission's national finding of no impairment; and are in accord with the Commission's rules emanating from the *TRO* and with the discussions contained within the *TRO* itself.

Because of the reasons established herein, the Board has determined to revisit whether CLECs continue to be impaired serving Enterprise Customers without access to local circuit switching under the operational criteria after a two-year period. The Board is

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[2] *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, 96-98 & 98-147, FCC 03-36, Report and Order and Order on Remand and Notice of Proposed Rulemaking (rel. August 21, 2003) ("*Triennial Review Order*" or "*TRO*").

committed to conduct a six-month proceeding in two-years that would determine whether the Board's findings no longer justify a waiver of the national impairment rules.

## 2. BACKGROUND

The Commonwealth of Puerto Rico is an insular territory of the United States. Notwithstanding its insular status, Puerto Rico has several metropolitan areas that have a high population density. In addition to a high population density, the Commission's Top 100 MSA List places the San Juan metropolitan area as the 27th largest metropolitan statistical area in the United States.[3] Despite these significant population characteristics, telecommunications competition has been slow to develop in Puerto Rico.

The telecommunications market in Puerto Rico has developed from a set of historical, cultural, technical, and political dimensions that are unique within the United States. From 1974 through 1999, a state-owned monopoly dominated the market in Puerto Rico. The Puerto Rico Legislature created the Board in 1996. Subsequent to its creation, a majority share of the state-owned incumbent local exchange carrier ("ILEC"), PRTC, has been purchased and is now controlled by Verizon Communications, Inc. as part of its international holdings.

Since its creation, the Board has worked to promote a transition from a market dominated by a state-controlled monopoly (and characterized by a level and quality of service less than experienced in much of the mainland), to an open and competitive market. This

[3] The U.S. Department of Commerce Census Bureau 2000 Census shows the San Juan area to have a total population of 1,595,333. *See* Brief of Puerto Rico Telephone Company, Inc., page 9.

process has been difficult, but the Board has made significant progress given the unique obstacles the Puerto Rico market represents. Nevertheless, competition in the local telephone market in Puerto Rico has been slow to develop, and robust, facilities-based competition has yet to take root.

The Board concludes that the circumstances that enabled the Commission to make a finding of no impairment for unbundled switching for Enterprise Customers nationally are not present in the Puerto Rico market. The Board believes that when the Commission takes into account the uniqueness of the Puerto Rico market, as set forth below, it will find that waiver of its earlier finding of "no impairment" for competitors seeking to utilize unbundled switching to serve Enterprise Customers is appropriate.

While the Commission cited as evidence of no impairment on a national level the "widespread switch deployment" to provide DS1 and higher capacity service;[4] the widespread switch development that the Commission highlighted in the *TRO* does not yet exist in Puerto Rico. According to the Board's record, only one facilities-based competitor exists on the island. There are six resellers on the island, with the top two resellers controlling nearly 95% of the reseller market.[5] This is in contrast to the multitude of resellers and facilities providers that have entered many markets of similar size on the mainland. The factors that the Commission found justified a finding of no impairment for enterprise customers simply are not yet present in the Puerto Rico markets. In evaluating the Puerto Rico markets, it appears that because of a variety of

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4 *See TRO* at ¶ 419.

5 The top reseller has 80 percent of the reseller market in Puerto Rico.

reasons, the markets are more embryonic than corresponding markets on the mainland. The Board believes that the discontinuation of local circuit switching for Enterprise Customers would impair CLECs from growing into robust competitors in vibrant competitive markets.

The Board respectfully requests that the Commission waive its rule exempting ILECs from unbundling local switching for Enterprise Customers in Puerto Rico.

## 3. DISCUSSION

In this Waiver Petition, the Board will first review the authority and standard for review required by the Commission in its rebuttal of the national finding. Thereafter, the Board will define the various markets that exist for Enterprise Customers and it will review its findings related to operational barriers and economic barriers that rebut the national finding for the Puerto Rico enterprise markets.

### A. Commission Authorization of Waiver Petition

In the *TRO*, the Commission made a national finding based on the record evidence but allows the Board, as a state commission, to rebut that finding based on a more granular inquiry. In explaining its standard, the Commission states:

> We conclude that a more targeted, granular unbundling analysis is needed in light of the lessons learned over the last three years. To achieve the successful implementation of our new framework, we have examined what role the states should play. The policy framework we adopt in this Order is based on carefully targeted impairment determinations. Where appropriate, based on the record before us, we adopt uniform rules that specify the network elements that must be unbundled by incumbent LECs in all markets and the network elements that must not be unbundled, in

> any market, pursuant to federal law. In doing so, we exercise our authority pursuant to sections 201(b) and 251(d) of the Act. As we explain in this Order, we find that setting a national policy for unbundling some network elements is necessary to send proper investment signals to market participants and to provide certainty to requesting carriers, including small entities. We find that states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations.[6]

One of the targeted impairment determinations that the Commission allows the Board to rebut is the provisioning of local circuit switching for Enterprise Customers. The Commission has specifically defined Enterprise Customers and state commission rebuttals in the following note:

> For purposes of determining whether impairment exists according to our standard, we define DS1 enterprise customers as those customers for which it is economically feasible for a competing carrier to provide voice service with its own switch using a DS1 or above loop. We determine that this includes all customers that are served by the competing carrier using a DS1 or above loop, and all customers meeting the DS0 cutoff described below in paragraph 497. As discussed below, however, we determine that the state commissions are best situated to identify potential enterprise customers, *i.e.*, those customers for whom it could be economically feasible to serve using a DS1 or above loop. See *infra* para. 497. Because of the expected difficulties and detailed information needed in conducting this inquiry, we allow the states nine [*sic*] months to make this identification, which would include determining the maximum number of lines that a carrier may obtain from a particular customer before that customer is classified as a enterprise customer. We expect such analysis to be conducted at the same time as the analysis of the mass market. State commissions have discretion to define the relevant markets for purposes of this inquiry, provided they follow the guidelines described here and below. See infra Part VI.D.6.a.(ii)(b)(i) (discussing the market definition to be used by states).[7]

Furthermore, the Commission specifically authorized the Board to rebut its national finding based on a more granular analysis. In the *TRO*, the Commission states:

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6 *TRO* at ¶ 187, notes omitted.

7 *TRO* at note 1376.

> While the record in this proceeding does not contain evidence identifying any particular markets where competitive carriers would be impaired without unbundled access to local circuit switching to serve enterprise customers, state commissions are uniquely positioned to evaluate local market conditions and determine whether DS1 enterprise customers should be granted access to unbundled incumbent LEC circuit switching. To that end, we permit state commissions to rebut the national finding of no impairment by undertaking a more granular analysis utilizing the economic and operational criteria contained herein. State commissions will have 90 days from the effective date of this Order to petition the Commission to waive the finding of no impairment. State commissions wishing to do so must make an affirmative finding of impairment showing that carriers providing service at the DS1 capacity and above should be entitled to unbundled access to local circuit switching in a particular market. State commissions have discretion to define the relevant markets for purposes of this inquiry, provided they follow the guidelines described here and below. After the 90-day period, states may wish, pursuant to state-determined procedures, to revisit whether competitive LECs are impaired without access to unbundled local circuit switching to serve enterprise customers due to changes in the specified operational and economic criteria.[8]

Based on this authorizing language, the Board has the authority to file this Waiver Petition specifically rebutting the Commission's national finding of no impairment. The Commission codified the authorization of a Waiver Petition in 47 CFR § 51.319(d)(3):

> (3) **DS1 capacity and above (i.e., enterprise market) determinations**. An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops except where the state commission petitions this Commission for waiver of this finding in accordance with the conditions set forth in paragraph (d)(3)(i) of this section and the Commission grants such waiver.

And in 51.319(d)(5):

> (5) **State commission proceedings**. A state commission shall complete the proceedings necessary to satisfy the requirements in paragraphs (d)(2)

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[8] *TRO* at ¶ 455, notes omitted. The ninety-day deadline established by the Commission is December 31, 2003. Despite a stay of the *TRO* by the Second Circuit, US Court of Appeals which may extend this deadline, the Board files this Waiver Petition in a timely manner regardless of the effectiveness of the stay.

> and (d)(3) of this section in accordance with paragraphs (d)(5)(i) and (d)(5)(ii) of this section.
>
> (i) *Timing*. A state commission shall complete any initial review applying the triggers and criteria in paragraph (d)(2) of this section within nine months from the effective date of the Commission's Triennial Review Order. A state commission wishing to rebut the Commission's finding of non-impairment for DS1 and above enterprise switches must file a petition with the Commission in accordance with paragraph (d)(3) of this section within 90 days from that effective date.
>
> (ii) *Continuing review*. A state commission shall complete any subsequent review applying these triggers and criteria within six months of the filing of a petition or other pleading to conduct such a review.

In the discussion hereafter, the Board's record evidence satisfies the requirement to rebut the Commission's finding of non-impairment. Additionally, the Board will open, on its own motion, a continuing review of its impairment findings in two years from the filing date of this Waiver Petition to determine whether the operational barriers that exist today have been sufficiently removed, thereby allowing the Board to withdraw its waiver of the Commission's national policy.

## B. Standard for Review

In addition to authorizing the Board to rebut the Commission's national finding regarding the present matter, the Commission has established a specific standard for review in both its discussion in the *TRO* and its rules emanating from the *TRO*. In this section, the Board will review this standard for review.

In the *TRO*, the Commission develops the standard for review state commissions must use in rebutting the national finding of non-impairment. Specifically, the Commission states:

> ... while the record shows that cut over cost differentials are eliminated and other operational challenges may be mitigated when competitive carriers use their own switches to serve enterprise customers, the characteristics of enterprise markets do not eliminate all of the cost and operational disadvantages. For example, in a local market with low retail rates, it is possible that difficulties in obtaining collocation space, costs accompanying collocation, high UNE rates for local loops, and backhaul costs could make it uneconomic for competitive LECs to self-deploy switches specifically to serve the enterprise market. In particular, the record suggests that such factors make impairment more likely in rural areas.[9]

The Commission specifies two criteria that must be used in the Board's rebuttal. In addressing operational and economic criteria, the Commission states:

> *Operational Criteria.* In order to rebut the Commission's finding of no impairment as it relates to operational barriers, the states must examine whether operational factors are impairing competitors, according to our impairment standard discussed above. In particular, state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs. We believe, based on the large record in this proceeding, that these factors can raise barriers to entry. We lack, however, sufficient specific evidence concerning whether and where they will be significant enough to constitute impairment. We therefore ask state commissions to consider evidence, which could include performance metrics and standards for BOCs or other types of evidence for non-BOC incumbent LECs, of whether these factors are impairing entrants in the enterprise market, and whether unbundling will overcome this impairment.
>
> *Economic Criteria.* To rebut the Commission's finding that competitive LECs are not impaired by the lack of access to unbundled local circuit switching, the states must find that entry into a particular market is uneconomic in the absence of unbundled local circuit switching. To make this determination, states must weigh competitive LECs' potential revenues from serving enterprise customers in a particular geographic market against the cost of entry into that market. In evaluating competitive LECs' potential revenues, the states should consider all likely revenues to be gained from entering the enterprise market (not necessarily any carrier's individual business plan), including revenues derived from local exchange and data services. The states should also consider the

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[9] *TRO* at ¶ 454, notes omitted.

> prices entrants are likely to be able to charge, after considering the prevailing retail rates the incumbents charge to the different classes of customers in the different parts of the state. In determining the cost of entry into a particular geographic market, the states should consider the costs imposed by both operational and economic barriers to entry.[10]

It is noteworthy to indicate that while the requirements listed by the Commission must be addressed, the Commission did not exclude other operational considerations that the Board could examine in rebutting the national finding. As will be shown hereafter, the record evidence in the Board's proceeding rebuts the operational criteria specifically established by the Commission and rebuts the general notion of PRTC operational efficiency in its dealings with CLECs operating within Puerto Rico. The Board finds that there is substantial operational evidence in the record that rebuts the impairment standard that points to the establishment and maintenance of barriers to entry making such entry into the market uneconomic.

In addition to these two criteria, the Commission states a general requirement that the Board consider all relevant factors that would lead to uneconomic entry by CLECs :

> The states must consider all relevant factors in determining whether entry is uneconomic in the absence of unbundled access to local circuit switching. For example, even in a market where retail rates would give competitive carriers the opportunity to earn considerable revenues, entry may nonetheless be uneconomic. For example, the potential revenues could be outweighed by a combination of even higher economic and operational costs, such as untimely and unreliable provisioning of loops, transport, or collocation by the incumbent LEC at high non-recurring charges, and significant costs to purchase equipment and backhaul the local traffic to the competitor's switch. However, where competitive LECs have the opportunity to earn revenues that outweigh the costs associated with entry, carriers are not impaired without unbundled access to local circuit switching for DS1 enterprise customers.[11]

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10 *TRO* at ¶ 456-457, notes omitted.

11 *TRO* at ¶ 458.

This requirement emphasizes that the mere existence of operational or economic barriers are not sufficient to rebut the national finding. Rather, the rebuttal must determine that any potential revenue from Enterprise Customers is insufficient to overcome the economic cost resulting from the operational, economic or other barriers to entry. The Board has considered this requirement in the context of the Puerto Rico markets and, as is discussed hereafter, has found that the operational barriers are so significant as to satisfy this requirement and rebut the national finding of non-impairment for local circuit switching provided to Enterprise Customers.

The Commission has codified these requirements in one section of the CFR. Section 51.319(d)(3), which states:

> (i) State commission inquiry. In its petition, a state commission wishing to rebut the Commission's finding should petition the Commission to show that requesting telecommunications carriers are impaired without access to local circuit switching to serve end users using DS1 capacity and above loops in a particular geographic market as defined in accordance with paragraph (d)(2)(i) of this section if it finds that operational or economic barriers exist in that market.
>
> (A) In making this showing, the state commission shall consider the following operational characteristics: incumbent LEC performance in provisioning loops; difficulties associated with obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC; and the difficulties associated with obtaining cross-connects in the incumbent LEC's wire center.
>
> (B) In making this showing, the state commission shall consider the following economic characteristics: the cost of entry into a particular market, including those caused by both operational and economic barriers to entry; requesting telecommunications carriers' potential revenues from serving enterprise customers in that market, including all likely revenues to be gained from entering that market; the prices requesting telecommunications carriers are likely to be able to charge in that market, based on a consideration of the prevailing retail rates the incumbent LEC charges to the different classes of customers in the different parts of the state.

The remaining standard necessary for the Board to review is the Commission's rule related to the definition of markets. In 47 CFR § 51.319(d)(2)(i), the Commission states:

> *Market definition.* A state commission shall define the markets in which it will evaluate impairment by determining the relevant geographic area to include in each market. In defining markets, a state commission shall take into consideration the locations of mass market customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets profitably and efficiently using currently available technologies. A state commission shall not define the relevant geographic area as the entire state.

In defining the markets for Puerto Rico, there are three islands on which telecommunications services are generally made available: Puerto Rico, Culebra, and Vieques. All three islands are within the Commonwealth of Puerto Rico, and all three islands are identified within the market definitions adopted by the Board for its review.

### C. Overview of Board's Proceeding

On October 1, 2003, the Board established a procedural schedule in order for interested parties to participate in providing argument, testimony and other evidence related to the Board's determination of whether to file a Waiver Petition to rebut the national finding of non-impairment for local circuit switching for Enterprise Customers.

The Board is pleased with the record evidence gathered in this proceeding. Despite the need to rush discovery, testimony and briefing schedules, as well as the need to adjust the schedules because of the Second Circuit stay of the *TRO*, the Board believes that a substantial amount of evidence was gathered and recognizes the efforts of all participating parties in this matter. The principal parties involved in this proceeding

include PRTC, WorldNet Telecommunications, Inc. ("WorldNet"), Telefónica Larga Distancia de Puerto Rico ("TLD"), Inc., and Centennial Puerto Rico License Corp. ("Centennial").

Through the process of discovery, testimony and briefs, the Board has been able to develop a record that supports the Board's finding that significant operational barriers exist in Puerto Rico. The record also provides ample evidence in the establishment of the Enterprise Customer markets in Puerto Rico. It is the market definition to which we first turn.

**D. Establishment of Enterprise Customer Markets**

The parties were not uniform in their proposals for defining Enterprise Customer markets. Among the proposals was the development of an island-wide market, the development of wire center markets and the development of three metropolitan markets and one rural market for all other portions of the Puerto Rico Commonwealth.

The Board examined each proposal and has found that the most appropriate market definition is the one that identifies three specific markets for three distinct metropolitan areas: San Juan, Ponce, and Mayagüez; and one market comprising the rural portions of the Commonwealth. The record evidence demonstrates that this market definition, proposed by PRTC, more accurately corresponds to the market characteristics of Enterprise Customers. Moreover, the other market definitions were not satisfactory in

that they were either too large – island wide, or too narrowly defined – wire center, to provide a reasonable market definition.[12]

Notwithstanding the above discussion, the Board notes to the Commission that, although the Board has identified separate markets in its analysis, the separation of Puerto Rico into these distinct markets effectively does not matter. As explained by the record evidence, specifically WorldNet's witness testimony and Centennial's discovery responses and oral arguments, the operational barriers existing in Puerto Rico to CLEC switch deployment do not vary throughout the Commonwealth. In particular, the operational and economic barriers flowing from PRTC's actions involving collocation appears to extend to every Puerto Rico market equally. Although certain individualized distinctions between markets may still exist (*e.g.*, different PRTC pricing for services provided in different areas of Puerto Rico), the core operational barriers in Puerto Rico apply without geographic distinction to the entire Commonwealth and alone lead to the ultimate conclusion that regardless of the geographic market definition employed, CLECs are impaired without access to unbundled PRTC high-capacity switching.[13]

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[12] Some parties argued that the island wide definition was inconsistent with the Commission's requirement that the market definition not include the entire state or territory. As indicated above, there are three islands on which telecommunications services are provided; thus, an island wide definition would create three markets. However, this definition, while technically correct, is too large because the largest island, Puerto Rico, comprises nearly all if not all of the current Enterprise Customers.

The proposal to have markets defined as wire centers is too narrow of a definition and suffers from the same problem of an island-wide market; to wit, there would be separate markets that do not have any current Enterprise Customers and there is no rational reason in the record to define these areas separately.

[13] *See* WorldNet Closing Brief.

Having established a market definition consistent with the Commission's rules, the Board now briefly reviews the record evidence related to the non-impairment finding adopted by the Commission.

## 4. NATIONAL NON-IMPAIRMENT STANDARD

Section 1.3 of the Commission's rules states that "[a]ny provision of the rules may be waived by the Commission . . . on petition if good cause therefore is shown."[14] In finding that CLECs are not impaired without unbundled local circuit switching when serving Enterprise Customers, the Commission recognized that "a more geographically specific record may reveal such impairment in particular markets and thus allow states to rebut this national finding based on certain operations and economic criteria."[15] In the *TRO*, the Commission recognized that "special circumstances" could create impairment without access to local circuit switching to serve enterprise customers in particular markets.[16] Such is the case in all four markets in Puerto Rico.

### 1. The Commission's National Findings are not Consistent with the Board's Record Evidence for Puerto Rico markets.

The Commission based its national no impairment finding with regard to high-cap switching on two primary conclusions. Neither of these conclusions reflects the market conditions in Puerto Rico.

#### a. There has not been a "significant" deployment of local wireline switches by CLECs in Puerto Rico.

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14 47 U.S.C. § 1.3.

15 *See TRO* at ¶ 411.

16 *See TRO* at ¶ 421

The first conclusion that the Commission based its national no impairment finding on high-cap switching was that there has been a "significant nationwide deployment of switches by competitive providers to serve the enterprise market."[17] Although this may be true from a national perspective, it is not true in Puerto Rico.

The record in this case reflects that PRTC owns all but four (4) of the one hundred and eight (108) local service switches currently installed and operating in Puerto Rico.[18] CLECs have deployed only about 3 percent of the local circuit switches in Puerto Rico. The Board believes that this is not "significant" CLEC deployment. In fact, 3 percent is the same small market penetration percentage that the FCC cited in finding impairment with regard to mass market local circuit switching.[19]

Moreover, the four CLEC switches in Puerto Rico are all owned by a single CLEC, Centennial.[20] According to expert testimony, mainland markets comparable in size to San Juan alone have numerous switch-based local providers.[21] The entire Commonwealth of Puerto Rico has one. This, too, cannot be found to be "significant" CLEC deployment. The FCC's national finding about "significant" CLEC switch deployment is simply not consistent with the market reality in Puerto Rico.

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17 *See TRO* at ¶ 435.

18 *See* Reynolds Direct Testimony at Exhibit 1, p. 4; Centennial Response to Board Initial Information Request II.2.

19 *See TRO* at ¶ 438.

20 *See* Centennial Response to Board Initial Information Request II.2.

21 *See* Walker Direct Testimony at 3 (lines 27-31).

### b. No CLECs are competing in Puerto Rico using UNE-L (successfully or otherwise).

The second conclusion that the FCC based its national no impairment finding on high-cap switching was that CLECs "are competing successfully in the provision of switched services, using collocation network with associated backhaul transport, to medium and large enterprise customers without unbundled [high-cap switching]."[22] Again, although this may be true in other parts of the nation, it is not true in Puerto Rico.

The record evidence reflects that CLECs in Puerto Rico are not "competing successfully" in providing switched services via collocation and backhaul transport (*i.e.*, UNE-L). In fact, they are not competing at all. Not one CLEC in Puerto Rico is providing switched services using UNE-L. Indeed, the only CLEC to deploy its own local switches in Puerto Rico has been asking PRTC to provide the collocation necessary for a UNE-L based service platform for more than three years without success.[23]

Like the FCC's national finding about "significant" CLEC switch deployment, the FCC's national finding about "successful" UNE-L based competition has no basis in fact in

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22 *See TRO* at ¶ 453.

23 *See* Bogaty Rebuttal Testimony at 3 (lines 5-11) (relying on *Centennial Puerto Rico License Corp. v. PRTC*, Request for Emergency Order and Complaint, Case No. JRT-2003-Q-0070 (filed May 13, 2003).

Moreover, PRTC urges the Board to place considerable weight on the ability of competitors to utilize currently deployed wireless switches that serve customers throughout the Commonwealth. (Brief of Puerto Rico Telephone Company, Inc. page 11-12) PRTC points to Centennial as having modified its existing wireless switches thereby allowing it to serve both wireline and wireless customers. The Board declines to place considerable weight on this apparent competitive anomaly. The Board does not believe that competition should come exclusively from wireless carriers' attempts to modify switches to accommodate wireline deployment. If the Board were to place undue weight on this fact, the number of competitive wireline providers would be circumscribed by the number of wireless carriers serving the Commonwealth. The Board's ultimate vision is to have a robust competitive marketplace with a multitude of competitors in the significant Puerto Rico markets – a goal that has not yet been realized.

Puerto Rico. It is the Board's view that these disparities alone justify rebuttal of the FCC's no impairment finding.

**c. Requiring CLEC to compete using a facilities-based approach is an appropriate policy for a mature competitive market. The markets in Puerto Rico are not yet mature that would justify adopting this policy approach.**

In addition to the two explicit justifications for the Commission's finding of non-impairment is the determination that facilities-based competition is the preferred avenue for CLECs. The Board understands the Commission's preference for facilities-based competition; however, the Board urges the Commission to consider that the three avenues of competitive entry: resale, UNE, and facilities-based provisioning all have a public interest benefit. One of which that is noted in the Board's record evidence is the evolutionary nature of CLEC operations. One CLEC operating in Puerto Rico has an extensive resale operation and is planning to migrate to a UNE platform in the eventual development of a facility-based operation. The evolutionary nature of competitive entry was anticipated by Congress when it adopted a three-prong approach. Other national markets may be at a point of evolution so that the encouragement of facilities-based entry is appropriate. However, the markets in Puerto Rico have not reached that evolutionary threshold where facilities-based competition should receive preferential policy treatment. As is demonstrated herein, there are significant operational issues regarding collocation, and possibly operational issues regarding UNE loops and cross-connects that warrant the continuation of the requirement that PRTC provide access to local circuit switching on

an unbundled basis to CLECs for the purpose of serving end-user customers using DS1 capacity and above loops.

### 2. Operational Criteria

Aside from attempts to clarify the record evidence, PRTC's response to all operational issues is that it is ready, willing and able to provide collocation, UNE loops and cross connects in a timely and efficient manner. It recommends that the Board conclude that no operational impairment exists in Puerto Rico markets. In examining the record evidence, the Board finds that there exists significant operational impairment in Puerto Rico markets that the Board believes are sufficient to rebut the Commission's national finding of no impairment.

#### a. Despite its claim, PRTC is not ready or able to provide stand-alone UNE loops, collocation, or cross-connects.

The *TRO* states that the Board may rebut the FCC's national no impairment finding if it finds that operational barriers exist in Puerto Rico markets.[24] According to the Commission:

> In making this showing, the state commission shall consider the following operational characteristics: incumbent LEC performance in provisioning loops; difficulties associated with obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC; and the difficulties associated with obtaining cross connects in the incumbent LEC's wire center.[25]

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24 *See TRO* at ¶ 456; 47 C.F.R. § 51.319(d)(3).

25 *See* 47 C.F.R. § 51.319(d)(3)(i).

The record developed and reviewed by the Board shows that PRTC has not provided a stand-alone UNE loop to a CLEC in Puerto Rico.[26] PRTC has only recently completed two collocations and their final acceptance is a matter of dispute between PRTC and Centennial.[27] And, PRTC has not provided a cross-connect to a CLEC in Puerto Rico.[28] Simply put, the FCC identified three specific activities that it considers to be critical to switch-based competition, and apparently PRTC has not successfully done any of them. Evidence from Centennial's collocation experience unmistakably suggests that there are significant operational impediments to collocating with PRTC. This alone would satisfy the operational criteria outlined by the Commission.

Moreover, the Board's record evidence does not support the contention by PRTC in the proceedings before the Board that, despite its inexperience, PRTC is nevertheless "ready, willing, and able" to provide stand-alone UNE loops, collocation, and cross-connects effectively. As a general matter, it is unrealistic to assume that any ILEC can provide a service without difficulties or delays when it has never provided the service before.[29] Indeed, PRTC witness Correa readily admitted in his direct testimony that problems with

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[26] *See* Correa Direct Testimony at 8 (lines 1-3). Mr. Correa mistakenly testified that PRTC has provided as contemplated in the FCC's analysis because it has provided UNE-P circuits to WorldNet that include UNE loops. The Commission's analysis, however, refers to providing stand-alone UNE loops -- a fundamentally different process that, unlike UNE-P, involves the physical cutover of loops to a CLEC collocation or switch. *See* Bogaty Rebuttal Testimony at 5 (lines 19-33); Walker Rebuttal Testimony at 3 (lines 42-45) & 4 (lines 1-6).

[27] *See* Correa Direct Testimony at 4 (lines 4-6). In Oral Arguments on December 16, 2003 the Board understood that there is a dispute regarding the finality of two Centennial collocation requests that have been fraught with unexpected delays and costs. Centennial's singular evidence is compelling and signals the various operational impediments CLECs face when attempting to collocate with PRTC.

[28] *See* Correa Direct Testimony at 10 (lines 2-5).

[29] *See* Bogaty Direct Testimony at 3 (lines 34-41); Walker Rebuttal Testimony at 1 (lines 27-30) & 2 (lines 1-3).

new service offerings should be expected.[30] Under the best circumstances, therefore, it would be difficult for the Board to find that PRTC that has never provided a UNE loop, cross-connect would nevertheless be able to do so well enough to validate the FCC's no impairment finding.

The record reveals beyond this, however, that PRTC's case does not even involve the best circumstances. Rather, the record documents a track record of PRTC wholesale service failures (including specific collocation failures) that make PRTC's claims of instant and unprecedented competence even less credible. Indeed, this documented track record includes instances where even after two to four years of experience and opportunity, PRTC has failed to devote the resources or attention necessary to provide even the most basic services and facilities without substantial operational problems.

With regard to collocation, the record simply does not support PRTC contentions that it is "ready, willing, and able," that it is providing collocation "apace," or that it has met all of its interconnection agreement deadlines in dealing with collocation requests.[31] In reality, the only attempt that PRTC has made to provide collocation in Puerto Rico resulted in a formal complaint filed with the Board earlier this year. In the complaint, Centennial reported that PRTC failed to meet a July 2003 interconnection agreement deadline for a number of Centennial collocation orders and that other Centennial collocation orders

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30 *See* Correa Direct Testimony at 4 (lines 15-16).

31 *See* Correa Direct Testimony at 5 (lines 11-13). Notably, Mr. Reynolds' testimony that PRTC is ready to provide collocation simply because collocation space is available is also not supported by law. The FCC analysis requires consideration of space availability, but also of difficulties and delays in obtaining that collocation space. *See TRO* at ¶ 456.

have been pending with PRTC for over three years.[32] And, Centennial has commented on the record in this proceeding that despite its settlement of its complaint against PRTC, the collocation process devised by PRTC is still "highly problematic" and that "many issues remain."[33]

Very similarly, the record also reveals that in 2001, PRTC committed to be "ready, willing, and able" to make UNE-P available for the first time in Puerto Rico by no later than October 1, 2002. On October 1, 2002, however, PRTC did not provide UNE-P as required or promised. Although PRTC tacitly accepted and processed initial UNE-P orders, it did so without processes or systems in place for a host of important UNE-P arrangements, including, importantly, detailed usage billing.[34] Moreover, the completion of WorldNet's initial orders was (and, over a year later, still is) plagued with significant and costly process breakdowns, including widespread and recurring billing errors, completely unnecessary disconnections of WorldNet customers, and a billing system that, according to PRTC, was (and still is) not yet configured to charge WorldNet based on WorldNet customers' actual usage of UNE-P lines.

Finally, the record also reveals that PRTC has had four years of experience in providing resale services to WorldNet. Yet, despite continuing WorldNet complaints, meetings, and PRTC promises, PRTC is providing bills to WorldNet that require, according to

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[32] *See* Bogaty Rebuttal Testimony at 3 (lines 5-11) (relying on *Centennial Puerto Rico License Corp. v. PRTC*, Request for Emergency Order and Complaint, Case No. JRT-2003-Q-0070 (filed May 13, 2003).

[33] *See* Centennial Response to Initial Board Information Requests II.9 & II.17.

[34] In like manner, the PRTC processes and plans described by Mr. Correa in his direct testimony do not address a number important provisioning issues with which PRTC has historically had substantial and crippling problems, including most prominently, billing.

WorldNet, it to make approximately 5,000 manual adjustments each month and, in some cases, reflect errors that have been included on every WorldNet bill for the past four years.[35]

In conducting its analysis, the Board found it difficult to envision any stronger showing of an operational barrier than an ILEC that has absolutely no experience in successfully providing stand-alone UNE loops or cross-connects and very limited experience in providing collocation. Indeed, perhaps the only possibility to have a stronger showing is to have a record in which the ILEC not only does not have any successful experience, but actually has negative experiences in providing these services and a consistent track record of being unprepared, uninterested, and incapable of providing wholesale services as and when required or promised. Such is the finding the Board makes regarding the Puerto Rico markets. The Board finds this evidence compelling enough to rebut the Commission's national finding and to warrant a Waiver Petition.

**b. PRTC is not ready or able to provide other services necessary for CLEC switch deployment.**

In the *TRO*, the Board notes that the Commission did not limit the Board to considering only PRTC's performance with regard to providing UNE loops, collocation, and cross-connects. Instead, the FCC went on to ask state commissions also to consider "other evidence" regarding potential operational barriers.[36]

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35 *See* Bogaty Direct Testimony at 4 (lines 4-10).

36 *See TRO* at ¶ 456.

In this case, the record includes "other evidence" of operational barriers in Puerto Rico markets, which, again, reflects problems created by PRTC inexperience and its history of ignoring service obligations until forced to confront them. For example, the record indicates that there is a complaint regarding PRTC's provisioning of local number portability to a CLEC in Puerto Rico.[37] Local number portability is a vital and necessary component to CLEC switch deployment, and it is an obligation and issue that PRTC has largely ignored.

Similarly, the record indicates that PRTC has little to no experience in cooperating with competitors to gain or share access to necessary easements or rights-of-way provided by third parties.[38] Quite simply, without this experience or any existing service commitments or processes with regard to this necessary service, PRTC has placed itself in another very powerful position to frustrate CLEC efforts to deploy facilities and, accordingly, to create a significant operational barrier.

Moreover, as noted above, CLEC switch deployment in Puerto Rico has been negligible in comparison to other jurisdictions governed by the *TRO*. Puerto Rico simply has not yet had the opportunity to establish the support systems and vendors, consultants, technical experts, and other critical resources that have become readily available in other jurisdictions.[39] In essence, without access to PRTC high-cap switching, CLECs would be

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37 *See* Bogaty Direct Testimony at 5 (lines 29-33); Walker Rebuttal Testimony at 4 (lines 2-6).

38 *See* Bogaty Direct Testimony at 5 (lines 34-37).

39 *See* WorldNet Response to Initial Board Interrogatory No. 17.

forced to incur the time, resources, and expense of creating these support systems nearly from scratch.

The Board finds that there are substantial operational barriers related to PRTC operations that strongly rebut the national finding of non-impairment. CLECs interested in the Puerto Rico market have entered and then have exited the marketplace, even after extensive interconnection agreements have been arbitrated. This suggests to the Board that the operational hurdles carry a significant financial burden so as to make entry into the Puerto Rico markets uneconomic. The Board is hopeful that in the next 2 years, the track record of PRTC in cooperating with CLECs and in the provisioning of network components will justify a removal of the provisioning of high-capacity switching. As it indicated earlier, the Board will open a proceeding within two years of the filing deadline of this Waiver Petition to determine whether PRTC's actions have improved to warrant removal of the operational considerations mentioned above. Thus, the Board requests that the Commission grant this Waiver Petition so that the markets in Puerto Rico may mature in the next two years, thereby justifying the removal of local circuit switching for Enterprise Customers that would integrate Puerto Rico into the national uniform policy envisioned by the Commission.

## 5. ECONOMIC CRITERIA

In addition to the costs imposed by the operational criteria discussed above, the Commission also identified economic criteria that also cause barriers to entry. The Commission's rules state that a successful rebuttal of the national finding of non-

impairment can be obtained by either showing the existence of economic characteristics of costs caused by operational barriers, economic barriers to entry, or both.[40] The evidence supporting operational barriers is so strong that the Board determines that it does not need to examine, at this time, the specific economic barriers evidence in the record.

If it were to do so, the Board would find that the record evidence is incomplete as to economic barriers and therefore cannot make any findings regarding the same. Hence, the Board will leave to another time a complete examination of economic barriers. The 90-day schedule did not provide sufficient time for a second round of Board interrogatories that would be necessary to develop the record evidence sufficient to support explicit findings related to economic barriers.

## 6. CONCLUSION

The Board respectfully requests that the Commission grant this Waiver Petition that would require the continuation of PRTC's provision of local circuit switching for Enterprise Customers. This waiver would apply to each of the four Enterprise markets described by PRTC and adopted by the Board in this Waiver Petition. The operational barriers to CLECs exist and are significant. The Board finds that these operational barriers pose a significant barrier to entry that makes entry into the Puerto Rico markets uneconomic.

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[40] 47 CFR § 51.319(d)(3)(i).

The Board finds also that the record evidence is incomplete and therefore does not make any determination regarding economic barriers at this time. This finding is not a limitation to the Waiver Petition because the Commission's rules provide that operational barriers, economic barriers or both can successfully rebut the national finding of non-impairment. The granular findings made by the Board regarding operational barriers sufficiently rebut the national finding.

Furthermore, the Board will initiate a proceeding in two years to determine whether its findings regarding operational barriers have been removed by a successful track record posted by PRTC in the next two years.

Respectfully submitted,

/s/ _____
Phoebe Forsythe Isales
Chair