Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338
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

COMMENTS OF PUERTO RICO TELEPHONE COMPANY, INC. ("PRT")

José E. Arroyo Dávila
PUERTO RICO TELEPHONE
COMPANY, INC.
1515 Roosevelt Avenue, 12th Floor
Caparra Heights, PR 00921
(787) 793-8441

Gregory J. Vogt
Joshua S. Turner
WILEY, REIN & FIELDING, LLP
1776 K. St., NW
Washington, DC 20006
(202) 719-7000

Its Attorneys

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TABLE OF CONTENTS

I. A State Commission Seeking a Waiver of the Commission's National Finding of "No Impairment" Bears a Heavy Burden. 2

II. The Puerto Rico Board Conducted an Analysis Largely Unencumbered By the FCC's Conclusions in the *Triennial Review Order* or the Facts in the Record. 5

A. The Puerto Rico Board's Petition Second-Guesses the Commission's Conclusions. . 5

B. The Puerto Rico Board Misapplied Its Own Test to the Evidence in the Record. 6

III. The Puerto Rico Board's Cursory Analysis of the Factors Specifically Mentioned in the *Triennial Review Order* Is Deeply Flawed. 9

A. There Is No Evidence of Impairment In Providing UNE Loops or Cross-Connects. . 9

B. The Puerto Rico Board's Conclusions on Collocation Are Erroneous and Based on Incomplete Evidence. 11

IV. The Petition Contains Other Serious Errors..... 13

A. The Puerto Rico Board's Exclusion of Evidence Relating to Carriers Using Wireless Switches to Provide Wireline Service is Arbitrary. 13

B. The Puerto Rico Board Considered Other, Irrelevant Factors..... 14

V. Conclusion 16

SUMMARY

The Telecommunications Regulatory Board of Puerto Rico ("Puerto Rico Board") has filed a Petition[1] seeking a waiver, for every market in Puerto Rico, of the Commission's national finding that CLECs are not impaired without unbundled access to incumbent LEC's circuit switching in order to serve enterprise customers.[2] The Puerto Rico Board's Petition falls far short of meeting the heavy burden necessary to justify a waiver of the Commission's national finding. To carry that burden, a state must produce evidence different from the facts reviewed by the Commission during the *Triennial Review* proceeding, not simply craft its own rationale for why the national finding does not apply in its state. Moreover, the 1996 Act, court decisions, and the *TRO* require that the requesting state provide specific evidence of actual impairment, not mere speculation about possible impairment.

Here the burden must be especially high, because the Commission had before it in its Triennial Review decision specific evidence relating to competition in Puerto Rico. That evidence only supports the Commission's conclusions. Not only does it show that carriers *can* enter this market, it demonstrates that there is actual entry — with a competing carrier serving thousands of enterprise customers using its own switches.

Given these facts, the only way the Board was able to reach a contrary result from the Commission was to establish its own test for impairment, relying on irrelevant factors and unsupported allegations. The Commission should deny the Petition.

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[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Waiver Petition of the Telecommunications Regulatory Board of Puerto Rico for Enterprise Market Switching Impairment in Defined Puerto Rico Markets (filed Dec. 30, 2003) ("Petition").

[2] See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 451 (2003) ("Triennial Review Order" or "TRO").

DISCUSSION

I. A State Commission Seeking a Waiver of the Commission's National Finding of "No Impairment" Bears a Heavy Burden.

In the *TRO*, the Commission found that "record evidence establishes that" there is "no operational or economic impairment on a national basis" to "deploying competitive switches to serve customers in the enterprise market."[3] The Commission based this conclusion on a detailed discussion of a voluminous record, consisting of information submitted by a wide range of commenting parties, including both incumbent and competitive carriers.[4] In particular, the Commission found that the characteristics of the enterprise market nationwide — including the "significant revenues [available] to the service provider," the ability "to enter[] into long-term contracts," and a greater "willing[ness] to tolerate any provisioning difficulties" — demonstrate that the "denial of access to unbundled switching would not impair a competitor's ability to serve the enterprise markets."[5] Indeed, the FCC found extensive evidence of actual facilities-based competition in the enterprise market — "competitive LECs are competing successfully in the provision of switched services…to medium and large enterprise customers without unbundled circuit switching."[6]

The Commission's *national* finding of no impairment for enterprise circuit switching applies with as much force in Puerto Rico as it does in the rest of the United States. Indeed, the record before the Commission during the Triennial Review proceeding contained detailed factual information regarding the entire country, including material submitted by both WorldNet (the

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[3] *TRO*, ¶ 451.

[4] *Id.*, ¶¶ 451-453.

[5] *Id.*, ¶ 453.

[6] *Id.*, ¶ 453.

largest resale/UNE-P CLEC operating in Puerto Rico) and by PRT specifically covering Puerto Rico.[7] WorldNet explicitly sought the creation of an exception for Puerto Rico, based on an alleged lack of competition in the Commonwealth.[8] The Commission, however, declined WorldNet's invitation.

Although the Commission permitted state commissions to seek a waiver of that national finding,[9] there can be no doubt that such a waiver could be justified only if based on evidence *other than* that considered by the Commission. As the FCC explained, the extensive record before it "show[ed] no impairment on a national basis" and did "not contain any evidence identifying any particular markets where competitive carriers would be impaired without unbundled access to local circuit switching to serve enterprise customers."[10] While state commissions may seek to "rebut th[at] national finding of no impairment,"[11] the Commission did

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[7] *See, e.g.*, Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Feb. 12, 2003); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Jan. 17, 2003); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Jan. 17, 2003); Letter from José E. Arroyo Dávila on behalf of PRT to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (December 24, 2002); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Dec. 13, 2002); Letter from Lawrence R. Freedman and Aimee E. Knapp, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Dec. 11, 2002); Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Dec. 2, 2002).

[8] Letter from Lawrence R. Freedman, Counsel for WorldNet Telecommunications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket 01-338 (Feb. 12, 2003).

[9] The Commission explained that, under its "governing rules," "'[a]ny provision of [its] rules may be waived by the Commission . . . on petition.'" *TRO* ¶ 455 n.1395 (quoting 47 C.F.R. § 1.3). Such waivers are "appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

[10] *TRO*, ¶¶ 454-455.

[11] *Id.*, ¶ 455.

not permit them to revisit the conclusions that it reached based on the extensive record in the Triennial Review proceeding. Accordingly, a state commission filing a waiver petition must rely on types of evidence that were not before the Commission when it made its national finding of no impairment.

Moreover, a state commission must present specific evidence of actual, existing operational and economic barriers to entry. As the Commission explained, it had not been presented with "specific evidence" that would justify creating any exceptions to its national finding of no impairment.[12] State commissions, therefore, may not rely on mere guesswork or conjecture about potential economic or operational barriers to entry when submitting a waiver request.

The Puerto Rico Board, like any other state commission, thus bears a heavy burden in seeking a waiver of the FCC's finding. The Board has failed to meet that burden. As an initial matter, the Board claimed that it was under no obligation to examine evidence regarding the economic feasibility of competitive deployment of circuit switches to serve enterprise customers.[13] But it is clear that any valid impairment inquiry requires, at a minimum, consideration of the potential revenues available to a new entrant. *See, e.g.*, *TRO*, ¶ 457 ("states *must* weigh competitive LECs' potential revenues from serving enterprise customers in a particular geographic market") (emphasis added); *id.* ¶¶ 457-458 ("where competitive LECs have the opportunity to earn revenues that outweigh the costs associated with entry," which include "costs imposed by both operational and economic barriers," "carriers *are not impaired*")

[12] *Id.*, ¶ 456.

[13] *See* Petition at 25-26.

(emphasis added). *See also id.*, ¶ 84. The Board's failure to consider such evidence, in and of itself, provides grounds for denial of the Board's petition.

In addition, as explained below, in considering purported operational barriers to entry the Board rejected the FCC's conclusions in favor of its own analysis, misapplied that analysis to the record in the case, artificially limited the evidence it considered, and incorrectly construed that limited evidence.

II. The Puerto Rico Board Conducted an Analysis Largely Unencumbered By the FCC's Conclusions in the *Triennial Review Order* or the Facts in the Record.

In its Petition, the Puerto Rico Board first revisits matters that the Commission itself already decided, as if the Board were conducting a *de novo* review of the national no impairment finding. The Board then ignored or misconstrued facts in the record.

A. The Puerto Rico Board's Petition Second-Guesses the Commission's Conclusions.

In its Petition, the Board relies heavily on the supposed uniqueness of the Puerto Rico market.[14] However, the Board provides neither evidence nor persuasive argument to show why Puerto Rico is differently situated from any other part of the United States, or why competitive entry in Puerto Rico is more difficult than in similar markets throughout the country.

In making its national finding of no impairment, the Commission relied on factors common to enterprise markets nationally. Although the Commission also noted that, consistent with its findings that competitive deployment of circuit switches to serve enterprise customers is economic, facilities-based CLECs have made substantial in-roads into the enterprise market, those findings were not designed to be a minimum standard, without which there is impairment.

[14] *Id.* at 15-19.

Instead, as explained above, the Commission analyzed the possibility of competing in *all* markets throughout the United States, *including Puerto Rico.*[15]

Accordingly, whether competition is less developed in markets in Puerto Rico than in markets in other states — the claim that forms the bulk of the Board's Petition — is beside the point. The question, as the D.C. Circuit has made clear, is whether the element in question is "unsuitable" for competitive supply.[16] As the Commission found, enterprise switching *is* suitable for competitive supply, because features of the enterprise market provide CLECs with "revenue opportunities . . . sufficient to justify the . . . costs associated with using and installing the switch."[17] The fact, which the Board highlights, that a facilities-based CLEC currently provides service to enterprise customers in Puerto Rico demonstrates that these same features exist in Puerto Rico.[18] Indeed, the presence of this one carrier confirms that it is economically feasible for facilities-based carriers to enter the Puerto Rico market, and that such carriers are not impaired.

B. The Puerto Rico Board Misapplied Its Own Test to the Evidence in the Record.

The Puerto Rico Board's errors were not confined to revisiting the FCC's conclusions about impairment. The Petition goes on to misread fundamentally the evidence in the record. Even using the Puerto Rico Board's own standards, the record simply does not justify a finding of impairment in enterprise switching in Puerto Rico.

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[15] The contours of the market in Puerto Rico have not changed substantially since the Commission considered the information submitted by PRT and WorldNet, and thus many of the facts that made up the record before the Puerto Rico Board were also before the FCC during its consideration of the Triennial Review proceeding.

[16] *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

[17] *TRO*, ¶ 452.

[18] Petition at 16.

First, the Petition attempts to minimize the level of competition in Puerto Rico. The Puerto Rico Board erroneously claims that there has not been "significant" deployment of wireline switches in Puerto Rico.[19] The statistics used by the Puerto Rico Board to justify this conclusion are misleading. The Puerto Rico Board argues that only four of the 108 switches in Puerto Rico are owned by competitors, and that CLECs have thus deployed only 3 percent of the switches in the Commonwealth.[20] But the number of switches owned by PRT — which include switches used to serve residential customers — relative to the number of switches deployed by CLECs provides no insight into the ability of CLECs to offer service. PRT uses a legacy network built to provide universal service throughout the island. CLECs, free of such considerations, can provide service to enterprise customers using fewer (but more centrally located) switches. The Commission has acknowledged that CLEC "switches are capable of serving significantly broader service areas than traditional incumbent LEC rate centers."[21] As PRT showed, enterprise customers in Puerto Rico are heavily concentrated in three metropolitan markets, San Juan, Mayaguez, and Ponce.[22] Switches serving these regions would cover a large percentage of the enterprise customers in the Commonwealth. Moreover, the small geographic size of Puerto Rico means that competitive carriers can serve wireline customers throughout Puerto Rico by converting existing switches to provide local switching capability and connecting their transport networks to these convertible switches over leased or self-deployed T1 lines.[23]

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[19] *Id*.

[20] *Id.*

[21] *TRO*, ¶ 436.

[22] FCC's Triennial Review Order, Brief of Puerto Rico Telephone Company, Inc., Case No. JRT-2003-CCG-0004, at 10-11 (filed December 16, 2003) ("PRT Brief").

[23] *Id.* at 11.

The Puerto Rico Board attempts to justify its finding that there is little competitive penetration in Puerto Rico by saying that "3 percent is the same small market penetration percentage that the FCC cited in finding *impairment* with regard to mass market local circuit switching."[24] The FCC's finding, however, referred to the *percent of lines served*, not the percent of switches owned, which is the basis for the 3 percent number in Puerto Rico that the Board cites.[25] There is no relationship between the percentage of lines served (which may be relevant to competitive penetration) and the percentage of switches owned (which is wholly irrelevant to the question).

Moreover, the Puerto Rico Board's characterization glosses over the simple, competitive reality that Centennial, a facilities-based CLEC in Puerto Rico, has deployed four of its own switches and has spent hundreds of millions of dollars installing these switches and constructing the network to support them.[26] This investment is apparently paying off, as Centennial continues to invest in the market; its fourth switch was activated recently. Centennial provides service to several thousand enterprise customers using these facilities, and is aggressively moving to expand its already sizable market share.

In light of Centennial's success, the Board cannot possibly make an "affirmative finding of impairment" that could "rebut the national finding of no impairment."[27] Indeed, if the Board were to be believed, Centennial is doing the impossible. Centennial's expansion in the Puerto

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[24] Petition at 16 (emphasis in original).

[25] *TRO*, ¶ 438.

[26] More precise figures regarding the investment made by Centennial were available to the Board during its proceeding on a confidential basis.

[27] *TRO*, ¶ 455.

Rico market demonstrates conclusively that facilities-based entry into that market is economically possible, and thus cannot be "uneconomic."

III. The Puerto Rico Board's Cursory Analysis of the Factors Specifically Mentioned in the *Triennial Review Order* Is Deeply Flawed.

While the Puerto Rico Board underpins much of its Petition with the consideration of inappropriate factors and flawed interpretations of the record, the Puerto Rico Board does give some mention of the factors articulated by the FCC in the *TRO*. However, the Puerto Rico Board's conclusions here rest on an inaccurate analysis or mistaken conclusions regarding the record, as well. Moreover, the Puerto Rico Board's arbitrary exclusion of certain facts makes it impossible for the Petition to demonstrate that impairment exists in enterprise switching in Puerto Rico.

A. There Is No Evidence of Impairment In Providing UNE Loops or Cross-Connects.

The Board notes that carriers are not currently providing service to customers in Puerto Rico using stand-alone UNE loops ("UNE-Ls").[28] But this is because, as the Petition fails to note, no CLEC in Puerto Rico has yet ordered a stand-alone UNE loop.[29] The Petition makes the same assertion regarding cross-connects,[30] despite the record evidence showing that PRT has not had the opportunity to provide cross-connects yet because of delays by Centennial in completing its collocation arrangements.[31]

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[28] Petition at 17.

[29] *Id.* at 20.

[30] *Id.*

[31] PRT Brief at 25-26.

The fact that CLECs have not ordered UNE loops or cross-connects is not evidence of "operational factors [that] are impairing competitors."[32] On the contrary, the fact that Centennial is serving thousands of enterprise customers *without* UNE loops or cross-connects demonstrates that CLECs in Puerto Rico, as in the rest of the country, are not impaired without unbundled switching to serve enterprise customers. Moreover, given the existence of the prior unbundling obligations, it is not surprising that many CLECs have chosen to take advantage of low-cost access to PRT switching facilities, rather than shouldering the cost of deploying their own switches. The Commission itself recognized this in the *TRO,* finding that "excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."[33] Nonetheless, the substantial market penetration that CLECs have gained in Puerto Rico using resale and UNE-P — 14% of enterprise customers are served through these two routes — give these companies both a customer base and revenue stream that would justify installing their own switches once they can no longer obtain unbundled switching for these customers.

Nor is there any reason to suspect that PRT would not be able to provision UNE loops or cross-connects when they are requested. The Board attempts to shore up its speculative claims of impairment by relying on certain billing difficulties PRT experienced when originally provisioning UNE-P services.[34] This reliance is misplaced. First, the Petition erroneously suggests that these billing errors continue unabated.[35] In fact, the problems to which the Puerto Rico Board refers were resolved, and PRT is provisioning UNE-P orders routinely and without

[32] *TRO,* ¶ 456.

[33] *Id.,* ¶ 3.

[34] Petition at 22.

[35] *Id.*

incident.[36] Indeed, the methods and procedures that PRT has developed in order to provide UNE-P give PRT an established and existing set of processes that can be utilized to provide UNE-Ls, when and if orders for such loops are received. Second, the difficulties the Board cites with respect to PRT initial provisioning of UNE-P involved billing for metered switch usage, which is not an issue when a CLEC orders UNE loops.[37]

B. The Puerto Rico Board's Conclusions on Collocation Are Erroneous and Based on Incomplete Evidence.

The Petition also incorrectly asserts that there is impairment resulting from collocation difficulties in Puerto Rico.[38] This is an impermissible inference from the record in this case, relying on argument and allegations rather than solid factual submissions. Moreover, it is compounded by the Puerto Rico Board's arbitrary exclusion of highly probative evidence submitted by PRT.

In the Petition, the Puerto Rico Board avers that the "only attempt that PRT has made to provide collocation…resulted in a formal complaint filed with the [Puerto Rico] Board."[39] A complaint filed at the Puerto Rico Board, however, is merely a document containing unproven

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[36] PRT Brief at 24. The Puerto Rico Board's conclusion is based solely on testimony provided by a CLEC. As explained in note 44, *infra*, PRT provided declarations rebutting this testimony, but the Board improperly excluded this information from its analysis.

[37] *Id.*

[38] Petition at 21. The Commission's inclusion of collocation as one of the specifically enumerated factors that state authorities should consider in their enterprise switching analysis is itself problematic. As then Commissioner Powell noted in the *UNE Remand Order*, collocation is a matter separate and apart from the unbundling of switching facilities. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (Statement of Commissioner Michael K. Powell, Dissenting in Part). To the extent that there are difficulties with collocation, these difficulties should be resolved without reference to switching impairment. Imposing unbundling obligations on enterprise switching will not resolve collocation problems, and "may just be layering ineffective rules on top of ineffective rules." *Id.*

[39] Petition at 21.

allegations. To conclude that CLECs suffer from impairment in the provision of collocation because a single company filed an unsubstantiated complaint with the Puerto Rico Board is improper. In any event, the complaint that the Puerto Rico Board refers to, filed by Centennial, was rapidly resolved by the parties involved, and has since been held in abeyance by agreement of the parties.[40]

The Puerto Rico Board also contends that Centennial's collocation requests have been "pending with PRTC for over three years," inaccurately implying that PRT is responsible for an extensive delay in providing collocation.[41] In fact, while Centennial first made its original collocation requests three years ago, these requests were withdrawn and resubmitted, and have not been pending for the entire three year period. Further, the record shows that Centennial itself is responsible for the timing of completing and provisioning these collocation requests.[42] Centennial decided to use its own subcontractors to build the collocation arrangements, and as a result completion of the collocation arrangements is affected by factors well outside of PRT's control.[43]

Finally, the Puerto Rico Board cites to submissions made by Centennial that allege that despite the resolution of the complaint, there remained outstanding issues in the provision of collocation.[44] PRT provided the Puerto Rico Board with declarations addressing this issue, which show that at the time the Puerto Rico Board was making its decision, the outstanding

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[40] PRT Brief at 27.

[41] Petition at 21-22.

[42] PRT Brief at 27. At the time of the hearing, PRT and Centennial were working through the steps needed for final acceptance of two Centennial collocation sites.

[43] *Id.*

[44] Petition at 22.

issues between PRT and Centennial stemmed primarily from Centennial's mistaken belief that special access services are available at a discount through the parties' interconnection agreement, rather than through the tariff.[45]

IV. The Petition Contains Other Serious Errors.

A. The Puerto Rico Board's Exclusion of Evidence Relating to Carriers Using Wireless Switches to Provide Wireline Service is Arbitrary.

Evidence in the record before the Puerto Rico Board showed that wireless carriers can upgrade wireless switches to provide wireline service, and that in fact Centennial is doing so in Puerto Rico.[46] Once Centennial upgraded its switch, it became a multi-purpose wireless/wireline switch. This is not an example of intermodal competition; Centennial is both a wireline and wireless competitor that decided it was economically rational to upgrade its wireless facilities to provide wireline service to enterprise customers.

This evidence is directly relevant to the cost of installing switching facilities in Puerto Rico, because it means that existing wireless carriers can cost-effectively upgrade equipment that they already possess in order to serve wireline customers. While WorldNet raised a number of objections to considering wireless switches in the Puerto Rico Board's impairment

[45] The Puerto Rico Board improperly excluded these declarations from the record, and rejected a motion by PRT to reconsider this exclusion. *See FCC's Triennial Review Order*, Resolution and Order, Case No. JRT-2003-CCG-004 (December 30, 2003). The Puerto Rico Board claimed that this information was not timely filed, despite the fact that there was no deadline for the submission of factual information in effect at the time of submission, and the declarations themselves were filed to respond to information redacted and released by the Puerto Rico Board only five days prior to their filing. It is unclear when the Puerto Rico Board expected this type of testimony to be filed. Moreover, the Puerto Rico Board never explained how any party would be prejudiced by review of this information, or how the public interest was served by excluding this type of information from its deliberations. Without the benefit of the facts in these declarations, it is impossible for the Puerto Rico Board to have rendered an informed decision on the question of collocation impairment.

[46] PRT Brief at 21.

determination,[47] the fact that Centennial is using an upgraded wireless switch to provide wireline service is undisputed.

Despite the relevance of this evidence, the Puerto Rico Board declared it a "competitive anomaly" and declined to afford weight to it.[48] The Board stated that if it "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."[49] The exact meaning of this argument is not clear, but the Puerto Rico Board appears to be concerned either that competition in the wireless sector would mask a lack of competition in the wireline sector, or that competitive entry in the wireline sector would be limited by the number of carriers providing wireless service. Either of these concerns are a *non sequitur*. The fact that wireless carriers can — and do — upgrade their switches to serve wireline customers *expands* the pool of potential entrants into the enterprise market and provides further evidence that the Commission's national impairment finding was as correct for Puerto Rico as for the rest of the nation.

B. The Puerto Rico Board Considered Other, Irrelevant Factors.

The Puerto Rico Board also improperly considered factors irrelevant to the switching analysis. Because these factors provide no insight into the question of enterprise switching impairment, they do not form a proper basis for a waiver of the FCC's national finding.

First, the Puerto Rico Board asserts that PRT has "largely ignored" its Local Number Portability ("LNP") obligations.[50] But the Board bases its claim on the fact that there was a *single* complaint, involving a handful of delayed LNP requests early in the process. No further

[47] *Id.* at 22.

[48] Petition at 17 n. 23.

[49] *Id.*

[50] Petition at 24.

problems after this initial start-up period have even been alleged by the original complainant. In addition, no final action has been taken on this complaint, and PRT maintains that the complaint itself is without merit. The Puerto Rico Board's citation of this complaint as "evidence" of impairment is another example of the Board attributing improper weight to unproven allegations and assertions.

Second, the Puerto Rico Board also grounds its Petition on its claim that "PRTC has little to no experience in cooperating with competitors to gain or share access to necessary easements or rights-of-way."[51] But the Puerto Rico Board bases its finding here not on evidence of impairment, but rather on the fact that there have been no requests. In any event, the inquiry here is whether CLECs are impaired without access to unbundled *switching*. Access to rights-of-way, as the Commission recognized, is relevant, if at all, to determining whether CLECs are impaired in deploying *loops*.[52]

[51] *Id*.

[52] *See, e.g.*, TRO ¶¶ 237, 309.

V. Conclusion

For all of the foregoing reasons, the Puerto Rico Board's Petition seeking waiver of the Commission's national finding of no impairment for enterprise switching as applied to Puerto Rico should be denied.

RESPECTFULLY SUBMITTED,

PUERTO RICO TELEPHONE COMPANY, INC.

By: __/s/ Gregory J. Vogt_____

Gregory J. Vogt
Joshua S. Turner
WILEY, REIN & FIELDING, LLP
1776 K. St., NW
Washington, DC 20006
(202) 719-7000

José E. Arroyo Dávila
PUERTO RICO TELEPHONE COMPANY, INC.
1515 Roosevelt Avenue, 12th Floor
Caparra Heights, PR 00921
(787) 793-8441

Its Attorneys

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