Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re: Telefónica Larga Distancia de Puerto Rico, Inc. Petition for Expedited Declaratory Ruling Regarding Section 253 of the Communications Act of 1934, as amended	WC Docket No. 06-1

COMMENTS OF PUERTO RICO TELEPHONE COMPANY, INC.

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SUMMARY

TLD's Petition requests that the FCC take the extraordinary step of using its Section 253 authority to protect an individual competitor from the forces of competition. In a direct response to the services offered by its competitors, both wireline and wireless, PRT has filed a tariff that eliminates its current, numerous local calling zones in favor of a single local calling area covering the entire island of Puerto Rico. The dramatic success of PRT's competitors that use a single calling zone, including the two largest competitive local exchange carriers ("CLECs") and six wireless carriers (*see* Exhibit A), and the corresponding sharp decline in intraisland toll volume, show that customers *are demanding* this rate structure. Rather than recognize this market trend and create a new business plan to address it, TLD asks the Commission for a federal regulatory decree that the intraisland toll market should remain unchanged, regardless of consumer preference. Moreover, by failing to seek similar relief when PRT's competitors changed to single zone pricing, TLD's Petition effectively asks that the increasingly unpopular intraisland toll market be supported solely by PRT, putting the company at a significant competitive disadvantage.

Beyond the audacious nature of its request for federal government protection of a disappearing market, TLD's petition is legally defective. TLD asks the Commission to preempt a hypothetical state action under Section 253. TLD claims that the Telecommunications Regulatory Board of Puerto Rico ("TRB") is considering whether to "approve" a tariff filed by PRT that would put into place a single calling zone throughout the island. However, the TRB has yet to take *any* action that could be characterized as a legal requirement under Section 253, making FCC involvement premature. Moreover, no legal requirement has even been proposed by the TRB. There is no requirement in Puerto Rico law that the TRB "approve" a tariff, and all tariffs filed with the TRB take effect by operation of their terms. The TRB is considering

discrete complaints filed regarding the tariff. If the TRB denies these complaints, PRT's tariff will take effect without any TRB action.

Regardless, there is no prospect that such a requirement would create a prohibition on the provision of telecommunications service within the meaning of Section 253(a). The disappearance of intrastate long distance as a separate market is being driven by competition and customer preference, not by regulation. As a certificated CLEC with an interconnection agreement, TLD is well positioned to continue providing telecommunications services in Puerto Rico and to structure service offerings quickly to meet the competitive realities of the current market.

Assuming for the sake of argument that there was an existing or even potential legal requirement that might arguably run afoul of Section 253(a), there still is no basis to grant TLD's Petition. Because the TRB has yet to take any action on this matter, it is impossible to determine whether any hypothetical action that it may take would fall inside the Section 253(b) safe harbor. However, even absent a TRB order, it is clear that the public interest supports adoption of the PRT Single-Zone calling plan. The plan is a response to competitive pressure and is necessary to promote further competition. PRT must be allowed to move to single zone calling in order to stay competitive with CLECs and wireless carriers, as well as Voice-over-Internet-Protocol ("VoIP") providers, all of whom have captured substantial market shares in both the business and residential markets. Indeed, the substantial benefits of one calling zone for both consumers and businesses have been recognized by leading business groups and political leaders throughout Puerto Rico.

Further, by rebalancing rates and allowing them to reflect service costs more accurately, the Single-Zone plan will promote competitive entry and universal service in underserved areas.

TLD's claim that the necessary rate rebalancing constitutes an improper burden on the Lifeline system is without merit. One of the primary functions of the Lifeline system is to provide a cushion for consumers for those rate increases that may be necessary as markets transition from implicit support to a more transparent, competitive structure.

Finally, the antitrust and slamming issues raised in the Petition are red herrings. There are not two separate products that can efficiently be offered separately, and the expansion of the local calling zones will not result in any change to any customer's presubscribed interexchange carrier.

Because it is both premature and without merit, TLD's Petition should be denied.

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COMMENTS OF PUERTO RICO TELEPHONE COMPANY, INC.

The Puerto Rico Telephone Company, Inc. ("PRT") hereby submits its Comments in response to Telefónica Larga Distancia, Inc.'s ("TLD") Petition for Expedited Declaratory Ruling ("Petition") filed on December 20, 2005. TLD's Petition seeks preemption under Section 253 of the Communications Act of a nullity. No state statute, regulation, or other legal requirement has either been imposed or proposed by the Telecommunications Regulatory Board of Puerto Rico ("TRB" or "Board"). As a result, there is no existing or potential basis for applying Section 253(a). Moreover, Section 253(b) provides a safe harbor for certain actions taken by state regulators that protect enumerated public interest concerns. Because the TRB has not issued a decision, it is impossible to tell whether any decision that the TRB *might* issue would fall within Section 253(b), even if such a decision could be considered a "legal requirement" under Section 253(a). The Petition is thus both speculative and premature and

should be denied. Further, a review of the Single-Zone tariff itself shows that it is in the public interest and meets all of the requirements set forth in Section 253(b), while TLD's antitrust and slamming concerns are frivolous.

As explained below, this Petition has been interposed merely to cause delay in the TRB proceeding. Therefore, to minimize the potential uncertainty that a pending FCC proceeding may create, PRT urges the Commission to deny the Petition quickly.

I. BACKGROUND

PRT is the incumbent wireline local exchange carrier in Puerto Rico. Traditionally, PRT has divided its service area into a number of local calling zones. In response to competition from facilities-based and resale competitive local exchange carriers ("CLECs") and wireless carriers, PRT has recently reduced the number of its calling zones from 68 to 10, and has filed a tariff proposing to include the entire Commonwealth within a single calling zone. Customers in Puerto Rico have made clear that they prefer this rate structure, as the increasing amount of wireless substitution (from carriers offering all-distance pricing) and rapidly declining volumes of intrastate toll traffic demonstrate. The largest facilities-based and resale CLECs have already introduced a single calling zone, as well.

Despite the strong customer demand for single calling zones, a number of entities have filed complaints with the TRB regarding PRT's prospective tariff. The TRB's proceeding, which has involved substantial discovery and will include live hearings and examination of witnesses, remains ongoing. The TRB has yet to issue any final order regarding the complaints against PRT's prospective tariff, and has given no signal, formal or informal, about whether it will grant or deny the complaints before it. While PRT has voluntarily elected to defer the effective date of the tariff pending resolution of the TRB proceeding, TRB approval of tariffs is

not required under Puerto Rico law, and if the TRB elects to deny the complaints, the tariff will take effect by operation of the terms of the tariff.

II. THE PETITION CANNOT IDENTIFY EITHER AN EXISTING OR POTENTIAL VIOLATION OF SECTION 253(A).

A. The TRB Has Taken No Action That Could Possibly Be a "Legal Requirement" Under The Terms of Section 253(a).

Section 253(a) of the Communications Act bars any "State or local statute or regulation" or any "other State or local legal requirement" that "prohibit[s] or ha[s] the effect of prohibiting" an entity from providing a telecommunications service. 47 U.S.C. § 253(a). Section 253(d) of the Act grants the Commission express authority to remove those barriers to entry that may be imposed by state or local governments in violation of Section 253(a). *Id.* § 253(d).

The Commission's authority under Section 253(d), however, is not absolute. Section 253(d) provides that if the FCC "determines that a State or local government *has permitted* or *imposed* any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall *preempt the enforcement* of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency." *Id.* (emphasis added). The plain language of Section 253(d) makes clear that in order for the Commission to preempt the enforcement a state statute, regulation, or legal requirement, there must first *be* a state statute, regulation, or legal requirement to preempt.

As the Commission has held, "[i]n the absence of some form of statute, regulation, official conduct, or other legal requirement to preempt, [the FCC] cannot act under Section 253(d)." *Guam Telephone Authority Petition for Preemption*, Order, 12 FCC Rcd. 13938, 13940, ¶ 8 (1997) (denying a petition to preempt any state laws, including a then-ongoing court case, which may have jeopardized the ability of the petitioner to provide telecommunications service in a given area). Where, as here, the Petition "does not allege that the [state] has imposed

any such requirement nor can [the Petitioner] even identify any such requirement," the Petition has failed to state a cognizable claim for preemption under Section 253. *Id.*; *see also* Statement of Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, *Western Wireless Corp. Petition for Preemption*, Memorandum Opinion and Order, 15 FCC Rcd. 16227, 16235 (2000) (fact that the statute is drafted in the present tense calls into question "whether [the FCC] may legally make Section 253(d) determinations on state commission rulings that do not exist"). "[A]bsent an adverse decision in that complaint case or the identification of some specific statute, regulation or other legal requirement, there is nothing for us to preempt under Section 253(d)." *Guam Telephone*, 12 FCC Rcd. at 13940, ¶ 8.

Here, no legal requirement exists, and any action by the Commission would necessarily be speculative. Just as in *Guam Telephone*, in this case the Commission has no way of knowing what "unspecified future application of an unknown law," *if any*, might arguably run afoul of Section 253(a).[1] *Id.* at 13941, ¶ 11. As TLD admits in its Petition, the proceeding before the TRB remains ongoing, and the TRB intends to hold hearings on the various issues involved in the case in early February. *See* Petition at 7-8. Contrary to TLD's repeated suggestions, *see, e.g., id.* at i, ii, 1, 3, 8, the TRB is not considering whether to "approve" the tariff. As explained in Section B, *infra,* no prior approval is needed for a tariff to take effect in Puerto Rico. Instead, the TRB is conducting a proceeding based on complaints filed regarding PRT's prospective tariff, which contain a laundry list of allegations from PRT's competitors about the propriety of different aspects of the tariff. It is not clear what action the Board will take on the merits of the

[1] The speculative nature of TLD's Petition is highlighted by its request for relief, which asks the Commission to either "issue a declaratory ruling . . . stating that approval by the [TRB] of the 'Single Zone Plan' . . . would violate Section 253(a)" or "[a]lternatively, if the [TRB] approves the Single Zone Plan (*including permitting the [plan] to go into effect*) prior to a ruling on this Petition, . . . that the Commission find that approval of the Single Zone Plan is preempted under Section 253." Petition at 1-2 (emphasis added).

complaints that have been filed. The TRB may dismiss the complaints entirely, in which case the tariff would take effect, despite the lack of any affirmative approval by the TRB. As a result, there is no way for the Commission to "render any useful ruling regarding its validity," *Guam Telephone,* 12 FCC Rcd. at 13941, ¶ 11, and the Petition is premature.

TLD's Petition offers no authority to the contrary. The Petition concentrates on proving the uncontroversial proposition that the FCC "has construed its general ability to entertain petitions for declaratory rulings quite broadly," Petition at 27, as well as demonstrating the well-settled principle that the Commission's jurisdiction is broader than the jurisdiction possessed by Article III courts. However, in each of the cases cited by TLD, there was a state action taken that the FCC was able to evaluate.[2] *Id.* at 27-31. None of the cases cited by TLD stands for the proposition that the FCC should preempt hypothetical actions that may not be taken and could potentially be justified under federal law. *See American Communications Services et al. Petition for Expedited Ruling*, Memorandum Opinion and Order, 14 FCC Rcd. 21579 (1999) (preempting a statute enacted by the Arkansas legislature); *Petition of State of Minnesota for Declaratory Ruling*, Memorandum Opinion and Order, 14 FCC Rcd. 21697, 21702-703, ¶¶ 6-7 (1999) (declining to issue a declaratory ruling approving an agreement between the state and a developer that granted the developer exclusive access to certain rights of way); *Operator Services Providers of America Petition for Declaratory Ruling*, Memorandum Opinion and Order, 6 FCC Rcd. 4475, 4475, ¶¶ 1-2 (1991) (considering a Tennessee statute that had been enacted but not yet enforced); *Telerent Leasing Corp. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 45 F.C.C.2d 204 (1974) (considering a set of proposed rules

[2] TLD's contention that "the terms of the Single Zone Plan are known," Petition at 29, is irrelevant. The terms of the Single-Zone Plan, as proposed by PRT, do not constitute an action by the TRB that can violate Section 253(a). 47 U.S.C. § 253(a). The relevant inquiry is what action *the TRB* may take in the ongoing complaint proceeding. *See* Section II.B, *infra.*

in North Carolina and a written advisory opinion in Nebraska). Moreover, the *Telerent Leasing* case involved the FCC's general preemption authority, rather than the specific preemption provision in Section 253(d) that directs the Commission to preempt enforcement of existing state legal requirements as they apply to inter- and intrastate services. TLD has provided no authority even suggesting that, contrary to the statute's plain language, Section 253(d) allows for preemption where there is no identifiable state action to preempt.

B. The TRB's Proceeding Cannot Create a Regulation, Law, or Other Legal Requirement Within the Meaning of Section 253(a).

TLD's Petition requests that the Commission intervene in the pending proceeding at the TRB and foreclose further proceedings by the Board. Petition at 3. TLD, however, misrepresents the nature of the TRB proceeding. The Board is not considering whether to "approve" PRT's tariff. Puerto Rico law does not require administrative approval prior to tariffs taking effect, and the TRB has specifically rejected a request by TLD that the TRB issue an affirmative approval order prior to the tariff taking effect. *See TLD v. PRT*, Case No. JRT-2005-Q-0121 (Puerto Rico TRB Jan. 17, 2006) (Resolution and Order).

Instead, Puerto Rico law provides that, upon filing, tariffs take effect by operation of the terms of the tariff. *See* Puerto Rico Telecommunications Act, Law 213 of Sept. 12, 1996 ("Law 213"), § 7(a), *codified as* P.R. Laws Ann. tit. 27 ("[e]very telecommunications company shall have to submit to the [TRB] a list of prices and charges, and every time a change is made, it shall have to submit them simultaneously when implemented in the market"). The TRB is not required to take any action in order to approve a tariff in the ordinary course, and, in fact, does not have the statutory authority to approve or reject a tariff *sua sponte*. *Id.* The TRB is limited by law to adjudicating complaints filed by "interested part[ies]," and even then may only "ascertain whether the prices and/or charges established [by the tariff] are not based on their cost,

thus violating the principle of fair and sound competition." *Id.* § 7(b). The TRB proceeding that TLD's Petition would have the Commission preempt is based on complaints filed by various "interested part[ies]" challenging the terms of PRT's Single-Zone tariff.[3] The tariff will go into effect, by operation of its terms, without any further affirmative TRB action. TLD's Petition, therefore, does not seek preemption of a specific order that the TRB may adopt approving the tariff, but rather requests that the FCC intervene and prohibit the TRB from *denying* the complaints that it is currently considering. In essence, TLD seeks an order from the Commission granting the complaints filed at the TRB.

This is not within the FCC's authority under the plain meaning of Section 253, and stands well outside any prior preemption decisions taken by the agency. While the Petition correctly notes that the Commission has held that *state approval* of a tariff is a "legal requirement," Petition at 12 (citing *Public Utilities Commission of Texas et al. Petitions for Declaratory Ruling and/or Preemption*, Memorandum Opinion and Order, 13 FCC Rcd. 3460, 3561, ¶ 129 (1997)), the Petition cannot identify *any* potential action by *any* state regulatory authority in this case that would constitute a "legal requirement" under the terms of Section 253(a). The Petition attempts to sidestep this issue by continually characterizing the TRB proceeding as one that will lead to "approval" of the tariff, but the Petition cannot transform the nature of the TRB proceeding with misleading language and repetition.

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[3] While the terms of Law 213 only allow the TRB to consider cost issues, the complaints that initiated the pending proceeding at the TRB raise broader, non-cost issues, and the TRB has elected to consider those issues, as well. PRT does not concede that this broader set of non-cost issues are properly before the TRB, but no matter how expansive the TRB's review of the terms of the tariff in the complaint proceeding, there remains no provision of law that requires the TRB to *authorize* the tariff before it takes effect. As noted above, the TRB has rejected TLD's request that the TRB utilize such a structure. *See TLD v. PRT*, Case No. JRT-2005-Q-0121 (Puerto Rico TRB Jan. 17, 2006) (Resolution and Order).

TLD cites no case that supports the proposition that the Commission can use the terms of Section 253(a) in order to step in to an ongoing state complaint proceeding, direct the state regulatory body to grant the pending state law complaint, and fashion relief under state law. Indeed, of the cases cited by the Petition, only three are even tangentially related to the issue of what constitutes a "legal requirement" under Section 253(a). The central case upon which the Petition relies, *Public Utilities Commission of Texas*, involved a completed state proceeding under which the PUC had not only *affirmatively approved* the tariff at issue, but had also relied on the terms of that tariff in an arbitration. 13 FCC Rcd. at 3561, ¶ 129. The Commission concluded "that *Texas Commission approval* in 1994 of the continuous property restriction, *since it has been interpreted and applied through the recent Texas Commission decisions* approving the Arbitration Award, constitutes a 'legal requirement' under section 253(a)." *Id.* (emphasis added). No similar action exists here. The *State of Minnesota* decision is completely inapposite because there the petitioner was the State of Minnesota itself, which requested that the Commission approve a contract that it had entered into with a developer giving the developer exclusive access to certain rights of way. 14 FCC Rcd. at 21697, ¶ 1. Not only are these facts and procedural posture completely unlike those in this case, the Commission *did not preempt* the contract at issue, but rather merely refused to issue a declaratory ruling approving it. *Id.* Finally, the Pennsylvania Public Utility Commission decision cited in the Petition is also inapplicable because it (1) is a state commission decision and thus does not address federal preemption at all, and (2) involves, like *Public Utilities Commission of Texas*, a question of PUC *approval* of a tariff. *Pa. Pub. Utils. Comm'n v. Choice One Commc'ns of Pa., Inc.*, No. R-16940, 2002 WL 971920 (Pa. P.U.C. Feb. 7, 2002).

C. **No Conceivable TRB Order Would Result In a Prohibition on Offering Telecommunications Service Under Section 253(a).**

Even if the TRB proceeding could result in a "legal requirement" under Section 253(a), which it cannot, this putative requirement would not "prohibit or have the effect of prohibiting" the provision of service that would fall within Section 253(a). 47 U.S.C. § 253(a). TLD's petition is predicated on the erroneous notion that Section 253(a) requires the Commission to intervene in the market in order to calcify the scope of local service and allow a carrier to continue to use an outmoded business model based on services *that customers have shown that they do not want.* Rather, the 1996 Act, in which Section 253 was adopted, was designed to enhance competition and innovation in service offerings, not to set in stone then-existing service definitions. Section 253 does not require or allow the Commission to act as a central market planner and provides no basis for using federal law to actively discourage the development of innovative products and services.

As set forth below, the Single-Zone plan is PRT's response to both competitive and public pressure to do away with multiple calling zones and move toward a single, all-island calling rate structure. *See* Section IV.A, *infra.* The Single-Zone plan would not "prohibit" or "have the effect of prohibiting" any carrier from offering telecommunications services anywhere in Puerto Rico. 47 U.S.C. § 253(a). TLD is *already* certificated as a CLEC and is free to offer telecommunications services to any and all customers in Puerto Rico. It can fashion a competitive offering using resale (as other CLECs in Puerto Rico already do), or using unbundled network elements, or it can decide to invest in its own facilities (as, again, other CLECs in Puerto Rico already do). The 1996 Act has thus provided TLD with many modes to compete, and many ways in which it can continue to compete as its existing business model loses

relevance due to a changing market.[4] TLD essentially admits that its Petition is designed to do nothing more than insulate TLD's existing business plan from changes in the market. *See* Petition at 18 (TLD should not be deprived of the ability to "continue operating its core business due to distortions in the market."). The "distortions in the market" that TLD refers to are changes driven by competition and consumer demand. TLD may wish that it were possible to keep reaping large margins from intraisland long-distance service indefinitely, but it is the market, rather than any "legal requirement," that makes long-term reliance on intraisland toll (and, indeed, on toll service generally) a dubious strategy.[5]

The cases cited by TLD offer no support for the radical idea that the FCC should intervene in order to guarantee the continuing economic vitality of a particular competitor and prevent the normal workings of the market. In *Classic Telephone* and *Silver Star* the Commission was confronted with affirmative regulations that *explicitly prevented* the entry of competitors and gave the incumbent provider a veto over such entry, respectively. Petition at 13-14 (citing *Classic Telephone Petition for Preemption*, Memorandum Opinion and Order, 11 FCC Rcd. 13082, 13108, ¶ 50 (1996) and *Silver Star Telephone Co. Petition for Preemption*, Memorandum Opinion and Order, 12 FCC Rcd. 15639, 15656, ¶¶ 37-38 (1997)). There is no

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[4] TLD's claim that moving to a single calling zone would hamper its ability to offer *interstate* toll services, Petition at 19, is frivolous. There is no evidence that carriers cannot economically provide interstate toll service without also offering an intrastate toll offering; indeed, this claim defies common sense.

[5] TLD's contention that the company would be unable to offer local exchange services because it "will have no intrastate customer base or revenue during the period it would take to establish a presence in the local exchange market," Petition at 17-18, is also meritless. Even if a carrier needed a guaranteed revenue stream in order to offer local exchange service (which it does not), the decline of the intrastate toll market has been evident for years, and PRT's tariff has been on file since April 2005. TLD has had plenty of time to devise new strategies to cope with the changes occurring in the toll market, and the FCC should not reward the company's shortsightedness with a federal guarantee that it can continue to earn revenue in an increasingly unpopular market segment.

question that a flat regulatory ban on competitive service, like that in *Classic Telephone* or *Silver Star*, is prohibited by Section 253(a), but there is no such ban in this case, nor will there ever be. As the Petition notes, the FCC has held that "Congress intended primarily for *competitive markets* to determine which entrants shall provide the telecommunications services *demanded by consumers*." *Id.* at 14 (quoting *Silver Star*, 12 FCC Rcd. at 15656-657, ¶ 38 (emphasis added)). Here, it is consumer demand and a competitive market that is driving the move toward single zone calling plans. Unlike traditional Section 253 cases, where the Commission is asked only to sweep away barriers to entry, the Petition asks the Commission to attempt to alter the outcome of consumer demand and competition, and to promote artificially a specific type of calling plan that customers do not want.

TLD's citation to the Vermont and Delaware proceedings does nothing to support the Petition's Section 253(a) claim. First, both of those cases were decided by state public utility commissions, based on public interest factors specific to the states. These decisions illustrate that this is not a public policy decision left to the FCC. Second, neither case is relevant to the question of whether single calling zones are appropriate public policy in Puerto Rico in 2006, even if that were a proper question for the FCC to address under Section 253 (which it is not). In Delaware, the public service commission rejected a move to a single calling zone *three years prior to the 1996 Act* and well before competition in local exchange services became a reality. Petition at 15. The situation in Puerto Rico, which has substantial competition in local exchange service from facilities-based, resale, and wireless carriers, is fundamentally different. In the cited Vermont decision, the Public Service Board did not address the question of whether statewide local calling would be good public policy. *See Petition of Global NAPs, Inc. for Arbitration*, No. 6742, 2002 Vt. PUC LEXIS 272, at *35 (Vt. Pub. Serv. Bd. Dec. 26, 2002)

(noting that "this is not the appropriate proceeding" to make that determination). Rather, the Vermont Board determined that allowing a *CLEC* to implement state-wide local calling zones *without also allowing the ILEC to do the same* would tilt the playing field and provide an unfair competitive advantage to the CLEC. *Id.* Far from bolstering TLD's Petition, this decision actually provides strong support for PRT's proposed new rate structure. As explained in Section IV.A, *infra*, PRT's largest CLEC competitors, as well as the wireless carriers with whom the company competes for local exchange business, have implemented single calling zones. As the Vermont Board observed, where one competitor offers a single zone and another is forbidden from doing so, "[s]uch unequal competition does not benefit ratepayers as a whole and should be discouraged." *Id.*[6]

III. THE COMMISSION CANNOT DETERMINE WHETHER POTENTIAL STATE REGULATORY ACTION WOULD FALL WITHIN THE SECTION 253(B) SAFE HARBOR.

Even if it would have been otherwise proper for the FCC to: (1) speculate about what actions the TRB may or may not take; (2) try to determine whether these hypothetical actions constituted "legal requirements"; and (3) find that these hypothetical actions run afoul of Section 253(a), the Petition's request for preemption would *still* be premature absent a TRB decision. Section 253(b) provides a safe harbor for the "[s]tate to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b). The FCC has held that, if it determines that an action

[6] As noted by the Vermont Board, any decision limiting PRT's ability to offer the same rate plans as its competitors would raise serious competitive neutrality concerns.

> is proscribed by subsection 253(a) standing alone, [it] must then determine whether the [state action] falls within the reservation of state authority set forth in subsection 253(b), which excludes from the scope of the Commission's preemption powers certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives enumerated in subsection 253(b).

Amigo.net Petition for Declaratory Ruling, Memorandum Opinion and Order, 17 FCC Rcd. 10964, 10966, ¶ 5 (2002).

The Commission cannot determine whether hypothetical action by the TRB would fall inside the safe harbor of Section 253(b), because: (1) the proceeding at the TRB is ongoing; (2) the record below is incomplete; and (3) the TRB has not issued an order, let alone explained the reasons for any such order. The TRB's proceeding has so far resulted in voluminous discovery, and the TRB intends to conduct live hearings and examine witnesses on the subject of whether the complaints brought against PRT's prospective tariff have any merit.[7] The Commission should allow the TRB to consider the record and make the relevant determinations, and decline TLD's invitation to short-circuit the state regulatory process by stepping in and pre-judging the outcome of this state proceeding.[8]

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[7] TLD has already raised its Section 253 arguments at the TRB. *See* TLD de Puerto Rico, Inc. Memorandum on Claims Not Involving Cost Based Rates, Appendix B, *TLD v. PRT*, Case No. JRT-2005-Q-0121 (Puerto Rico TRB filed Aug. 29, 2005). The delay in submitting this "expedited" request suggests that TLD may be hoping to use the pendency of the FCC action to delay the eventual resolution of the TRB proceeding—something that seems likely, given that TLD served only one person at the FCC with its Petition, but sent a copy to six different people affiliated with the TRB. *See* Petition, Certificate of Service.

[8] In light of the fact that the TRB has not acted, and thus there is no record or other basis to determine whether any TRB action would be within the 253(b) safe harbor, it is not surprising that TLD provides no argument whatsoever on this point, and gives it only cursory mention in its Petition. *Id.* at 24-26.

IV. THE SINGLE-ZONE TARIFF WILL SERVE THE PUBLIC INTEREST.

Although it would be premature for the Commission to determine whether any TRB action falls within the Section 253(b) safe harbor, a review of PRT's Single-Zone tariff shows that it meets all of the requirements enumerated in the statute. The Single-Zone tariff will promote competition by allowing PRT to update its offerings and compete on equal footing with wireless, wireline, and Voice-over-Internet-Protocol ("VoIP") providers and thus will ensure the continued availability of high-quality telecommunications services for consumers, businesses, and public safety agencies. In addition, the Single-Zone plan will further the goal of universal service by reducing cost support that deters entry into underserved areas by both PRT and its competitors.

A. PRT's Single-Zone Tariff Is a Response to Market Forces and Is Essential to Promoting Competition.

Stripped of its rhetoric and viewed in conjunction with actual market evidence, TLD's Petition asks the Commission to use its Section 253 preemption authority to create a barrier to intrastate competition in Puerto Rico. TLD claims that PRT is attempting "to leverage its significant market power in the local market to eliminate competitors in the intrastate long distance market," Petition at 15, so that there will be "no demand for intrastate long distance service from other providers," *id.* at 8. Unfortunately for TLD, it is inter- and intra-modal competition, not PRT, that has eliminated the demand for intrastate toll in Puerto Rico. Since 2002, PRT's intraisland toll switched access minutes of use have declined almost *50 percent*. Puerto Rico Telephone Company Inc. Brief on Treatment of Non-Cost Matters at 36, *TLD v. PRT*, Case Nos. JRT-2005-Q-0128, JRT-2005-Q-0121, JRT-2003-Q-0297, JRT-2004-Q-0068 (Puerto Rico TRB filed Aug. 29, 2005).

Customers have made clear that they increasingly do not want intrastate toll service, from PRT or any other carrier. The six major wireless carriers in Puerto Rico treat the entire island as one calling zone and allow customers to purchase a bucket of minutes that they can use for calls anywhere on the island. Indeed, wireless penetration in Puerto Rico is higher than on the mainland, at least in part because PRT's calling zones have historically been small in size and large in number. In the United States as a whole, there are 1.24 mobile phones for every ILEC access line whereas in Puerto Rico, there are two wireless phones for every PRT access line. *See* FCC, Industry Analysis and Technology Division, Local Telephone Competition: Status as of December 31, 2004, at Table 9, Table 13 (rel. July 8, 2005). Moreover, Centennial, a facilities-based CLEC with a large share of the market and which as of May 2004 had fiber reaching over 1,100 buildings, *see* Centennial Communications Corp., Amended Annual Report (Form 10-K/A), at 5 (Oct. 1, 2004), has been using a single calling zone in Puerto Rico for more than one year, and WorldNet, another large CLEC with in excess of 15 percent of the market, *see* Augusto Durand, *WorldNet: A Visionary Approach to Telecom*, Caribbean Business, Mar. 31, 2005, at 46, has also recently moved to one calling zone. *See* Exhibit A (advertisements of Centennial and WorldNet promoting single calling zone rate structures).

TLD argues that it cannot rely on providing intrastate service to customers of CLECs because there is only one facilities-based carrier on the island and it only serves business customers. Petition at 18. This is incorrect. First, Centennial serves business customers and residential customers. Indeed, Centennial has facilities in some residential areas where PRT does not. Second, Centennial customers do not purchase TLD's toll services because Centennial implemented a single calling zone for Puerto *Rico more than one year ago*, and WorldNet has

also recently adopted a single calling zone. Thus, it is lack of a competitive offering, rather than a lack of CLECs, that prevents TLD from serving CLEC customers.

Customers are moving to Centennial and wireless carriers for their toll calls, and increasingly their local calls, because they do not want to pay toll charges. The advent of numerous VoIP providers will only further this trend away from toll calling.[9] Indeed, in the recent Verizon/MCI merger decision, the Commission noted that there is substantial evidence long-distance services purchased on a stand-alone basis are becoming a "fringe market" and that "consumers are increasingly using their mobile wireless service for long distance calls." *Verizon Communications Inc. & MCI, Inc. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd. 18433, 18484-486, ¶¶ 92, 94 (2005). These comments are equally applicable to intra- and interstate long distance services.

PRT is adopting one calling zone because customers are demanding it. If PRT is not allowed to react to market pressures in the same way as its competitors (such as WorldNet and Centennial), it will continue to lose both toll revenues and access lines as customers switch to wireless and wireline providers offering single-zone services. Hamstringing PRT will diminish competition and result in higher prices and lower quality services for consumers and businesses. The Single-Zone tariff is a step forward, not "backwards," Petition at 2, as TLD claims. The purpose of the 1996 Act was to enhance competition. By changing its offerings to meet customer demand, PRT is bringing the "new packages of services, lower prices and increased innovation," *id.* at 11 (quoting *Implementation of Local Competition Provisions*, First Report and

[9] For example, cable operator Liberty advertises its VoIP service that treats all of Puerto Rico as one calling zone. *See* Exhibit A (advertisement of Liberty Cable). Level 3 and Centennial also offer, or will soon offer, VoIP in Puerto Rico. *See* Level(3) Communications, "(3)VoIP Toll Free[SM]," http://www.level3.com/2192.html (last visited Jan. 25, 2006); News Release, Nortel, Centennial Deploying VoIP Technology in Puerto Rico and Dominican Republic with Nortel Solutions (Oct. 18, 2005), http://www2.nortel.com/go/news_detail.jsp?cat_id=-8055&oid=100189458).

Order, 11 FCC Rcd. 15499, 15506, ¶ 4 (1996)), that TLD claims the Act was intended to foster. TLD is trying to preserve the status quo against the forces of competition which have brutally demonstrated that customers no longer value TLD's toll services.

The Single-Zone tariff will not discourage or prevent competitive entry.[10] TLD claims that (1) "PRTC retains a monopoly in the residential local exchange services market," Petition at 17, and that (2) providing local and intraisland calls is "an almost insurmountable barrier to entry," *id.* This is not the case. Competition in Puerto Rico is thriving.[11] As noted above, Centennial and WorldNet are each serving residential and business customers in Puerto Rico, and have shown that both facilities-based and non-facilities-based entry is not only possible, but highly successful, in Puerto Rico. Moreover, TLD is owned by a self-proclaimed "world leader in the telecommunications sector," Telefónica, "Our Activities," http://www.telefonica.es/acercadetelefonica/eng/1descripcion/actividad.shtml (last visited Jan. 25, 2006), has facilities and personnel in Puerto Rico, has an interconnection agreement with PRT, and has filed a tariff for local services at the TRB.[12] Thus, TLD is ready and able to enter the local market at any time. The only question is whether TLD is willing to compete.

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[10] As explained in Section IV.B, below, the Single-Zone tariff will encourage competitive entry by rebalancing rates to be more in line with actual costs.

[11] TLD bemoans that PRT's residential customers will have "to pay for intrastate long distance service which they do not need, want or use." Petition at 9 n.18. This is not the case. For customers that do not make a large number of calls, there is a low-priced option which allows them to make a limited number of calls anywhere on the island. Moreover, rather than rejecting wireless carriers', Centennial's, and WorldNet's use of one calling zone because it forces them to pay for something they do not want, customers have been flocking to these providers.

[12] There is no basis to TLD's claim, *id.* at 9 n.18, that the Single-Zone tariff would bias customers toward PRT for interstate and international services, and TLD provides no evidence to support its statement. PRT does not control the interstate or international markets, and the Single-Zone plan will have no effect on these markets.

B. Treating All of Puerto Rico as One Calling Zone Will Benefit Consumers and Businesses.

The benefits of one calling zone for both businesses and consumers have been recognized throughout Puerto Rico, and has attracted widespread political and public support. For example, a single local calling area is supported by a coalition of mayors of the largest cities across Puerto Rico,[13] numerous cities individually,[14] and by Puerto Rico business organizations.[15] Moreover, the Board itself has recognized that Puerto Rico is best served by one calling zone. In its recent arbitration of an interconnection agreement between PRT and Centennial, the Board required that the parties exchange local traffic treating all of Puerto Rico as one local calling zone. Finding that "[t]he general trend towards convergence of calling zones and the influence of wireless calling makes it likely that island-wide calling will be the standard in Puerto Rico in the very near future," the Arbitrator confirmed that her "primary goal, aside from assuring consistency with the Communications Act and the Puerto Rico Act, should be the achievement of island-wide calling in the most expeditious and efficient manner possible." *Petition of*

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[13] Letter from Gilberto Conde Román, Director Ejecutivo, Federación de Alcaldes de Puerto Rico, to the TRB, TRB Case No. JRT-2005-SU-0003 (Apr. 22, 2005) (stating that use of one calling zone can increase competition for both residential and commercial customers).

[14] *See, e.g.,* Comments of Gobierno Municipal de Orocovis, TRB Case No. JRT-2005-SU-0003 (Apr. 20, 2005); Comments of Municipio Autónomo de Caguas, TRB Case No. JRT-2005-SU-0003 (Apr. 22, 2005); Comments of Gobierno Municipal Autónomo de Ponce, TRB Case No. JRT-2005-SU-0003 (Apr. 22, 2005).

[15] For example, the Association of Industrialists of Puerto Rico stated that eliminating local toll charges would greatly benefit economic development in Puerto Rico, would reduce geographic barriers, would facilitate the commercial, industrial, and social interchange, and would promote the family by allowing greater interaction between family members living throughout Puerto Rico. Comments of Asociación de Industriales de Puerto Rico, TRB Case No. JRT-2005-SU-0003 (Apr. 22, 2005). Similarly, the Puerto Rico Chamber of Commerce affirmed that "PRTC's establishment of a one calling zone, at least in regards to commercial clients, would eliminate the artificial barriers that an over 20 years rate scheme created" and that by eliminating long distance charges, PRT will be able to "offer a product that may effectively compete with those available by other telecommunication companies." Initial Comments from the Puerto Rico Chamber of Commerce, TRB Case No. JRT-2005-SU-0003, at 2 (Apr. 25, 2005).

Centennial Puerto Rico License Corp. For Arbitration, Arbitrator's Report and Order, TRB Case No. JRT-2005-AR-0001, at 4, 8 (May 23, 2005). The Board approved the interconnection agreement incorporating this decision August 29, 2005 and declined to reconsider this issue in its Order on Reconsideration. *Centennial Puerto Rico License Corp. & Puerto Rico Telephone Co.,* Order on Reconsideration, TRB Case No. JRT-2005-AR-0001 (Dec. 16, 2005).

C. **The Rate Rebalancing Effected by the Single-Zone Tariff is Consistent with the Commission's Universal Service Goals and Will Foster Greater Competition in Underserved Areas.**

The Single-Zone tariff will encourage competitive entry into the Puerto Rico residential market and allow PRT to compete effectively in the business market. TLD argues that PRT will be using the additional revenues from its Single-Zone tariff offering to subsidize lower business rates in Puerto Rico. Petition at 19. This is inaccurate. For many years, high business rates have provided support for lower cost residential rates. PRT's Single-Zone plan reduces this support so that residential rates will now recover slightly more of the cost of providing residential services. As long as residential rates are held artificially low, that market will never be subject to full competition. As the Commission has recognized,

> [i]n many states, particularly rural states such as Vermont, higher business rates subsidize some residential rates, and, consequently, certain residential services are priced below cost . . . . The existence of local rate subsidies might mean that, initially, the competition would be most prevalent in business markets and for higher-margin residential customers. This competition, however, will eventually erode the subsidies and create pressure to rebalance local rates.[16]

This is precisely the point at which PRT has found itself; competitive pressure in the business and urban residential market has forced PRT to eliminate some of the support in those rates that

[16] *Application by Verizon New England Inc. et al. for Authorization To Provide In-Region, InterLATA Services in Vermont*, Memorandum Opinion and Order, 17 FCC Rcd. 7625, 7663, ¶ 68 (2002) (footnotes omitted).

are used to keep residential rates artificially low. Raising residential rates and eliminating some of this support will encourage entry so these customers can benefit from increased competition.

The Single-Zone tariff also removes the support from intraisland toll offerings that have kept local rates in certain areas artificially low. For example, the charge for local service in some local calling areas is currently about $10. The Single-Zone tariff raises that minimum charge to $16.95, but includes the capability to call anywhere on the island without toll charges. There are no meaningful differences in costs between providing service within the current local calling zones and providing intra-calling zone calls, although intraisland toll charges have traditionally been higher. Removal of this support will further encourage competition and will put PRT on more equal footing vis-à-vis wireless providers.

TLD's claim that "the Single Zone Plan can work to injure Lifeline consumer protection in Puerto Rico," Petition at 23, is nonsensical. The use of Lifeline funding to cushion necessary increases when support is eliminated satisfies both the need to maintain and increase subscribership while creating a more competitive market. For example, when the Commission eliminated certain pricing support as part of the CALLS plan, it relied on Lifeline to ensure that rates remained reasonable and affordable.[17] Both the Commission and the TRB have been encouraging the expansion of Lifeline independent of PRT's Single-Zone plan.[18] Under the Commission's recently expanded Lifeline eligibility rules, some 800,000 Puerto Rico households are eligible for Lifeline assistance. Currently, only 112,000 households participate. PRT is

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[17] *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12962, 12976, ¶ 33 (2000).

[18] *See, e.g.*, Working Group On Lifeline And Link-Up Telephone Services Seeks Information On Effective Outreach To Low-Income Consumers, FCC Public Notice, DA 06-41 (rel. Jan. 10, 2006); *see also Programas de Servicio Universal "Lifeline" y "Link-Up,"* Administrative Order, TRB Case No. JRT-2005-SU-0005 (Nov. 17, 2005) (ordering ETCs to adopt plans for promoting Lifeline service).

working hard to increase Lifeline subscription rates and is developing a plan with extensive outreach efforts to encourage more customers to take advantage of the Lifeline program.

1. The Single-Zone tariff does not raise antitrust concerns.

TLD's throw-away claim that PRT's meeting competition to create a single calling zone constitutes an impermissible tying arrangement, Petition at 21, is misguided. TLD wrongly assumes that two separate products exist, an essential prerequisite for a tie-in to exist. A firm, even a firm with market power, is not required to unbundle all elements of a package that rivals would like to cherry pick. As the very case TLD invokes (*Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21-22 (1984)) explains, tying law recognizes this by finding two separate products "only" when there is separate demand for *each* item "such that" it is "efficient" to offer *each* separately. If it is not efficient to offer the so-called "tying" product without the "tied" product, then only a single product exists for tying purposes, and there is no tie. Evidence that other competitors – those without market power – do not find it efficient to offer the asserted "tying" product without the "tied" product is a compelling reason to find a single integrated product and not a tying arrangement. *See* 10 Phillip E. Areeda *et al.,* Antitrust Law ¶ 1744c4, at 174 (2d ed. 2004) (explaining that bundling by competitive fringe warrants treating such bundling by the leading firm "as one product").

Here, TLD cannot dispute that six wireless carriers and the two largest CLECs have made Puerto Rico a single zone, eliminating the distinction between local and intrastate long distance that TLD wishes to retain. That PRT's competitors have paved the way and no longer offer local exchange service separate from intrastate toll demonstrates that it is no longer efficient for PRT to offer both separately, and that only a single product exists.

Even if local exchange and intrastate toll were two products, a packaged product is not a per se unlawful tie-in if bundling the two products offers consumers substantial efficiencies and

is justified by business necessity. *See Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1348-49 (9th Cir. 1987). Here, it is plainly efficient for PRT to eliminate the local/intrastate toll distinction because PRT must do so to compete with CLECs and wireless carriers, who are winning PRT customers by making Puerto Rico a single zone. In order to attract these customers back, PRT must be able to offer the same service as its competitors. Retaining a "dual" system—offering a single zone structure to some customers but retaining a local-only product for others—would maintain a situation that exists today, while offering a simplified dialing arrangement for Single-Zone customers only would create technical concerns. Further, PRT's Single-Zone plan does not foreclose a substantial volume of commerce in the "tied" product market, because the asserted "tied" product market is quickly evaporating. As explained above, consumers want a product that treats Puerto Rico as a single calling area. CLECs and wireless carriers have responded by offering such a product, and PRT should be allowed to do so as well. As explained above, TLD is trying to use the Commission to protect its declining business from the forces of competition. This is not good for consumers and is not consistent with the antitrust laws.

Finally, a tie-in is not per se illegal, but is evaluated under the Rule of Reason, if it represents productive technological integration. *See United States v. Microsoft Corp.,* 253 F.3d 34, 90-94 (D.C. Cir. 2001) (per curiam) (en banc) (applying Rule of Reason to integration respecting software platform products because of substantial efficiencies from such integration). Here, the Single-Zone plan is plainly an integrated product offering substantial efficiencies: PRT has one network and there is no rational basis for dividing the island into several calling zones. Under the Rule of Reason, moreover, the arrangement is plainly lawful, because as demonstrated above (i) it enables PRT to offer consumers substantial efficiencies, meeting inter- and intra-

modal competition; and (ii) there are rapidly declining numbers of customers interested in purchasing the two products separately.

2. PRT's Single-Zone offering will not result in slamming or affect carriers' rights under Section 251(b)(3).

TLD argues that the Single-Zone plan will result in PRT switching customers' service providers without their consent in violation of Section 258. Petition at 20. There is no basis for this assertion. Section 258 of the Communications Act prohibits the submission or execution of an unauthorized change in a subscriber's selection of a provider of telephone exchange service or telephone toll service. However, PRT will not be changing *any customer's toll service provider*. Rather, PRT will be expanding the size of the local calling area. All calls by PRT customers within Puerto Rico will be local calls and those calls will still be carried by PRT. Customers' interstate PICs will remain as they are. PRT customers will not be subject to intraisland toll charges so no intraisland PIC is needed.

The weakness of TLD's arguments is highlighted by the fact that prior changes in calling zones have not raised slamming issues. For example, Centennial changed to one calling zone in Puerto Rico last year; TLD cites no slamming complaints related to this change nor does PRT know of any. Moreover, TLD notes that a few years ago PRT changed from 68 local calling zones to 10, Petition at 7 n.13. PRT did not receive any complaints regarding slamming as a result of that change.

TLD also argues that the Single-Zone tariff will somehow deprive TLD of dialing parity and nondiscriminatory access as required by Section 251(b)(3). Petition at 22. There is no basis to this assertion. PRT will continue to provide dialing parity and nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings just as it does now.

V. CONCLUSION

The FCC should deny the petition.

Respectfully submitted,

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January 26, 2006

Attachment A

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Declaration Regarding Translations

I, Alcides Ortiz, certify under penalty of perjury that the foregoing are true and correct translations.

Executed on January 26, 2005

Alcides Ortiz