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ORIGINAL

July 3, 2012

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FILED/ACCEPTED

JUL - 3 2012

Federal Communications Commission
Office of the Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Emergency Request for a Stay; Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator; WC Docket Nos. 08-71 and 06-122, CC Docket Nos. 97-21 and 96-45; USAC Audit No. CR2009CP002

Dear Ms. Dortch:

On behalf of Puerto Rico Telephone Company, Inc. ("PRT"), enclosed for filing in the above-referenced dockets is an Emergency Request for a Stay. In its request, PRT asks that the Federal Communications Commission ("FCC" or "Commission") exercise its equitable discretion to stay the "pay-and-dispute" policy of the Universal Service Administration Company ("USAC") while the Commission reviews PRT's appeal of USAC's demand for additional contributions to the Universal Service Fund.[1]

As detailed in the enclosed Request for Confidential Treatment, PRT requests that the Commission treat as confidential parts of the request and supporting declaration that contain confidential and proprietary information. Accordingly, PRT submits two versions of the request and supporting declaration: (1) a non-redacted version that contains confidential and proprietary information; and (2) a redacted version for public inspection. PRT requests that the Commission treat the non-redacted version and the accompanying documents confidentially.

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[1] *Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator*, WC Docket Nos. 08-71 and 06-122, CC Docket Nos. 97-21 and 96-45, USAC Audit No. CR2009CP002 (filed June 25, 2012).

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Please contact the undersigned with any questions.

Sincerely,

Thomas J. Navin
Counsel for Puerto Rico Telephone Company, Inc.

Enclosures

REDACTED - FOR PUBLIC INSPECTION

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

In the Matter of	)	
	)	
Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator	)	WC Docket No. 08-71
	)	
	)	WC Docket No. 06-122
	)	
	)	CC Docket No. 97-21
	)	
	)	CC Docket No. 96-45
	)	
	)	USAC Audit No. CR2009CP002

PUERTO RICO TELEPHONE COMPANY, INC.'S EMERGENCY REQUEST FOR A STAY

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July 3, 2012

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND SUMMARY 2

II. BACKGROUND 5

A. Puerto Rico Telephone Company, Inc 5

B. USAC's Audit of PRT's 2008 Form 499-A 5

C. Pay-and-Dispute 7

III. ARGUMENT 8

A. PRT Is Likely to Succeed on the Merits of Its Challenge to USAC's Pay-and-Dispute Policy 9

1. USAC's Adoption of the Pay-and-Dispute Policy Was Ultra Vires 9

2. Enforcement of USAC's Pay-and-Dispute Policy Violates the Notice-and-Comment Requirements of the Administrative Procedure Act 11

3. Enforcement of USAC's Pay-and-Dispute Policy Violates Basic Notions of Due Process 12

B. The Equities Weigh Strongly in Favor of A Stay 13

IV. CONCLUSION 19

Appendix A – Declaration of Angel Oscar Vega Santiago

REDACTED - FOR PUBLIC INSPECTION

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

In the Matter of	)	
	)	
Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator	)	WC Docket No. 08-71
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	)	CC Docket No. 97-21
	)	
	)	CC Docket No. 96-45
	)	
	)	USAC Audit No. CR2009CP002

PUERTO RICO TELEPHONE COMPANY, INC.'S
EMERGENCY REQUEST FOR A STAY

Pursuant to Commission Rule 1.43,[1] Puerto Rico Telephone Company, Inc. ("PRT"), by its attorneys, hereby requests that the Federal Communications Commission ("Commission") exercise its equitable discretion to stay the Universal Service Administration Company's ("USAC") "pay-and-dispute" policy while the Commission reviews PRT's appeal of USAC's demand for $[redacted] in additional contributions to the Universal Service Fund ("USF").[2] Not only is USAC's enforcement of its own pay-and-dispute policy clearly unlawful, but the policy is on uncertain legal ground because it is currently the subject of a Notice of Proposed Rulemaking

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1 47 C.F.R. § 1.43.

2 *See* Letter from Chang-Hua Chen, Universal Service Administrative Company, to Ana Maria Betancourt, Puerto Rico Telephone Company, Inc. (June 4, 2012) ("June 4 Letter"); Letter from Brandon Ruffley, Universal Service Administrative Company, to Robert Figenscher, Puerto Rico Telephone Company, Inc., Re: "Final USAC Audit Report for Puerto Rico Telephone Company, Inc." (April 25, 2012) ("April 25 Letter"); *see also* "USAC Internal Audit Division Report on the Audit of Puerto Rico Telephone Company, Inc. 2008 – FCC Form 499-A Rules Compliance," USAC Audit No. CR2009CP002 (Nov. 16, 2011) ("Final Audit Report").

in WC Docket No. 06-122 & GN Docket No. 09-51.[3] Absent a stay, PRT will be irreparably harmed on July 4, 2012, when USAC begins calculating penalties and interest under the pay-and-dispute policy.

I. INTRODUCTION AND SUMMARY

On June 4, 2012, PRT received an audit letter from USAC demanding that PRT revise its 2008 FCC Form 499-A and immediately pay an additional $[redacted] in USF contributions to avoid late payment penalties. On June 25, 2012, PRT filed an appeal of USAC's audit findings and USAC's pay-and-dispute policy. PRT now requests that the Commission stay the pay-and-dispute policy while PRT's appeal proceeds. The stay standard is easily satisfied in this case.

PRT's legal challenge to the pay-and-dispute policy has a substantial likelihood of success on the merits because the policy is clearly unlawful for several reasons. *First,* USAC's adoption of the pay-and-dispute policy was *ultra vires*. USAC applies the "pay-and-dispute" policy as if it were a Commission rule, but the Commission has never adopted that policy, let alone codified it as a rule. The USAC Administrator's authority is extremely limited under the Commission's rules, and adoption of the pay-and-dispute policy clearly exceeded that narrow authority.

Second, USAC's adoption of the pay-and-dispute policy was unlawful because the policy is a substantive rule adopted without the notice and opportunity for comment required by the Administrative Procedure Act ("APA"). Substantive rules may only be adopted after notice and opportunity for public comment. USAC utterly failed to comply with this fundamental APA requirement in adopting the pay-and-dispute policy that USAC applies with the force of law.

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[3] *In re Universal Service Contribution Methodology A National Broadband Plan For Our Future*, Further Notice of Proposed Rulemaking, 2012 WL 1524623, ¶ 360 (2012) ("*FNPRM*").

Third, imposition of penalties and interest under the pay-and-dispute policy violates PRT's Due Process rights. No statute or regulation provides notice of the pay-and-dispute policy. The Government simply cannot impose a massive $[redacted] penalty without providing any notice at all.

The equities also clearly warrant a stay. Absent a stay, PRT will suffer irreparable harm in the form of lost customers, damage to reputation, lost goodwill, and unrecoverable economic losses. If PRT must immediately pay $[redacted] to USAC under the pay-and-dispute policy, it will be compelled to pass these charges on to its customers, as it is lawfully entitled to do. This will result in PRT inevitably losing customers who will turn to lower-cost alternatives, especially in areas where competition is robust. Even if PRT succeeds on appeal, it will nevertheless lose the time-value of the $[redacted] assessment that USAC demands now and will incur significant expense in attempting to locate and provide refunds to those customers who contributed to pay the $[redacted] assessment. All of these economic losses will be unrecoverable even if PRT is successful on appeal. Finally, if PRT must raise customer prices because of the $[redacted] assessment, PRT will become known as the "expensive" service provider, which will irreparably damage the reputation and goodwill PRT has worked hard to achieve. These are classic harms that courts routinely find to be irreparable.

The public interest also weighs strongly in favor of a stay. As noted, PRT's customers will ultimately shoulder the cost of the $[redacted] assessment. This will impact PRT's existing customers and will be particularly burdensome to those customers who, given their low income, cannot readily absorb these types of price increases. In areas where PRT is the sole service provider, customers will be forced to pay the increased costs or forgo service. As with PRT, customers will never be reimbursed for the time-value of the money they will lose if forced to

pay higher prices, even if PRT is successful on appeal and refunds the $[redacted] paid by customers. And even if PRT wins on appeal and attempts to reimburse customers who paid for the assessment, inevitably, some former customers will never be found and, consequently, never reimbursed. Thus, because of the real and imminent harms to PRT's customers, the public interest overwhelmingly favors a stay.

Finally, a stay is warranted because pay-and-dispute is currently under consideration by the full Commission. In the pending *FNPRM*, the Commission has proposed to codify pay-and-dispute as a Commission rule. Codification of the policy will allow USAC to lawfully apply the policy on a prospective basis, but it cannot cure USAC's unlawful enforcement of its own policy. Until the policy is codified as a Commission rule, the Commission should exercise its discretion as a matter of equity and fairness to suspend the pay-and-dispute policy. Moreover, the appeals by Level 3 and Ascent Media, which remain pending, could determine the lawfulness of USAC's enforcement of the pay-and-dispute policy.[4] A stay would fairly allow PRT to pursue its appeals before the Commission free from the threat of hundreds of thousands of dollars of penalties and interest if its appeal is unsuccessful. It would be inequitable for the Commission to allow USAC to continue to enforce a substantive rule that the Commission itself recognizes must be codified in its rules.

For all these reasons, a stay should be granted.

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[4] *See, e.g.*, Ascent Media Group Petition for Reconsideration in the Matter of Universal Service Contribution Methodology Request for Waiver of Decisions of the Universal Service Administrator by Achieve Telecom Network of Massachusetts, LLC, et al., WC Docket No. 06-122 (filed Jan. 14, 2009); Application for Review of Level 3 Communications, LLC, ICG Telecom Group, Inc., Looking Glass Networks, Inc., Looking Glass Networks of Virginia, Inc., Progress Telecom, LLC, and WilTel Communications, LLC, WC Docket No. 06-122 (filed Mar. 1, 2010).

II. BACKGROUND

A. PUERTO RICO TELEPHONE COMPANY, INC.

PRT is an incumbent local exchange carrier and operates as a mobile phone service provider in the Commonwealth of Puerto Rico. PRT delivers a comprehensive array of telecommunications solutions to individuals, growing businesses, large enterprises, government customers, information service providers, and other telecommunications carriers. Of relevance to this proceeding, PRT offers government agencies, business customers, and carriers a variety of private line services such as point-to-point dedicated circuits and high-capacity dedicated transport circuits that originate and terminate within Puerto Rico through intrastate and interstate tariffs.

Private line services typically provide non-switched point-to-point services on a stand-alone basis to other carriers or as part of a private network. The services often are used by businesses, organizations, institutions, and service providers that need to exchange data and other communications traffic between two or more discrete locations. Further, PRT's geographically intrastate, closed circuits do not connect to other carrier circuits, customer premises equipment that bridges traffic to other locations, the public switched telephone network ("PSTN") or the Internet.

B. USAC'S AUDIT OF PRT'S 2008 FORM 499-A[5]

On November 16, 2011, USAC's Internal Audit Division ("IAD") released an audit report detailing findings and offering recommendations regarding PRT's 2008 FCC Form 499-A.[6] IAD concluded—albeit incorrectly—that PRT failed to comply with the Commission's rules

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[5] USAC's audit of PRT's 2008 Form 499-A is discussed in detail in PRT's appeal filed on June 25, 2012.

[6] Final Audit Report at 2.

for the period reviewed and that PRT's revenues were not reported in accordance with the Commission's rules. Primarily, IAD asserted in its Findings that PRT's reported revenues were inaccurate because PRT had not reported its private line revenues using the most accurate jurisdiction. In total, IAD has estimated that its Findings would result in an increase of $[redacted] in the contribution base for the period audited.[7] Based on this amount, IAD has concluded that PRT owed an additional $[redacted] in USF contribution obligations for the period audited.[8]

On April 24, 2012, the USAC Board of Directors approved the final audit report. On April 25, 2012, USAC Financial Operations sent PRT a letter, notifying PRT of its decision to approve the final audit report and alerting PRT that the carrier has until June 25, 2012, to appeal USAC's decision with the Commission.[9]

On May 2, 2012, USAC sent a letter to PRT regarding the requirement to revise its FCC Form 499-A within 60 days in accordance with IAD's audit of the contributor revenue filings for the year 2008 audit.

On June 4, 2012, USAC sent PRT a letter informing the company that USAC had not received a revised Form 499-A.[10] USAC reminded PRT that the required FCC Form 499-A revisions must be received by USAC no later than 30 days from the date of the letter (July 4, 2012).[11]

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7 *Id.* at 4.

8 *Id.* at 4.

9 April 25 Letter.

10 June 4 Letter at 1.

11 *Id.*

C. PAY-AND-DISPUTE

USAC's "pay-and-dispute" policy "requires contributors that wish to challenge a USAC invoice to keep their accounts current while disputing the amounts billed in order to avoid late fees, interest, and penalties."[12] USAC will not waive late fees, interest, and penalties, unless it is later determined that USAC made an error in calculating an invoice charge.[13] Several carriers have challenged the lawfulness of USAC's pay-and-dispute policy, and those appeals remain pending before the full Commission.

Recently, on April 30, 2012, the Commission released the *FNPRM*, seeking public comment on whether the Commission should adopt USAC's "pay-and-dispute" policy as a policy or codified rule.[14] The *FNPRM* noted that contributors continue to challenge the pay-and-dispute policy by withholding payment.[15] Thus, the *FNPRM* indicated that adopting pay-and-dispute as a Commission policy or codified rule would lessen administrative burdens on the Commission and USAC by reducing challenges, and also "put[] all contributors on notice of the procedures for appealing contested invoices."[16] The *FNPRM* also sought comment on whether adoption of the pay-and-dispute rule would serve the Commission's goal of reforming the USF and enhance the Commission's debt collection rules.[17]

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12 *FNPRM*, 2012 WL 1524623, ¶ 360.

13 *See* Universal Service Administrative Company, *Billing Disputes*, http://www.usac.org/cont/about/billing-disputes.aspx (last visited July 3, 2012).

14 *FNPRM*, 2012 WL 1524623, ¶ 360.

15 *Id.* ¶ 364.

16 *Id.*

17 *Id.* ¶ 365-66.

Despite the pending *FNPRM*, USAC enforced its pay-and-dispute policy against PRT in this case as if the Commission had already codified it as a rule. In its June 4, 2012 audit letter, USAC demanded, pursuant to its pay-and-dispute policy, that PRT submit payment of the $[redacted] in USF contributions that USAC alleges PRT owes or face late-payment and interest penalties.[18] As a result, PRT now faces the decision of whether it will submit the massive $[redacted] payment to USAC even while it pursues its appeal of the audit letter, or face the possibility, if PRT withholds payment, of having to pay large late-payment and interest penalties in the event that PRT loses its appeal of the audit letter decision.

III. ARGUMENT

In determining whether to grant a stay, "the Commission applies the four factor test established in *Virginia Petroleum Jobbers Assocation v. FPC*, as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*"[19] Under that test, the Commission asks whether: "(i) Petitioners are likely to prevail on the merits; (ii) Petitioners will suffer irreparable harm absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest favors grant of the stay."[20] In this case, all four factors strongly weigh in favor of a stay.

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18 *See* June 4 Letter at 1.

19 *In re Regulation of Prepaid Calling Card Servs.*, Order, 22 FCC Rcd 5652, ¶ 7 (2007) (citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

20 *In re City of Boston, Mass, & Sprint Nextel*, Order, 22 FCC Rcd 2361, ¶ 8 (2007) (footnote omitted).

A. PRT IS LIKELY TO SUCCEED ON THE MERITS OF ITS CHALLENGE TO USAC'S PAY-AND-DISPUTE POLICY.

USAC's audit letter demands that PRT file a revised Form 499-A and pay $[redacted] while it disputes the lawfulness of USAC's audit. The Commission will likely agree in this case (and in the other pending appeals) that USAC's pay-and-dispute is unlawful. Foremost, USAC lacked authority under Commission rules to adopt the policy in the first place. Even if USAC had the authority to adopt pay-and-dispute, the policy is nevertheless unlawful because it is a substantive rule that was not adopted pursuant to the notice-and-comment requirements of the APA. Further still, USAC cannot impose penalties pursuant to the pay-and-dispute policy without violating PRT's Due Process rights because the policy was inadequately noticed.

1. USAC'S ADOPTION OF THE PAY-AND-DISPUTE POLICY WAS *ULTRA VIRES*.

USAC applies an internal pay-and-dispute policy that requires carriers to pay disputed invoices even while a dispute and appeal is pending.[21] As a result, while waiting for USAC to issue a refund or the Bureau to act on appeal, carriers face an unreasonable choice, either: (1) pay billed contributions that are inequitably higher than the amount due under Commission rules; or (2) incur interest and penalties which can be significant. The policy inflicts harm on carriers that make mistakes because, as even USAC admits, refunds can take up to 18 months to be processed and issued.

Pay-and-dispute is a policy created by USAC alone. The Commission has not adopted it through a rulemaking subject to legally required notice and comment,[22] although the

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[21] *See* Universal Service Administrative Company, *Program Integrity: Appeals*, http://www.usac.org/cont/about/program-integrity/appeals.aspx (last visited July 3, 2012).

[22] *See, e.g.*, 5 U.S.C. § 553.

Commission has now proposed to do so. Whenever the Commission or a Bureau has referred to pay-and-dispute, it has been characterized as a "USAC principle" or "USAC policy."[23]

The USAC Administrator's authority is extremely limited under the Commission's rules. Section 254 of the Communications Act directs the Commission to implement policies governing the universal service program.[24] Under the Commission's rules, "[t]he Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."[25]

The Commission will likely agree that the Administrator clearly exceeded this limited authority by adopting the pay-and-dispute policy. The Administrator has no authority to "make policy." Even if it did, the Administrator could not exercise such policy-making authority to essentially fill gaps in "unclear provisions" of the Commission's rules. Yet that is precisely what the Administrator did in adopting the pay-and-dispute policy as a gap-filling measure. Instead of

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23 *Request For Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, CC Docket No. 96-45, 23 FCC Rcd 10731, n.17 (June 30, 2008) ("general USAC principle of 'pay and dispute'"); *Federal-State Joint Board on Universal Service, Universal Service Contribution Methodology, Aventure Communications Technology, LLC, Form 499 Filer ID: 825749 Request for Review of USAC Rejection Letter and Request for Waiver of USAC 45 Day Revision Deadline*, Order, CC Docket No. 96-45, WC Docket No. 06-122, 23 FCC Rcd 10096, ¶ 5, n.16 (June 26, 2008) ("USAC's 'pay and dispute' policy"); *Federal-State Joint Board on Universal Service Request for Review by WorldxChange Corp. of Action by Universal Service Administrator*, Order, CC Docket No. 96-45, 22 FCC Rcd 5082, Appendix A, (March 16, 2007) ("USAC maintains a 'pay and dispute' policy"); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, to Scott Barash, Universal Service Administrative Company, DA 08-602, 23 FCC Rcd 4705 (Mar. 24, 2008) ("USAC's general 'pay and dispute' policy"); Letter from Dana R. Shaffer, Chief, Wireline Competition Bureau, to Scott Barash, Universal Service Administrative Company, DA 08-1447, 23 FCC Rcd 9571 (June 19, 2008) ("USAC's general 'pay and dispute' policy").

24 47 U.S.C. § 254.

25 47 C.F.R. § 54.702(c).

usurping the Commission's authority for its own, the Administrator should have followed the Commission rule requiring it to "seek guidance from the Commission."

2. ENFORCEMENT OF USAC'S PAY-AND-DISPUTE POLICY VIOLATES THE NOTICE-AND-COMMENT REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT.

Even assuming USAC had authority to adopt pay-and-dispute, the policy is unlawful because it is a substantive rule never adopted pursuant to the notice-and-comment requirements of the APA. As discussed above, substantive rules must be adopted by the Commission after notice and an opportunity for public comment.[26] The pay-and-dispute policy is a substantive rule because it "carries the force and effect of law"[27]—penalizing carriers for failing to comply with USAC's demand for payment while appeals are pending. USAC's pay-and-dispute policy was not the subject of a notice-and-comment rulemaking.

Despite these APA deficiencies, USAC enforces the pay-and-dispute policy as if it were an official Commission rule adopted after notice and comment. USAC attempts to use the Form 499-A instructions and true-up process to justify treating its pay-and-dispute and form revision processing guidelines as Commission rules. But USAC cannot point to anything in the Commission's true-up rules that adopts USAC's pay-and-dispute policy or form revision processing guidelines. To the contrary, the Commission has acknowledged the pay-and-dispute policy but has never mandated compliance.

The Commission's pending *FNPRM* effectively concedes that the pay-and-dispute policy is a substantive rule that must be adopted after notice and comment. In the *FNPRM*, the Commission proposes to codify pay-and-dispute as a Commission rule. Codification would be

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[26] 5 U.S.C. § 553(c).

[27] *Air Transp. Ass'n of Am., Inc. v. FAA*, 291 F.3d 49, 55 (D.C. Cir. 2002).

unnecessary if USAC could bypass the APA's notice-and-comment requirements and lawfully enforce the pay-and-dispute policy.

Even if the Commission codifies pay-and-dispute as a rule in the *FNPRM*, USAC could not retroactively apply the codified rule to PRT's conduct in this case. The Commission must apply its rules prospectively, and USAC cannot apply the Commission's rules to PRT without violating the APA's prohibition on retroactive rulemaking.[28]

3. ENFORCEMENT OF USAC'S PAY-AND-DISPUTE POLICY VIOLATES BASIC NOTIONS OF DUE PROCESS.

USAC cannot impose penalties pursuant to the pay-and-dispute policy for the further reason that it would violate PRT's Due Process rights. As noted above, and as the Supreme Court recently explained in *FCC v. Fox Television Stations, Inc.*, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is . . . required."[29] Indeed, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."[30] "A . . . punishment fails to comply with due process if the statute or regulation under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[31]

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[28] *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997); *Bergerco Canada v. U.S. Treasury Dep't*, 129 F.3d 189, 192 (D.C. Cir. 1997).

[29] No. 10-1293, slip op. at 11 (June 21, 2012).

[30] *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995) ("Due process requires that parties receive fair notice before being deprived of property.").

[31] *Fox*, slip op. at 12.

USAC has not provided sufficient notice of the pay-and-dispute policy. There is no statute or regulation that provides notice of the policy. Instead, USAC apparently deemed it sufficient to simply publicize the policy on its website. But an "isolated and ambiguous statement [on a government website] does not suffice for the fair notice required when the Government intends to impose over a [redacted] fine."[32] And the Commission's *FNPRM* effectively concedes there is a serious notice problem with enforcing USAC's policy because codification is necessary to "put[] all contributors on notice of the procedures for appealing contested invoices."[33] Accordingly, neither USAC nor the Commission can lawfully sanction PRT for failing to comply with a policy that was inadequately noticed.

B. The Equities Weigh Strongly in Favor of a Stay.

Absent a stay, PRT will suffer irreparable harm that is "both certain and great; . . . actual and not theoretical."[34] PRT currently faces the choice of having to immediately pay $[redacted] to USAC, or risk the potential that it might lose its challenge to USAC's audit decision and face large late-payment and interest penalties. Failure to stay USAC's pay-and-dispute policy will result in injury to PRT's reputation,[35] lost good will,[36] lost customers,[37] and unrecoverable

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32 *Id.* at 15.

33 *FNPRM*, 2012 WL 1524623, ¶ 364.

34 *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

35 *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) ("Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm."); *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) ("Loss of intangible assets such as reputation and goodwill can constitute irreparable injury."); *Qwest Commc'ns Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1103 (N.D. Cal. 2001) ("Injury to a business's goodwill and reputation is not easily measurable, and thus supports a finding of irreparable harm.").

36 *See Mich. Bell Tele. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) ("This court has held that even if higher rates and fees do not drive customers away, loss of established goodwill

economic loss.[38] These harms cannot be quantified as mere economic injuries.[39] Indeed, they are precisely the type of irreparable harms that warrant a stay pending appeal.

Specifically, PRT must recover the $[redacted] from its customers if it complies with USAC's pay-and-dispute policy.[40] PRT's margins are exceedingly thin and paying the sum of $[redacted] out of existing cash reserves is not feasible.[41] PRT simply does not have the budget to

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may irreparably harm a company."); *see also Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) ("The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute."); *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) ("[I]ntangible injuries, such as damage to ongoing recruitment efforts and goodwill, qualify as irreparable harm.").

[37] *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied."); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2d Cir. 1969) (affirming grant of temporary injunction, and finding "loss of profits with respect to Minolta's goods" and "loss of good will from the lack of a 'full line'" sufficient to show irreparable injury). *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37–38 (2d Cir. 1995) (in trademark licensing case, deprivation of opportunity to expand business is irreparable harm); *In the Matter of AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 14508, ¶ 27 (1998) ("Petitioners are already losing customers to Ameritech/Qwest and, if we do not order a standstill, they are likely to continue to do so. If we later find the agreement to be unlawful, it will be very difficult to remedy these losses without serious disruptions in service to the public and, indeed, it is possible that customers who have migrated to Ameritech/Qwest pursuant to the agreement will never return to their previous carriers. Thus, Petitioners may not be able to obtain full recovery of their losses if we do not issue the standstill order.").

[38] *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("The threat of unrecoverable economic loss, however, does qualify as irreparable harm."); *In re CBS Commc'ns Servs. Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 4471, ¶ 19 (1998) ("[T]he threat of unrecoverable economic loss does qualify as irreparable harm.") (internal quotation marks omitted).

[39] *Cf. Virginia Petroleum Jobbers*, 259 F.2d at 925 (mere economic loss does not suffice).

[40] Declaration of Angel Oscar Vega Santiago ("Santiago Decl."), ¶ 4.

[41] *Id.* ¶ 6.

contribute an *additional* $[redacted] to the USF this year.[42] Accordingly, as would any carrier, PRT will look to its customers to fund the $[redacted] contribution.[43] The Commission has "made clear that carriers have significant flexibility in the manner in which they may recover universal service contribution costs. [C]arriers . . . may recover these costs through their standard service charges or through a separate line-item."[44] This will result in irreparable harm to PRT.

First, PRT will likely lose customers—and thus, revenue—if it must comply with the pay-and-dispute policy. PRT faces substantial competition in Puerto Rico from other service providers in many areas of the island.[45] Customers in Puerto Rico, because of their low incomes, are extremely sensitive to price increases.[46] As a result, if PRT raises prices to recover the $[redacted] USAC now demands, many existing customers will likely cancel their PRT service and switch to lower-cost alternatives offered by competing carriers, especially in those areas where competition is robust.[47] PRT will also find it difficult to increase its customer base if it cannot maintain prices at a competitive level.[48] Lost customers is a well established ground for demonstrating irreparable harm.[49]

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42 *Id.*

43 *Id.* ¶ 4.

44 *In re Federal-State Joint Board on Universal Service; Access Charge Reform; Universal Service Contribution Methodology*, Order on Reconsideration, 23 FCC Rcd 6221, ¶ 8 (2008).

45 Santiago Decl. ¶ 5.

46 *Id.*

47 *Id.*

48 *Id.*

49 *See supra* note 37.

Second, PRT faces the imminent threat that its reputation and customer goodwill will be significantly harmed if forced to raise prices because of the pay-and-dispute policy.[50] PRT will inevitably be branded as the "expensive" service provider in Puerto Rico if it is forced to pass the $[redacted] loss onto its customers.[51] Undoubtedly, this would hurt PRT's ability to attract new customers and retain existing ones,[52] particularly in those areas where other service providers operate. Accordingly, this imminent harm to PRT's reputation and goodwill is sufficient to justify a stay.[53]

Third, USAC's policy will cause PRT to suffer unrecoverable economic loss. Even if PRT eventually succeeds in its appeal, the appeal process will likely take months—if not years—to complete, delaying PRT's $[redacted] refund for a substantial period of time. Given the time-value of money, $[redacted] refunded to PRT years from now—perhaps 2014 or 2015—would be much less valuable than the $[redacted] paid by PRT in July 2012. USAC would not refund PRT's $[redacted] with interest or any additional value added. Accordingly, even if PRT wins its appeal, it could never recover the lost time-value of its $[redacted] while that money is held by USAC.

Moreover, if PRT succeeds on appeal and USAC refunds its money, PRT will incur significant administrative costs in redistributing the $[redacted] to its several hundred thousand customers.[54] The task of locating all customers who contributed to the $[redacted] but who

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50 Santiago Decl. ¶ 8.

51 *Id.*

52 *Id.*

53 *See supra* notes 35 & 36.

54 Santiago Decl. ¶ 7.

terminated their service prior to PRT receiving a refund, would be particularly challenging and expensive.[55] USAC would not reimburse PRT for these administrative costs. Thus, as with the lost time-value, these administrative costs represent unrecoverable economic loss that PRT would suffer absent a stay of the pay-and-dispute policy.[56]

The public interest also heavily favors a stay. *First*, as explained above, PRT's existing customers will be forced to pay more than they currently do because they will ultimately be responsible for the $[redacted].[57] In areas where PRT is the only service provider, this harm will be particularly acute, as customers in those areas will have no ability to switch to cheaper competitors.[58] Indeed, customers in areas only served by PRT will be forced to pay for more expensive service or, in the alternative, forgo service entirely—a choice that runs directly counter to Congress' goal "that consumers in insular areas, as well as in rural and high-cost areas, have access to affordable telecommunications and information services."[59] In short, if PRT must comply immediately with USAC's pay-and-dispute policy, customers in areas only served by PRT will need to pay the increased prices charged by PRT if they want service, with no guarantee of any future reimbursement.[60]

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55 *Id.*

56 *In re Brunson Commc'ns, Inc. v. RCN Telecom Servs., Inc.*, 15 FCC Rcd. 12883, ¶¶ 3, 6 (2000) (granting stay because, barring stay, petitioner would incur "costs that will not be recoverable should it prevail on review").

57 Santiago Decl. ¶ 9.

58 *Id.*

59 *See In re Federal-State Joint Board on Universal Service, High-Cost Universal Service Support*, Notice of Proposed Rulemaking, 20 FCC Rcd. 19731, ¶ 33 (2005).

60 Santiago Decl. ¶ 9.

Second, as with PRT, any reimbursement from USAC will not compensate customers for the lost time-value of the extra money they will have to pay in higher prices during the months—and possibly years—while PRT's appeal is pending.[61] Although the amount of interest that would accrue may seem small to some, for many PRT customers, a large number of whom are low income, the loss would be considerable.[62] Thus, for many PRT customers, the higher prices they will face will result in unrecoverable economic loss—even if PRT succeeds on appeal—that could be avoided if the Commission stays USAC's unlawful pay-and-dispute policy.[63]

Third, even if PRT wins on appeal, not all PRT customers who bear the burden of inflated prices caused by the extra $[redacted] assessment will be reimbursed for their extra payments. Indeed, in the months and potentially years during which USAC's appeal is pending, many of PRT's customers will move out of PRT service areas or switch to other service providers.[64] PRT will find it extremely difficult to track down and deliver refunds to those customers who have moved away from the addresses listed for them in PRT's database.[65] Inevitably, some of these ex-customers will never be reimbursed.[66]

Fourth, a stay would serve the public interest while the Commission acts on the *FNPRM*.[67] The Commission recognized in its *FNPRM* that notice-and-comment rulemaking is

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61 *Id.* ¶ 10.

62 *Id.*

63 *Id.*

64 *Id.* ¶ 11.

65 *Id.*

66 *Id.*

67 *FNPRM*, 2012 WL 1524623.

necessary to determine whether adopting the pay-and-dispute policy as Commission policy or a codified rule would lessen administrative burdens, put all USF contributors on notice of the procedures for appealing contested invoices, serve the Commission's goal of reforming the USF, and enhance debt collection rules.[68] The Commission also noted in its *FNPRM* that numerous contributors, like PRT, have challenged the pay-and-dispute policy.[69] The public benefits where duly enacted Commission policies are enforced fairly after notice-and-comment rulemaking, not from requiring parties to submit to legally uncertain policies adopted solely by USAC. Thus, the public would benefit from staying enforcement of USAC's pay-and-dispute policy while the Commission completes notice-and-comment rulemaking in the manner prescribed by the APA.

Finally, while PRT and the public will be irreparably harmed if the pay-and-dispute policy is not stayed, a stay would not harm any other party. The relative harm to USAC is *de minimis* compared to the harm PRT faces if it must immediately pay $[redacted] or risk significant late fees for non-payment.

IV. CONCLUSION

For all these reasons, PRT's request for a stay of USAC's pay-and-dispute policy should be granted.

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68 *Id.* ¶¶ 364-65.

69 *Id.* ¶ 364; *see also Comment Sought on Level 3, LLC Application for Review of a Universal Service Contribution Order*, Public Notice, DA 10-410 (rel. Mar. 11, 2010), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-410A1.pdf (last visited July 3, 2012).

Respectfully submitted,

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July 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2012, I caused copies of the foregoing Emergency Request for a Stay to be served upon the following party by first-class mail:

Universal Service Administrative Company
Attention: David Capozzi, Acting General Counsel
2000 L Street, N.W., Suite 200
Washington, DC 20036

/s/ Steven Merlis
Steven Merlis

Appendix A

REDACTED - FOR PUBLIC INSPECTION

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

In the Matter of	)	
	)	
Request for Review by Puerto Rico Telephone Company, Inc. of Decision of the Universal Service Administrator	)	WC Docket No. 08-71
	)	
	)	WC Docket No. 06-122
	)	
	)	CC Docket No. 97-21
	)	
	)	CC Docket No. 96-45
	)	
	)	USAC Audit No. CR2009CP002

DECLARATION OF ANGEL OSCAR VEGA SANTIAGO

1. I, Angel Oscar Vega Santiago, am over the age of 18. I am the Comptroller and acting Administration and Finance General Director for Puerto Rico Telephone Company, Inc. ("PRT"). I submit this declaration in support of PRT's efforts to obtain an emergency stay of the Universal Service Administration Company's ("USAC") "pay-and-dispute" policy while the FCC reviews PRT's appeal of USAC's April 25, 2012 audit letter.
2. I understand that USAC's audit letter, which relates to PRT's 2008 FCC Form 499-A, asserts that PRT underreported its revenues during the audit period, primarily because USAC concluded that PRT did not report its private line revenues using the correct jurisdictional categorization. I also understand that USAC estimates that because of the allegedly underreported revenue, PRT's contribution base to the USF for the 2008 audit period should be increased by $[redacted]. As a result, USAC asserts that PRT owes an additional $[redacted] in USF contributions for the period audited.
3. I further understand that USAC's audit letter requires PRT to immediately pay more than $[redacted] in additional contributions to the Universal Service Fund ("USF") by July 4,

2012, or face late payment penalties under USAC's "pay-and-dispute" policy, which requires a party disputing an invoice charge to pay the invoice and then pursue a challenge to that charge.

4. If PRT is compelled to pay USAC $[redacted] by July 4, PRT will be forced to recover this money—as the rest of the industry does—by passing the charges through to its customers. This will irreparably harm PRT and its customers, and will lead to unrecoverable economic losses.

5. For PRT, the harms will be three-fold. First, PRT will likely lose customers and thus revenue. PRT faces substantial competition from other telecommunications providers in many areas of Puerto Rico. And customers in Puerto Rico—given their exceedingly low incomes—are extremely sensitive to price increases. Accordingly, if PRT raises its prices to collect the $[redacted] in question, many existing customers will likely cancel their service and switch to cheaper services provided by PRT's competitors, particularly in areas where competition is vibrant. Likewise, PRT will find it more difficult to attract new customers if it cannot keep its prices competitive.

6. I do not believe that the alternative—that PRT pay the $[redacted] out of existing cash reserves without increasing prices for customers—is feasible. PRT's margins are already exceedingly thin. And PRT has simply not budgeted to contribute an additional $[redacted] to the USF this year. Further, even if the Commission granted PRT's appeal, USAC would likely take months, if not years, to refund PRT its $[redacted]. Given the time-value of money, "$[redacted]" refunded to PRT in 2014 or 2015 would be much less valuable than the "$[redacted]" paid by PRT in 2012. PRT could never recover this difference in value.

7. Second, if USAC fully refunds the contribution revenue to PRT, PRT would incur significant administrative costs in redistributing the $[redacted] to its customers. Tracking down customers who contributed to the $[redacted], but who terminated service with PRT prior to USAC's refund, would be particularly challenging and expensive. And PRT would not be reimbursed for these expenses.
8. Third, compliance with USAC's pay-and-dispute policy will hurt PRT's reputation in Puerto Rico and cause it is to lose significant goodwill among its customer base. Even if PRT succeeds on appeal, PRT will be branded as the more "expensive" service provider in Puerto Rico because it raised prices. Naturally, this would hurt PRT's abilities to attract new customers and retain existing customers.
9. For PRT's customers, the harms would also be three-fold. First, PRT's existing customers will have to pay more than they currently pay for PRT's service because they are the ones ultimately responsible for paying the $[redacted]. This harm will be particularly acute in areas where PRT is the only service provider. As noted above, in competitive areas, some of PRT's customers will switch to cheaper plans offered by other providers. But in areas in which PRT is the only provider, switching providers will not be an option. Simply put, these customers will need to pay the increased bills if they want telephone service, but they will have no guarantee of any future reimbursement.
10. Second, even if USAC refunds PRT $[redacted] and PRT then refunds its customers, PRT's customers will not receive interest for their time without their money. As I explained above, USAC would likely take months, if not years, to refund PRT its $[redacted]. This unrecoverable economic loss—while it might seem small to certain

people—would be considerable for PRT's customers, many of whom are low income and live paycheck to paycheck.

11. Third, not all customers that contribute to the $[redacted] payment will be reimbursed, even if PRT's audit appeal is successful. Over the next couple of years, many of PRT's customers will move out of PRT's service area or switch to other providers. PRT may find it extremely difficult to track down and deliver refunds to some of these ex-customers, particularly ex-customers that move away from their addresses of record in PRT's systems. These ex-customers may never be reimbursed.

REDACTED - FOR PUBLIC INSPECTION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 2, 2012

Angel Oscar Vega Santiago

Affidavit No. 4972

Subscribed and sworn before me by Angel Oscar Vega Santiago, in his capacity of Puerto Rico Telephone Company, Inc.'s Comptroller and acting Administration and Finance General Director, of legal age, married and resident of Carolina, Puerto Rico, whom I personally know. In Guaynabo, Puerto Rico, this 2 day of July, 2012.

NOTARY PUBLIC

MADELAINE RIEFKOHL GORBEA
M.R.G.
Puerto Rico
ABOGADA - NOTARIO