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

In the Matter of	)	
	)	
Puerto Rico Telephone Company	)	ASD File No. 98-93
Petition for Waiver of Section 32.27	)	
of the Commission's Rules	)	

ORDER ON RECONSIDERATION

Adopted: April 24, 2001 **Released: April 25, 2001**

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 6, 1999, Puerto Rico Telephone Company, Inc., (hereinafter, "PRTC") filed a petition for reconsideration or clarification of the *PRTC Waiver Order*,[1] in which the Accounting Safeguards Division (the Division) denied PRTC's petition for a waiver of the Commission's affiliate transactions rules, as codified in section 32.27 of the Commission's rules.[2] Specifically, PRTC seeks reconsideration of the decision to apply the affiliate transactions rules to the transfer of assets from its incumbent local exchange carrier (LEC) to a nonregulated affiliate.[3] In the alternative, PRTC seeks reconsideration or clarification of the finding that

[1] Puerto Rico Telephone Company, Inc., Petition for Waiver of Section 32.27 of the Commission's Rules, ASD File No. 98-93, *Memorandum Opinion and Order*, DA 99-2233 (rel. Nov. 5, 1999) (*PRTC Waiver Order*). PRTC is an incumbent LEC serving Puerto Rico. It serves more than 1.3 million access lines and provides local exchange, exchange access, intra-island, and Internet access services. On February 12, 1999, the Commission approved an application to transfer control of PRTC to GTE Holdings (Puerto Rico) LLC, a wholly-owned subsidiary of GTE International Telecommunications Incorporated. The transfer was consummated on March 2, 1999. *See* Applications of Puerto Rico Telephone Authority, Transferor and GTE Holdings (Puerto Rico) LLC, Transferee, For Consent to Transfer Control of Licenses and Authorization Held by Puerto Rico Telephone Company and Celulares Telefonica, Inc, *Memorandum Opinion and Order*, 14 FCC Rcd 3122 (1999). Subsequently, GTE merged with Bell Atlantic. *See* Application of GTE Corporation and Bell Atlantic Corporation, CC Docket No. 98-184, *Memorandum Opinion and Order*, FCC 00-221 (rel. June 16, 2000). The successor company is Verizon. Therefore, PRTC is now controlled by Verizon.

[2] 47 C.F.R. § 32.27.

[3] On May 3, 2000, the Division released a Public Notice seeking comment on PRTC's petition for reconsideration or clarification. "Puerto Rico Telephone Company, Inc. Files Petition for Reconsideration or Clarification of the Denial of its Waiver Request of 47 C.F.R. § 32.27," *Public Notice*, DA 00-988 (rel. May 3, 2000). One party, Telefonica Larga Distanca de Puerto Rico, filed comments in opposition to

PRTC's ratepayers bore the risk of loss associated with its cellular and paging activities. In this Order, we deny PRTC's petition.

II. BACKGROUND

2. In 1987, the Commission established its affiliate transactions rules to protect ratepayers of regulated telecommunications services from bearing the costs and risks associated with a carrier's nonregulated activities.[4] After Congress enacted the Telecommunications Act of 1996 (1996 Act)[5] the Commission revised its long-standing affiliate transactions rules in order to implement the numerous statutory provisions prohibiting cross-subsidization.[6] The affiliate transactions rules, as codified in section 32.27, set forth the procedures that all incumbent LECs other than average schedule companies must use in recording transactions between regulated and nonregulated affiliates.[7] The affiliate transactions rules discourage cross-subsidization by requiring carriers to reflect appropriate valuation techniques in recording the transfer of assets and the provision of services between regulated and nonregulated affiliates.

3. In October 1997, the Commission released the *CMRS Safeguards Order*, which modified certain requirements that applied to incumbent LECs offering in-region commercial mobile radio services (CMRS).[8] To protect the CMRS market from potential anti-competitive conduct, including improper cost allocation, the Commission established a separate affiliate requirement that applied to incumbent LECs offering in-region CMRS.[9] The Commission stressed the importance of applying the affiliate transactions rules to any transaction between the incumbent LEC and its CMRS affiliate in order to permit the Commission and competitors to

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PRTC's petition. Reply comments were filed by PRTC.

[4] *See* Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities, CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298 (1987), *modified on recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom., Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir 1990).

[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934.

[6] *See* Accounting Safeguards under the Telecommunications Act of 1996, CC Docket No. 96-150, *Report and Order*, 11 FCC Rcd 17539, 17586-87, ¶¶ 107-09 (1996) (*Accounting Safeguards Order*), *recon.* 14 FCC Rcd 11396 (1999), *Second Order on Reconsideration*, 15 FCC Rcd 1161 (2000).

[7] 47 C.F.R. § 32.27.

[8] Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, WT Docket No. 96-162, *Report and Order*, 12 FCC Rcd 15668 (1997) (*CMRS Safeguards Order*), *appeal pending sub nom., GTE of the Midwest, Inc. v. FCC & USA*, No. 98-3167 (6th Cir. filed Dec. 12, 1997), *First Order on Reconsideration and First Memorandum Opinion and Order*, 14 FCC Rcd 11343 (1999), *Second Order on Reconsideration*, 15 FCC Rcd 414 (2000).

[9] *CMRS Safeguards Order*, 12 FCC Rcd at 15692-93, ¶¶ 37-38.

detect and address potential misallocation of costs.[10] These separate affiliate requirements went into effect on February 11, 1998.[11]

4. On September 24, 1998, PRTC filed a petition for waiver of section 32.27 of the Commission's rules. Specifically, PRTC sought permission to record the transfer of cellular and paging assets from its incumbent LEC to a nonregulated affiliate at net book cost,[12] rather than at the higher of fair market value[13] or net book cost. On November 5, 1999, the Division denied PRTC's request for waiver, finding that PRTC had failed to show that special circumstances existed to warrant departure from section 32.27 of the Commission's rules.

III. DISCUSSION

5. PRTC presents three arguments in support of its petition for reconsideration. First, PRTC argues that the valuation of CMRS assets at net book cost will result in a substantially more accurate portrayal of operating results or financial conditions.[14] Second, PRTC argues that it is not appropriate to apply the affiliate transactions rules here, where the one-time transfer is itself a special circumstance caused by a change in Commission policies. Finally, PRTC contends that the waiver would be in the public interest because otherwise the ratepayers will be unjustly enriched if any gain were passed on to them in the form of rate reductions.[15] In support of its petition for clarification, PRTC argues that it did not include CMRS costs with its regulated costs for ratemaking purposes.[16]

6. The Commission may grant a waiver of its rules for good cause shown.[17] Waiver of the Commission's rules is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[18] In addition, a petition for

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[10] *Id*. at 15703, ¶ 58.

[11] These requirements sunset on January 1, 2002. 47 C.F.R. § 20.20(f).

[12] Net book cost is the original cost of an asset adjusted by the associated valuation reserves (*e.g*., accumulated depreciation, and deferred taxes).

[13] Fair market value is the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.

[14] Petition for Reconsideration at 3-4.

[15] *Id.* at 15-16.

[16] *Id.* at 3-10.

[17] 47 C.F.R. § 1.3.

[18] *See* United States Telephone Association Petition for Waiver of Part 32 of the Commission's Rules, *Order*, 13 FCC Rcd 214 (Com. Car. Bur. 1997) (*citing Northeast Cellular Tel. Co. v. FCC,* 897 F.2d 1164 (D.C.Cir. 1990) (*Northeast Cellular*); *WAIT Radio v. FCC,* 418 F.2d 1153 (D.C.Cir. 1969), *cert. denied* 409 U.S. 1027 (1972) (*WAIT Radio*).

waiver of the Commission's Part 32 rules must "expressly demonstrate" that: (1) existing peculiarities or unusual circumstances warrant a departure from a prescribed procedure or technique; (2) a specifically defined alternative will result in a substantially equivalent or more accurate portrayal of operating results or financial conditions, consistent with the principles of Part 32; and (3) the application of such alternative procedure will maintain uniformity in substantive results among telecommunications companies.[19] Finally, a waiver request must be consistent with the principles underlying the rule for which a waiver is requested.

7. A thorough review of PRTC's petition and attachments shows that PRTC failed to meet its burden of demonstrating that a waiver of our affiliate transactions rules is warranted. To support its claim that the valuation at net book cost would result in a substantially more accurate portrayal of operating results or financial conditions, PRTC asserts that CMRS costs were excluded from the regulated rate base through adjustments.[20] PRTC does not explain how the valuation at net book cost would result in a substantially more accurate portrayal of operating results or financial conditions or how the alleged exclusion of CMRS assets from the regulated rate base would support this contention. PRTC's mere assertions that CMRS assets were excluded from the regulated rate base and that valuation at net book cost would result in a substantially more accurate portrayal of operating results or financial conditions are not sufficient grounds to grant a waiver of our affiliate transactions rules.

8. To demonstrate special circumstances warranting a waiver, PRTC contends that the one-time transfer of its wireless assets is itself a special circumstance caused by a change in Commission policies. We disagree that this is a special circumstance. All incumbent LECs providing in-region CMRS are subject to the provisions of the Commission's *CMRS Safeguards Order*.[21] We note that Aliant Communications Co. was also required to comply with our affiliate transactions rules regarding a transfer of CMRS assets from its incumbent LEC to a nonregulated affiliate.[22] We also disagree with PRTC's assertion that the affiliate transactions rules were designed to govern complex, on-going transactions, but in the case of one-time asset transfers where the ratepayers have not borne any risk of loss, the application of these rules to ensure that ratepayers benefit from any gain is not appropriate.[23] Our affiliate transactions rules apply to both services and assets and are not limited to "complex, on-going transactions." Furthermore, in the *CMRS Safeguards Order*, the Commission emphasized the importance of applying the affiliate

[19] 47 C.F.R. § 32.18.

[20] Petition for Reconsideration at 3-10.

[21] Less stringent requirements were adopted for rural LECs. Specifically, rural LECs are exempt from the separate affiliate requirements; however, a competing carrier interconnected with the rural LEC may petition the Commission to remove the exemption. *See* 47 C.F.R. § 20.20(d)(1).

[22] *See* Aliant Communications Co. Petition for Waiver of Section 32.27 of the Commission's Rules, AAD File No. 96-131, *Order on Reconsideration,* 14 FCC Rcd 6231 (Com. Car. Bur. 1999) (*Aliant Reconsideration Order*).

[23] Petition for Reconsideration at 3.

transactions rules to any transaction between the incumbent LEC and its CMRS affiliate in order to permit the Commission and competitors to detect and address potential misallocation of costs.[24]

9. In addition, we conclude that PRTC has failed to demonstrate that a waiver would be in the public interest. PRTC argues that the waiver would be in the public interest because otherwise the ratepayers will be unjustly enriched if any gain were passed on to them in the form of rate reductions. PRTC has not shown whether there has been an appreciation in the value of the transferred assets or how the transfer would lead to a rate reduction. Mere assertions that the application of the rule will result in unjust enrichment are not sufficient grounds to find that a waiver is in the public interest.

10. PRTC argues that under *Democratic Central Committee,* the Commission cannot require that any gain associated with the transfer of CMRS assets be passed through to ratepayers that did not bear the risk of loss associated with those assets.[25] We do not agree. As we discussed in the *Aliant Reconsideration Order*, *Democratic Central Committee* did not involve valuation of property, but the distribution of gains that had already been realized from the transfer or sale of certain real estate parcels.[26] In addition, the *Democratic Central Committee* court was not concerned with the threat of an incumbent LEC cross-subsidizing its competitive operations with revenues or assets provided by its regulated activities, which is a primary concern the Commission's affiliate transactions rules seek to address.[27] In the *Accounting Safeguards Order*, the Commission concluded that, in light of the increased level of nonregulated activities, the affiliate transactions rules, and the valuation methodologies specified therein, provide an important check against the increased risk of cross-subsidization by deterring the transfer of assets below fair market value and the cross-subsidy resulting from such a below-cost transfer.[28] The different policy goals and factual situations lead us to conclude, as we did in *Aliant Reconsideration Order,* that PRTC's reliance on *Democratic Central Committee* to value the transfer of its wireless assets at net book value instead of estimated fair market value is misplaced.

11. Finally, PRTC argues, in support of its petition for clarification, that its ratepayers did not bear the risk of loss associated with PRTC's CMRS activities.[29] PRTC asserts

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[24] *CMRS Safeguards Order*, 12 FCC Rcd at 15703, ¶ 58.

[25] Petition for Reconsideration at 10 (*citing Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786 (D.C.Cir. 1973).

[26] *See Aliant Reconsideration Order*, 14 FCC Rcd at 6235-36, ¶ 10.

[27] *See Accounting Safeguards Order*, 11 FC Rcd at 17550-51, 17605-08, 17654-55, ¶¶ 24-28, 145-48, 257; *CMRS Safeguards Order*, 12 FCC Rcd at 15688-89, 15691, 15693, ¶¶ 27-28, 33, 38; *see also* Implementation of Section 254(k) of the Communications Act of 1934, as Amended, *Order*, 12 FCC Rcd 6415 (1997).

[28] *See Accounting Safeguards Order*, 11 FCC Rcd at 17750-51, 17605-08, 17654-55, ¶¶ 24-28, 145-48, 257.

[29] Petition for Reconsideration at 3-10.

that in every year since PRTC and Puerto Rico Communications Corporation (PRCC)[30] commenced cellular and paging operations, the CMRS assets have been excluded from the regulated ratebase and that this is demonstrated in its ARMIS filings. In a subsequent meeting, PRTC provided additional exhibits to support their argument. We analyzed PRTC's supporting documentation and were able to determine that the cellular and paging assets were removed from the interstate ratebase. However, PRTC's documentation does not persuade us that these assets were removed from the intrastate ratebase. Additionally, we are not persuaded that the overhead costs and expenses associated with the provision of cellular service were excluded from the ratebase. Therefore, we conclude that PRTC has failed to substantiate its claim and PRTC's petition for clarification must be denied.

IV. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201-205, and 218-220 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 218-220, and sections 0.91, 0.291, 1.3, 1.106, 32.18 and 32.27 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, 1.106, 32.18 and 32.27, that the Petition for Reconsideration or Clarification filed by Puerto Rico Telephone Company is HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carol E. Mattey
Deputy Chief, Common Carrier Bureau

[30] PRCC, which was acquired by PRTC in 1993, provided paging services in central Puerto Rico beginning in 1985. *See* Petition for Reconsideration at 4.