

**GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
TELECOMMUNICATIONS BUREAU**

IN RE:

CASE NO. JRT-2000-0A-0001

**TO ALL COMPANIES OFFERING
TELECOMMUNICATIONS SERVICE IN
PUERTO RICO, INCLUDING THOSE
OFFERING COMMERCIAL MOBILE
RADIO SERVICE USING RESELLERS**

**MATTER: SERVICES RESELLERS
REPORT**

**CEASE THE RESELL OF SERVICES TO
COMPANIES NOT CERTIFIED AND/OR
REGISTERED**

MOTION FOR RECONSIDERATION OF CTIA

TO THE TELECOMMUNICATIONS REGULATORY BUREAU:

COMES NOW, CTIA, through its undersigned counsel, and respectfully states and prays:

I. INTRODUCTION AND SUMMARY

CTIA¹ respectfully submits this Motion for Reconsideration of the two Resolutions and Orders issued by this Bureau on August 24, 2021.² The first Resolution and Order (the “Reseller Registration Order”) requires all telecommunications companies operating in Puerto Rico, including commercial mobile radio service (“CMRS”) providers, to (a) “[m]ake sure” that all companies that resell their services are duly certified or registered with the Bureau, and

¹ CTIA[®] (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st -century connected life. The association’s members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry’s voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry’s leading wireless tradeshow. CTIA was founded in 1984.

² This Petition is timely because neither of the Orders contained the notice required by UAPA Section 3.15, and Bureau General Practice and Procedure Regulation 7848 (July 9, 2009) (advising parties of their right to seek reconsideration, which starts the clock on the 20-day reconsideration period). Because they did not contain the required notice, neither of the Orders has any binding effect yet.

(b) include the resellers' certification or registration numbers in the quarterly Reseller Reports required to be filed with the Bureau. It also prohibits, under penalty of administrative sanctions, all telecommunications carriers operating in Puerto Rico from selling their services to companies that resell the services without providing a certification or registry number. The second Resolution and Order (the "Cease and Desist Order") prohibits telecommunications carriers operating in Puerto Rico from selling services to a list of 22 CMRS resellers that are not certified or registered with the Bureau.

As detailed below, the Reseller Registration Order and the Cease and Desist Order (collectively, the "Orders") must be set aside. First, the Orders were adopted without notice, opportunity to comment, and explanation of the Board's reasons for adopting the Orders with reference to the points made in public comments, as required by the Puerto Rico Uniform Administrative Procedure Act ("UAPA," or "LPAU" for its Spanish acronym),³ relevant Puerto Rico Supreme Court precedent, and the Puerto Rico Telecommunications Act.⁴

Second, the requirements of the Orders are contrary to the Bureau's Regulation for the Issuance of Certifications and Franchises, Regulation No. 5631 of May 16, 1997 ("Regulation 5631"). Specifically, the Orders depend on the incorrect premise that the registry of companies created by Rule 5.7 of Regulation 5631 is mandatory. To the contrary, Rule 5.7 makes clear that the Registry is strictly voluntary for CMRS carriers—and this inconsistency undercuts the legal theory justifying the new requirements in the Orders.

Finally, the Orders are unnecessary to achieve the Bureau's goals because the Bureau's 1998 Administrative Order already requires facilities-based telecommunications carriers to

³ 3 P.R. LAWS ANN. § 2101 *et seq.*

⁴ 27 P.R. LAWS. ANN. § 267f(a)(1).

identify all resellers to which they sell their services in Puerto Rico, giving the Bureau all the information it needs to determine whether the resellers have complied with other Bureau regulations. If the Board no longer believes that its 1998 Administrative Order provides the necessary information for its enforcement activities, it should open a notice of inquiry or similar proceeding to identify a proper approach to obtaining it.

II. DISCUSSION

A. *THE ORDERS WERE ADOPTED WITHOUT REQUIRED NOTICE, COMMENT, OR EXPLANATION OF REASONS FOR THE ORDER WITH REFERENCE TO THE COMMENTS, AND NEVER BECAME FINAL*

As a threshold matter, the Orders must be set aside because they were adopted without the notice, comment, and explanation with reference to the record, as required by the UAPA and the Puerto Rico Telecommunications Act.⁵ As the Supreme Court of Puerto Rico has explained, the UAPA was enacted because, prior to its passage, Puerto Rico “lack[ed] a body of rules to guide and provide uniformity to [agency] decision-making process such as those that exist at federal and state levels”— and the “lack of such uniformity produce[d] instability and confusion[.]”⁶ As a result, the UAPA mandates notice “[w]henver [an] agency proposes to adopt, amend, or repeal a rule or regulation,⁷ and also requires the opportunity for public

⁵ 3 P.R. LAWS ANN. § 2101 *et seq.*

⁶ *Hernandez O’Farril v. Golden Tower Dev. Corp.*, 125 D.P.R. 744 (P.R. 1990) (official translation; internal citations, quotations omitted).

⁷ 3 P.R. LAWS ANN. § 2121.

comment.⁸ These provisions of the UAPA generally apply to the Bureau in its regulation of communications companies.⁹

Consistent with these statutory requirements, the Supreme Court of Puerto Rico has made clear that, for an agency to adopt regulations, the public must be informed of the regulation to be adopted; there must be an opportunity for public participation; and the regulation must be officially published to take effect.¹⁰

The Puerto Rico Telecommunications Act of 1996 requires the Bureau to comply with the UAPA,¹¹ and additionally requires the Bureau to (1) serve thru certified mail a copy of any proposed regulation on all certificated telecommunications companies in Puerto Rico; (2) provide a comment period on any such proposal of at minimum 30 days;¹² and (3) prior to adopting a regulation, issue a resolution explaining the reasons for the action specifically addressing points made in the public comments.¹³ In adopting the new requirements in the Orders, however, the Bureau failed to meet any of these requirements. The Bureau provided no notice of its intent to impose the new requirements and it sought no public comment on the proposed requirements. Because the Bureau failed to take public comment, it was unable to address the points made by parties in its order adopting the new rules. Indeed, the lack of notice

⁸ *Id.* § 2122.

⁹ 27 P.R. LAWS ANN. §§ 267f(a), 271.

¹⁰ *See, e.g., Municipio de San Juan v. Junta de Calidad Ambiental*, 152 D.P.R. 673 (P.R. 2000); *see also Sierra Club et al. v. Junta de Planificación*, 203 D.P.R. ____ (P.R. 2019); *Asociación de Farmacias de la Comunidad v. Dept. de la Salud*, 156 D.P.R. 105 (P.R. 2002).

¹¹ 27 P.R. LAWS ANN. § 267f(a).

¹² *Id.* § 267f(a)(1).

¹³ *Id.* § 267f(a)(2).

and opportunity for stakeholders to provide input contributed to the legal and substantive flaws in the Orders, as discussed in the subsequent sections of this motion.

The Bureau's failure to give the required mailed notice to parties is particularly problematic given that the Orders pertain directly to the registry of companies that have received certifications pursuant to section 269a of the Communications Act, because section 267f(a) specifically requires the provision of notice to all companies that have received such certification.¹⁴

Given that the Orders were adopted without the notice and comment required by the UAPA, the Puerto Rico Supreme Court, and the Telecommunications Act, they must be set aside.

B. THE ORDERS ARE INCONSISTENT WITH RULE 5.7 OF REGULATION 5631, AND THIS NULLIFIES THE LEGAL JUSTIFICATION FOR THEIR REQUIREMENTS

The Orders expressly prohibit all telecommunications companies from selling services “for resale” to companies that are not certified or registered with the Bureau—and the Reseller Order requires the same companies to certify that their resellers are certified or registered with the Bureau, regardless of CMRS carrier status. These requirements are inconsistent with the Board's articulated position, codified in Regulation 5631, that the registry created by Rule 5.7 is voluntary for CMRS carriers. The voluntary nature of the certification requirement is, in turn, consistent with the recognition in section 269a of the Puerto Rico Communications Act that the Bureau's authority to compel licensing for entry of CMRS carriers is limited by section 332 of the Federal Communications Act.¹⁵

¹⁴ *Id.* § 267f(a)(1).

¹⁵ *Id.* § 269a(a).

Rule 5.7 expressly states that “CMRS carriers are not required to obtain a certification” to provide telecommunication services in Puerto Rico, but those providers that wish for the Bureau to have their contact information may enroll in a “voluntary” registry. Neither of the Orders mentions this exemption; instead, both Orders’ discussions of Regulation 5631 focus on Rule 5.1 (which states the broad principle of registration).

This inconsistency undermines the entire legal theory upon which the Orders rest. The Orders justify their conclusion that telecommunications carriers in Puerto Rico may not sell to resellers that are not registered themselves by contending that unregistered resellers are in violation of the law. Specifically, the Reseller Registration Order states that

Certified telecommunications companies have the duty to comply with federal and local laws and regulations and with every applicable Order issued by the PRTB. As part of their obligations, they must not resell services to a company that is not certified or registered with the PRTB to offer services in Puerto Rico. The PRTB has the duty to ensure that the certified telecommunications companies comply with these provisions under penalty of sanctions.

The Cease & Desist Order uses similar language in justifying its conclusion that communications providers may not sell services for resale to the 22 enumerated unregistered companies.

In reality, certified telecommunications companies selling service to unregistered CMRS resellers are *not* in violation of any federal or local law, regulation, or order because, under Regulation 5631, CMRS resellers are not obligated to register with the Bureau in order to operate in Puerto Rico. As a result, there is currently no legal basis for the Orders’ prohibition on selling to unregistered CMRS resellers, or its threat of sanctions for telecommunications providers that do so. Because the Orders are inconsistent with an existing Bureau regulation, and as a result lack any valid legal premise, they must be set aside.

In addition, as noted above, because the Orders failed to include the notice to parties regarding rights to seek reconsideration as required by UAPA Section 3.15 and Bureau General Practice and Procedure Regulation 7848 (July 9, 2009), they are not yet binding on parties, and cannot lawfully have any final effect. Any effort by the Bureau to salvage this irreversible procedural flaw must *per se* include a notice-and-comment opportunity.

C. THE ORDERS ARE NOT THE PROPER METHOD TO ACHIEVE THE BUREAU'S GOALS

Finally, while the Orders do not explicitly discuss in detail the goals they seek to achieve, CTIA does not dispute that requiring registration for companies reselling service could constitute a legitimate goal.¹⁶ Such a registration process might assist the Bureau in a variety of ways—including by ensuring the accurate calculation and collection of surcharges for universal service and 911. The Bureau's 1998 Administrative Order already requires facilities-based telecommunications carriers to identify all resellers to which they sell their services, however, and these reports provide the Bureau with all information it needs to investigate whether the resellers have complied with other Bureau regulations and requirements. If the Bureau finds that a reseller identified in a Reseller Report is not in compliance with its requirements, the Bureau has the authority to initiate enforcement actions against resellers.

Because it appears that the Board does not believe that the Administrative Order provides the information necessary for the Board to perform its duties, it should open a notice of inquiry or similar proceeding to identify practical, lawful ways to obtain it. By identifying the Bureau's

¹⁶ CTIA reminds the Bureau that 47 USC § 332(c)(3)(A) bars state entry regulation of CMRS providers. An administrative registration requirement such as currently codified in Regulation 5631 does not appear to be preempted by Section 332, and that would still appear to be the case if registration were made mandatory. The Bureau may not, however, impose a discretionary registration requirement and adjudicate entry for applicants.

needs and exploring how to achieve them in a public proceeding, the Bureau can achieve its goals while ensuring that any resulting regulations are lawful and practicable for providers to implement.

III. CONCLUSION

For the reasons described above, the Reseller Registration Order and the Cease and Desist Order are contrary to law and must be set aside. Once this necessary action has been taken, CTIA looks forward to working with the Bureau in future proceedings, consistent with proper administrative procedure, to assist the Bureau with the appropriate performance of its lawful functions.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 2nd day of November, 2021.

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