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

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In re Application of	)	CC Docket No. 94-11
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	File No. 10209-CL-P-715-B-88
	)	
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B, in Market 715, Wisconsin 8 (Vernon), Rural Service Area	)	

MEMORANDUM OPINION AND ORDER AND HEARING DESIGNATION ORDER

Adopted: February 1, 1994 Released: February 1, 1994

By the Commission:

1. The Commission has before it two Applications for Review of the Common Carrier Bureau's (Bureau) decision in Telephone and Data Systems, Inc., 6 FCC Rcd 270 (Com. Car. Bur. 1991). These Applications for Review were filed on February 15, 1991, by a group of applicants which comprised a partial settlement group in the Wisconsin 8 (Vernon) Rural Service Area (hereinafter referred to collectively as the settling partners),[1] and by Telephone and Data Systems, Inc. (TDS). For the reasons stated below, we grant in part the Application for Review filed by TDS and deny the Application for Review filed by the settling partners. In this Order, we additionally designate for hearing character issues concerning a TDS subsidiary's conduct before the Commission and whether this calls in question TDS's qualifications as a Commission licensee.[2] By ensuring that our licensees are fully qualified, our action will promote full and fair competition to the benefit of the Nation's economy.

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[1] The settling partners are: Century Cellunet, Inc. (Century), Contel Cellular, Inc., Conn Valley Farmers Telephone Company, Inc., Farmers Telephone Company, Hillsboro Telephone Company (Hillsboro), LaValle Telephone Cooperative (LaValle), Monroe County Telephone Company, Mount Horeb Telephone Company, North-West Cellular, Inc., Richland-Grant Telephone Cooperative, Inc., Vernon Telephone Cooperative, and Viroqua Telephone Company.

[2] See La Star Cellular Telephone Company, 7 FCC Rcd 3762, at n.3 (1992).

I. BACKGROUND

2. TDS, Ameritech Mobile Communications, Inc. (Ameritech), GTE Mobilenet Incorporated (GTE), and all of the settling partners (excluding Hillsboro and LaValle) were applicants for the Block B (wireline) cellular authorization for the Wisconsin 8 (Vernon) Rural Service Area (RSA). Prior to the lottery, the ten settling partners who were original applicants in this market entered into a post-filing, partial settlement agreement (Wisconsin 8 Partnership). Also joining in the agreement were four wireline carriers which provide landline telephone service in the market but did not file applications -- Hillsboro, LaValle, Central Western Communications, Inc., and UTELCO, Inc. (UTELCO).[3] The original applicants in the market all agreed to substitute the Wisconsin 8 Partnership for their application should they be selected in the lottery. TDS, Ameritech, and GTE were not parties to the Wisconsin 8 Partnership. TDS was announced as the tentative selectee of the lottery.[4]

3. Century filed a petition to deny TDS's application, alleging that because TDS owns 49 percent of UTELCO and UTELCO was a party to the settlement agreement, TDS held an interest in more than one application for the market in violation of Section 22.921 of the Commission's Rules. Century further argued that TDS should be dismissed for failing to report to the Commission, pursuant to the requirements of Section 1.65 of the Commission's Rules, that UTELCO had become a party to the settlement agreement.

4. In Telephone and Data Systems, Inc., 4 FCC Rcd 8021 (Mobile Serv. Div. 1989), the Mobile Services Division (MSD) denied Century's petition, finding no violation of our cross-ownership rules. The MSD stated that UTELCO was not an applicant in the Wisconsin 8 lottery and the settlement agreement gave UTELCO no interest until a winning application was substituted with the Wisconsin 8 Partnership application. The MSD also indicated that interpreting Section 22.921(b) as applying to the situation here would be inconsistent with the Commission's Rules and policies favoring settlements among wireline applicants. Therefore, the MSD concluded, TDS held no interest in any other application for that market under Section 22.921(b).

5. Century and the other settling partners then filed a petition for reconsideration raising the same contentions.

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[3] Central Western and UTELCO were parties to the pre-lottery settlement agreement among the settling partners. However, neither is a participant in the settling partners' Application for Review.

[4] See Public Notice, Report No. CL-89-174 (released June 9, 1989).

Although the Bureau found that a violation of Section 22.921 occurred when UTELCO entered into the partial settlement agreement, it denied reconsideration in Telephone and Data Systems, Inc., 6 FCC Rcd 270 (Com. Car. Bur. 1991). The Bureau held that when UTELCO entered into the partial settlement agreement, a violation of the cross-ownership rules occurred because UTELCO held an interest in the settlement agreement and TDS held an interest in UTELCO. However, the Bureau decided not to dismiss TDS's application because 1) TDS was in compliance with the Commission's Rules when it filed its application; 2) if TDS's application were dismissed, all of the settling partners' applications would also have to be dismissed because they suffer from the same rule violation; and 3) TDS did nothing to unfairly skew the lottery in its favor because the settling partners could have prevented UTELCO's participation in the Wisconsin 8 Partnership. Additionally, the Bureau agreed with the MSD that TDS did not violate Section 1.65 because it was not a controlling party in UTELCO and UTELCO was not an applicant in the market. The settling partners now seek review of this decision.[5]

6. Additionally, on August 18, 1992, the settling partners filed a Supplement to Application for Review (Supplement) which argues that TDS lacks the character qualifications to be a Commission licensee because of alleged misrepresentation and lack of candor by United States Cellular Corporation (USCC), a TDS subsidiary, in the La Star Cellular Telephone Company proceeding. See La Star Cellular Telephone Company, 6 FCC Rcd 6860 (I.D. 1991) (La Star I.D.), aff'd, 7 FCC Rcd 3762 (1992) (La Star Reconsideration Order), appeal pending sub nom., Telephone and Data Systems, Inc. v. FCC, Case No. 92-1273 (D.C. Cir.).

7. The La Star proceeding involved La Star Cellular Telephone Company (La Star) and New Orleans CGSA, Inc. (NOCGSA) which filed mutually exclusive applications to provide Block B cellular service to St. Tammany Parish in the New Orleans, Louisiana, Metropolitan Statistical Area (MSA). La Star is a joint venture comprised of SJI Cellular, Inc. (SJI) and Star Communications Co. (Star); SJI owns 51 percent interest and Star owns 49 percent interest in La Star. All of the stock of Star is owned by USCC.[6] La Star's and NOCGSA's applications were designated for hearing. Threshold issues were designated against La Star to determine whether SJI,

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[5] Although the settling partners do not continue to directly argue that TDS violated Section 1.65, we affirm the Bureau on its finding that no Section 1.65 violation occurred.

[6] At the time La Star initially applied to serve St. Tammany Parish, Star was controlled by Maxcell Telecom Plus (Maxcell). Maxcell subsequently sold its interest in Star to USCC in August 1987.

the eligible carrier,[7] maintained control over La Star.[8] It was determined at the hearing that USCC was in control of La Star and its application was therefore dismissed as ineligible.[9] This decision was affirmed by the Commission.[10]

8. During the pendency of the La Star proceeding, NOCGSA attempted to add character issues against La Star. The presiding Administrative Law Judge (ALJ) declined to add such issues and made no findings as to character.[11] NOCGSA filed exceptions to the ALJ's decision on this matter.[12] In response, the Commission found it did not need to reach the character issues to find La Star ineligible for the proposed authorization. The Commission did, however, recognize the possibility that the character issues could be raised in future proceedings by stating that

> [q]uestions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance.

La Star Reconsideration Order, 7 FCC Rcd at 3767, n.3 (footnote 3).[13] The settling partners request in their Supplement that the

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[7] SJI has a wireline presence in the New Orleans MSA; USCC does not. Therefore, pursuant to Section 22.902(b) of the Rules, only SJI was eligible to apply for a wireline license in the market. See Montgomery Independent Cellular Telephone Company, Inc., 4 FCC Rcd 2323 (1989) (applicant for a Block B cellular authorization must be either a provider of wireline service in the MSA or controlled by such a provider).

[8] See La Star Cellular Telephone Company, 5 FCC Rcd 3286 (1990).

[9] See La Star I.D., supra.

[10] See La Star Reconsideration Order, supra.

[11] See Memorandum Opinion and Order, FCC 90M-3036, released Sept. 26, 1990.

[12] NOCGSA also argued extensively in its proposed findings and conclusions that USCC and SJI lacked candor and misrepresented facts despite there being no designated character issue.

[13] On February 2, 1993, USCC filed a Petition to Delete or Nullify the Effect of Footnote Three. On February 18, 1993, Louisiana CGSA, Inc., a sister company of NOCGSA, filed a Motion for the Return of USCC's Petition to Delete or Nullify the Effect of Footnote Three; Rochester Telephone Mobile Communications filed

footnote 3 character issues be resolved against USCC and its parent company TDS in the instant proceeding. To bolster their argument that TDS lacks the character necessary to be a Commission licensee, the settling partners reference relevant sections of NOCGSA's exceptions from the La Star proceeding.

II. DISCUSSION

A. Cross-Interest

9. The settling partners argue that while the Bureau was correct in finding a violation of Section 22.921(b) of the Rules, the Bureau was in error not to dismiss TDS for the violation. In its Contingent Application for Review, TDS, on the other hand, argues that no violation of the Rules occurred because UTELCO was only included as a member of a settlement group and that the Commission's policies favoring settlements have never been held to prohibit a cross interest created by the settlement agreement alone.

10. Section 22.921(b) of the Commission's Rules provides, in pertinent part, that:

> No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered.

The question before us is one of first impression -- does a wireline applicant's contingent interest in another application, created through a partial settlement agreement, violate Section 22.921(b)? We conclude that it does not and, accordingly, reverse the Bureau's decision to the contrary.

11. Section 22.921(b) must be read in conjunction with Section 22.33(b)(2), which was adopted at the same time.[14] Section

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a Motion to Strike Petition of USCC to Delete or Nullify the Effect of Footnote Three; Potosi Company filed an Opposition to Petition; and counsel to the settling partners filed a letter opposing USCC's petition. Several additional responsive pleadings have also been filed by USCC and the above parties. Because we are acting on footnote 3 herein, we will consider these pleadings in the instant proceeding. Louisiana CGSA, Rochester Telephone, and Potosi Company all have pending disputes against either TDS or USCC and have raised footnote 3 issues in these other proceedings.

[14] See Amendment of the Commission's Rules for Rural Cellular Service, 4 FCC Rcd 2440 (1988) (subsequent history omitted).

22.33(b)(2) provides in relevant part:

> [I]n Rural Service Areas . . . cumulative lottery chances . . . will be awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only . . . . Partial settlements among non-wireline applicants for Rural Service Areas are prohibited.[15]

This rule reflects the Commission's determination that "the prohibition against partial settlements should not apply to wireline applicants."[16] In this regard, the Commission indicated that it did "not anticipate any problem in their [wirelines] entering into partial settlements . . . ."[17] There is no indication in the Order adopting Sections 22.33(b)(2) and 22.921(b), or in any other Commission order, that we intended the Section 22.921(b) cross-ownership provision to restrict the right of wireline applicants to enter into partial settlement agreements. This is not surprising, given the Commission's long history of encouraging settlements among mutually exclusive wireline applicants.[18]

12. In light of this background, we interpret Section 22.921(b) as not covering contingent interests created by settlement agreements among mutually exclusive wireline applicants. Likewise, Section 22.921(b) does not cover contingent interests created by settlement agreements among wireline applicants and non-applicants. To reach any other conclusion would undermine our goal of encouraging wireline settlements, which speed the provision of service to the public without creating significant risk of encouraging speculation. Therefore, the Bureau's conclusion that

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[15] See 53 FR 18094 (May 20, 1988). We note that the words "in Rural Service Areas" do not appear in the text of Section 22.33(b)(2) in the Code of Federal Regulations (CFR) due to an inadvertent omission on the part of the Office of the Federal Register. The rule, however, was correctly published in the Federal Register. The error in the CFR will be rectified in a separate order.

[16] Amendment of the Commission's Rules for Rural Cellular Service, 4 FCC Rcd at 2442.

[17] Id.

[18] See Cellular Communications Systems, 86 FCC 2d 469, 490-91 (1981), recon., 89 FCC 2d 58, 76 (1982); Cellular Mobile Systems of Indiana, Inc., 93 FCC 2d 26, 29 (1983); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683, 691 (1983); Cellular Lottery Order, 56 Rad. Reg. 2d (P&F) 8, 24 (1984); Cellular Radio Lotteries, 101 FCC 2d 577, 588 (1985).

TDS's application should not be dismissed is affirmed, albeit on different grounds. We believe our decision will preserve our policy of favoring settlement agreements and will not lead to speculative applications. Accordingly, TDS's Application for Review is granted in part and the settling partners' Application for Review is denied with respect to this issue.

B. Character

13. Both La Star and USCC[19] argued extensively in their respective direct case exhibits that SJI was the controlling party of La Star and that USCC performed little more than ministerial tasks. La Star submitted as a part of its direct case exhibits written testimony from four USCC personnel -- USCC president, H. Donald Nelson; USCC vice president of Engineering and Operations, Richard Goehring; USCC treasurer and vice president of Finance, Kenneth Meyers; and USCC accounting manager Mark Krohse. USCC submitted a written statement of H. Donald Nelson as its direct case exhibit. Both USCC and La Star represented that SJI controlled La Star in their respective Proposed Findings of Fact and Conclusions of Law filed at the conclusion of the hearing.

14. The presiding ALJ in the La Star proceeding found that "the evidence of record overwhelmingly establishes that SJI, the eligible carrier, has never been in control of La Star."[20] The ALJ stated further that during the USCC ownership period, "USCC was the dominant partner. There is no evidence of SJI direction and oversight over the extensive La Star activities which took place."[21] The ALJ concluded that:

> [c]ontrary to La Star's contention, this was not a situation in which the ineligible partner performed only "ministerial" tasks and the eligible partner did everything else. In this case, <u>only</u> the ineligible partner had "active input" and participated in the prosecution of La Star's application.[22]

15. We affirmed the ALJ's conclusions, finding that the record "amply demonstrate[d] that SJI does not control La Star

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[19] USCC was permitted to intervene in the La Star proceeding as a party and was represented by its own counsel. <u>See</u> <u>La Star Cellular Telephone Company</u>, 6 FCC Rcd 1245 (1991).

[20] <u>La Star I.D.</u>, 6 FCC Rcd at 6885.

[21] <u>Id.</u> at 6886.

[22] <u>Id.</u> (emphasis in original).

. . . ."[23] We further concluded that "to all appearances, USCC controlled the applicant."[24] It is from this factual background that we examine the allegations that USCC misrepresented facts and lacked candor in the La Star proceeding.

16. The Commission has consistently required its applicants and licensees to be fully forthright and candid in their dealings with the Commission. As the Commission's Review Board stated in Silver Star Communications-Albany, Inc.,[25] there is a "special duty imposed upon FCC licensees and applicants to go beyond merely avoiding an affirmative misrepresentation, but to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited."[26] The United States Court of Appeals has recognized this special duty imposed upon applicants to be fully candid. As the Court stated in RKO General, Inc. v. FCC:

> the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known. (Citations omitted.)[27]

Accordingly, we will examine the testimony by the USCC witnesses against this standard.

17. While NOCGSA raises several instances in which it asserts USCC witnesses either lacked candor or misrepresented facts, we are examining in detail here only the allegations concerning Nelson's testimony about the La Star Management Committee. Prior to USCC's involvement in the New Orleans application, SJI and Maxcell entered into a Joint Venture Agreement.[28] When USCC assumed Maxcell's interest in La Star, it took Maxcell's position under the Joint Venture Agreement. The Joint Venture Agreement outlined the duties

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[23] La Star Reconsideration Order, 7 FCC Rcd at 3764.

[24] Id. at 3766.

[25] 3 FCC Rcd 6342 (Rev. Bd. 1988), aff'd in part, rev'd in part on other grounds, 6 FCC Rcd 6905 (1991)(Chairman Sikes dissenting). See also 47 C.F.R. § 1.17.

[26] Id. at 6349.

[27] RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

[28] A copy of the Joint Venture Agreement is found at La Star Ex. 12, Att. B.

and responsibilities of each party to the Agreement. Among other things, the Agreement called for the formation of a Management Committee of five members.[29] Three members of the La Star Management Committee were to be appointed by SJI and the remaining two appointed by USCC.

18. USCC president and member of the La Star Management Committee, Donald Nelson, in his written statement submitted as a part of La Star's direct case, swore that the Management Committee controlled the affairs of La Star. Specifically, Nelson testified: "Since my appointment to the Management Committee in August, 1987, I have always acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular. I am not aware of a single instance where that has not been the case."[30] Nelson further stated:

> I conferred with the SJI Cellular members of the Management Committee only when a particular issue facing the venture required a joint effort to resolve. For example, when La Star was engaged in settlement negotiations with New Orleans CGSA, Inc. (NOCGSA), La Star needed to develop a settlement proposal to present to NOCGSA. Because of the wide variety of possible settlement options and the different perspectives of the two venturers, a telephone conference was held. . . .
>
> All participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee . . . .[31]

19. A reading of Nelson's written testimony gives the appearance that the La Star Management Committee, which was under SJI's direction, was controlling the actions of La Star. Nelson's oral testimony, however, paints a different picture. For instance, under cross examination Nelson admitted that the Management Committee never formally voted on any matter and indeed never held telephone conferences:

> MR. TOLLIN:[32] Was there ever an official vote taken, that you could remember, of the Management Committee?

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[29] Article IV of the Joint Venture Agreement deals with the formation of the Management Committee. See id. at pp.7-10.

[30] See La Star Ex. 15, p.2.

[31] See id., at pp.3-4.

[32] L. Andrew Tollin was counsel representing NOCGSA in the La Star proceeding.

MR. NELSON: By an "official vote," do you mean --

MR. TOLLIN: A vote. Do you ever remember a conference call in which all Management Committee members were present or a personal meeting in which there was a vote taken?

MR. NELSON: No.[33]

20. Furthermore, Nelson's testimony under cross examination conflicts with the statement in the written exhibit that the Management Committee directed Nelson's actions in La Star. The following exchange is illustrative:

MR. TOLLIN: Well, I'd like to know the basis for your statement that you were directed by the Management Committee, for instance. Why don't you give me an example of that?

MR. NELSON: I would get a call from Mr. Belendiuk[34] who would indicate that we were being requested to provide such information.

JUDGE CHACHKIN: Did you ever receive a specific request from SJI Cellular or the Management Committee?

MR. NELSON: I don't recall a specific.[35]

Moreover, the record shows that after USCC acquired its interest in La Star, the Management Committee only met once shortly after USCC's acquisition of Maxcell's interest.[36] The Management Committee never met as a whole in person or over the telephone again thereafter.[37]

21. Additionally, during recross examination, Nelson's testimony showed an even more limited role of the La Star Management Committee:

MR. TOLLIN: You said there was really no need for any Management Committee telephone conferences or actual

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33 Tr. at 1443 (footnote added).

34 Arthur V. Belendiuk was counsel representing La Star in the La Star proceeding.

35 Tr. at 1448-49 (footnote added).

36 La Star Ex. 12, p. 7.

37 La Star I.D., 6 FCC Rcd at 6866.

meetings. Isn't it true during the period you owned the stock of STAR -- when I'm speaking of "owned" -- "you owned," I'm speaking of U.S. Cellular -- that there were decisions that had to be made about the contents of the October filing, decisions that had to be made with regard to the contents of your interim application, decisions that had to be made with regard to the appeal of the NOCGSA interim operating authority that was granted to it by the Commission after the La Star application was reinstated, and wasn't there really a need to have a full-blown Management Committee telephone conference call when you amended the agreement?

MR. MILLER:[38] Your Honor, I counted at least five questions there, and I don't know how the witness could possibly answer them.

JUDGE CHACHKIN: Well, we can go one by one.

MR. TOLLIN: Let's go one by one. Let's start with the October filing.

Were there not decisions that had to be made as to the contents of those filings and the direction that you were going to go in?

MR. NELSON: No.

MR. TOLLIN: No decisions? And how about any decisions with regard to the interim filing?

MR. NELSON: No.

MR. TOLLIN: No decisions with regard to whether to appeal the Commission's grant of interim operating authority to NOCGSA during the course of this proceeding?

MR. NELSON: No.

MR. TOLLIN: And no decision needed to be made as to amending the agreement?

MR. NELSON: No. My counsel had worked on that.

MR. TOLLIN: No decision needed to be made as to what you were going to do with the expenses that you had been incurring?

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[38] Herbert D. Miller, Jr., was counsel representing USCC in the La Star proceeding.

MR. NELSON: No.

MR. TOLLIN: And how the expenses were going to be dealt with?

MR. NELSON: No.[39]

22. USCC denies that Nelson's testimony misrepresented facts or lacked candor. Specifically, USCC disputes that Nelson's written testimony implies that Nelson was controlled by the Management Committee. Instead, claims USCC, Nelson, in his written statement, characterized his involvement in the La Star Management Committee as only agreeing to what La Star counsel, Arthur Belendiuk, had told him that SJI had proposed to do.[40] In this regard Nelson swore in his written statement:

> My usual contact regarding La Star matters was La Star's counsel, Mr. Belendiuk. Generally, I would receive a telephone call from Mr. Belendiuk and he would advise me of a need for La Star to take some action. Most of the calls involved a proposed course of action to be taken in the La Star litigation, e.g., the need to file an appeal. I understood that he had first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular.[41]

Nelson stated further that:

> In these circumstances, I did not believe that my approval was necessary, since three members of the Management Committee had already given their approval. I was satisfied being kept informed as to how the prosecution of La Star's application was proceeding, and never objected to any such course of action.[42]

USCC states that because Nelson would get his "marching orders" from La Star's counsel and not the Management Committee itself, there were no misrepresentations in Nelson's testimony.

23. However, Nelson became somewhat evasive when questioned about the basis of his statement that his vote was unnecessary because the SJI members had already approved of an action. The ALJ

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[39] Tr. at 1473-75 (footnote added).

[40] See USCC Reply to the Proposed Findings and Conclusions of NOCGSA, pp. 27-30.

[41] La Star Ex. 15, p.3.

[42] See id., at p.3.

questioned Nelson as follows:

JUDGE CHACHKIN: What do you mean there, in the same paragraph -- now you've stated that the basis of your understanding is your belief that Mr. Belendiuk had spoken to someone from SJI.

Then, you make the statement in the same paragraph, "I did not believe that my approval was necessary, since three members of the Management Committee had already given their approval."

Now, what's the basis for your belief that three members of the Management Committee had given their approval to this course of action, if your only discussion was with Mr. Belendiuk?

MR. NELSON: In our discussion our words would say, "Well, I have talked with the people in Louisiana," and they have three votes, we had two votes, it was their decision.

JUDGE CHACHKIN: Now, wait a minute. Did you -- why didn't you just convene in a formal or an informal meeting of the Management Committee and take up the matter, isn't that what the Management Committee was for?

MR. NELSON: As I've stated, they had three votes, we had two votes --

JUDGE CHACHKIN: There was no voting taken in this matter. You said all that happened was that you -- that Mr. Belendiuk indicated to you that he had spoken to someone -- someone, I say, at SJI Cellular.

Then, the next sentence you say, "Three members of the Management Committee." Now, what's the basis for your statement that three members of the Management Committee had given their approval?

There was no meeting of the Management Committee, informal or formal, so what is the basis for your statement?

MR. NELSON: The communications that Mr. Belendiuk had that they had been -- this was the direction and this was the way they were recommending we go.

JUDGE CHACHKIN: You were a member of the Management Committee, sir. There was no meeting held with the Management Committee on this matter, was there?

MR. NELSON: Which matter?

JUDGE CHACHKIN: The matter you are referring to in this paragraph concerning course of action to be taken with regard to La Star litigation, e.g., the need to file an appeal.

And then you state that you understand that Mr. Belendiuk had spoken to someone at SJI Cellular and the course of action had already been approved by SJI, and then you go on to say, "In these circumstances I did not believe my approval was necessary, since three members of the Management Committee had already given their approval."

Is it your testimony that Mr. Belendiuk told you that a vote had been taken by three members of the Management Committee and they had given their approval, is that your testimony?

MR. NELSON: No.

JUDGE CHACHKIN: In fact, there had not been a meeting of the Management Committee, had there?

MR. NELSON: (No response.)

JUDGE CHACHKIN: My question, sir, is: If there was a Management Committee, and the purpose of the Management Committee was to act on behalf of SJI, why, when you dealt with these matters, did you not convene a meeting of the Management Committee and take a vote on these matters?

MR. NELSON: When we discussed it I was in support of what the direction was.

JUDGE CHACHKIN: That is not my question, sir. My question is: There was a Management Committee, wasn't the Management Committee supposed to take up matters involving SJI, isn't that the purpose of it?

MR. NELSON: (No response.)

JUDGE CHACHKIN: What was the purpose of the Management Committee, if it wasn't to take up matters such as questions whether to appeal or not, what was the purpose of the Management Committee?

MR. NELSON: When it was developed it was to be the Management Committee as the operations of the market.

JUDGE CHACHKIN: Well, then, you're saying that the Management Committee was not of any function prior to the actual grant of the application, is that your testimony?

MR. NELSON: No.

JUDGE CHACHKIN: Well, you just said so. You said it was --

MR. NELSON: No.

JUDGE CHACHKIN: -- developed for the purpose of taking care of the cellular system after it was in the market.

Now I'm asking you, what was the purpose of the Management Committee prior to the grant of an application?

MR. NELSON: There had been time that had gone on, Your Honor.

JUDGE CHACHKIN: Pardon me?

MR. NELSON: There had been quite a bit of time that had gone on, and the original approach of the Management Committee was to build and manage the market. In the intervening activity, these legal activities had occurred, and we were handling the business via telephone.

JUDGE CHACHKIN: My question is, sir: As I am aware of it there was only one informal conference call between the members of the Management Committee. Now, what was the purpose of the Management Committee prior to the time of a grant, did it have any purpose?

MR. NELSON: Yes.

JUDGE CHACHKIN: What was its purpose?

MR. NELSON: To agree on the course of the action for the obtaining of the construction permit.

JUDGE CHACHKIN: Could you tell me why you didn't -- a Management Committee meeting was not convened to determine whether or not you should take an appeal? Did you consider the question of taking an appeal an important action of La Star?

MR. NELSON: If your question is within United States Cellular --

JUDGE CHACHKIN: No, I'm talking about as far as La Star venture is concerned. Was the question of whether you would take an appeal from the Commission's decision, did you consider it to be an important matter?

MR. NELSON: Yes.

JUDGE CHACHKIN: Why wasn't a Management Committee meeting convened on that?

MR. NELSON: We were all in support of the same direction.

JUDGE CHACHKIN: The question is: Why wasn't a Management Committee meeting convened, since that was the purpose of the Management Committee, at which a vote was taken?

MR. NELSON: I don't know, sir.

JUDGE CHACHKIN: So, you have no basis, in fact, for stating that three members of the Management Committee had already given their approval, since you had not discussed this matter with any members of the Management Committee, is that correct?

MR. NELSON: I had not discussed it with the Management Committee, but I had that information from Mr. Belendiuk.

JUDGE CHACHKIN: Mr. Belendiuk told you a meeting of the Management Committee had been held, in which three had voted for this proposition, is that your testimony?

MR. MILLER: Excuse me, Your Honor, that's not his testimony. He does not say that there was a meeting, he said that there were three members of the Management Committee who had --

JUDGE CHACHKIN: Who had already given their approval. Now, did Mr. Belendiuk tell you that three members of the Management Committee had already given their approval?

MR. NELSON: Yes.

JUDGE CHACHKIN: He told that in those words?

MR. NELSON: That's what I recall.

JUDGE CHACHKIN: Did he say what -- when they had given their approval and what manner they given their approval?

MR. NELSON: No, not that I recall.[43]

24. La Star counsel, Mr. Belendiuk, states his involvement in a slightly different manner. Prior to the calling of any witnesses, there was a discussion on the record of whether Mr. Belendiuk would need to be called as a witness. Mr. Belendiuk characterized his involvement as follows:

> MR. BELENDIUK: . . . I -- I've not made any -- I have not made a single decision for La Star other than very minor ones such as requesting motions for extension of time and such like that.
>
> Each significant decision that has -- that has had to be made or any decision as to whether to continue litigation or to file a motion to enlarge or anything along those lines has always been made by consultation with at least one of the principals of the Management Committee.[44]

25. The ALJ upon examining the record, however, stated about Belendiuk's participation that "there is no record evidence of a Management Committee meeting delegating any authority to Belendiuk."[45] The ALJ stated further that "there is no evidence in the record which even suggests that SJI was orchestrating and overseeing counsel's activities, or, for that matter, was even aware of the many activities engaged in by USCC and its employees on behalf of La Star."[46] The ALJ concluded that:

> the evidence suggests that counsel was, throughout the relevant period, more the agent of the ineligible partner, than the agent of SJI. La Star might have a more stronger [sic] agency argument if it had chosen counsel used by SJI for other cellular matters. In sum, it does not follow from the fact that Belendiuk is La Star's counsel that he is SJI's agent or that his actions can be attributed thereto.[47]

26. We affirmed this finding of the administrative law judge. We reached the conclusion that:

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43 Tr. at 1379-86.

44 Tr. at 755.

45 La Star I.D., 6 FCC Rcd at 6887.

46 Id.

47 Id.

> [SJI claims that it] unilaterally controlled La Star by means of instructions to USCC that were conveyed to USCC by attorney Belendiuk. The record does not, however, support this claim. . . . La Star fails to cite any evidence -- beyond generalized, self-serving claims -- to support the contention that SJI supervised Belendiuk. Rather, the documentary evidence and the specific testimony of the witnesses describes circumstances in which, to all appearances, Belendiuk was USCC's attorney and USCC supervised the prosecution of the application.[48]

Therefore, record evidence contradicts Nelson's written direct testimony that he relied on what Belendiuk had told him with regard to courses of action that had already been approved by SJI Cellular through the Management Committee.[49]

27. We have examined the allegations against USCC in light of the standards for designating a hearing issue. See Astroline Communications Limited Partnership v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); 47 U.S.C. §§ 309(d), 309(e). When we examine the record we find that there is a substantial and material question of fact as to whether Nelson engaged in misrepresentation and was not fully forthright and candid in his testimony about the Management Committee.

28. As shown above, Nelson's written testimony refers to the control exercised by the La Star Management Committee. For instance, Nelson's direct case exhibit states that he had "always acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular. [And that he was] not aware of a single instance where that had not been the case."[50] But also as shown above, the Management Committee served little purpose. From the time that USCC acquired its interest in La Star, the Management Committee only met once. The Management Committee did not discuss the October 1987 amendment filed by USCC to La Star's application, did not discuss the application for interim operation, did not discuss whether to

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[48] La Star Reconsideration Order, 7 FCC Rcd at 3765.

[49] Additionally, Potosi Company, in its Opposition to USCC's Petition to Delete or Nullify the Effect of Footnote Three, proffers evidence which contradicts Belendiuk's role as depicted by Nelson. Potosi offers affidavits from its principals who dealt with Nelson and Belendiuk over a proposed 39 dBu contour extension in La Star's application for interim authority. The discussions culminated, according to Potosi, with Belendiuk stating that he would have to call Nelson (as opposed to the three SJI members) for a decision.

[50] La Star Ex. 15, p.2.

appeal the grant of interim authority to NOCGSA, did not discuss the amendments made to the Joint Venture Agreement, and did not discuss the expenses being incurred by USCC.[51] Nonetheless, Nelson's written testimony makes several references to the control exercised by the Management Committee over La Star's operations, and Nelson told the ALJ that the Management Committee's purpose was "[t]o agree on the course of the action for obtaining a construction permit."[52]

29. Moreover, Nelson's written testimony that he would confer with SJI "when a particular issue facing the venture required a joint effort to resolve" and citing an example of such an instance,[53] gives the distinct impression that Nelson had conferred with the SJI members of the Management Committee more than once. The facts, as noted above, do not support this inference.

30. Based on the above, we believe a question exists as to whether Nelson was fully candid and truthful on the functioning of the Management Committee. Nelson's testimony does not disclose that the Management Committee only met once and that there were never any votes taken. Accordingly, we believe a question exists as to whether Nelson was attempting to mislead the Commission as to the functions of the Management Committee.

31. USCC's explanation of Nelson's testimony does not suffice to resolve the question. We do not agree with USCC's claims that Nelson's testimony only stands for the proposition that Nelson received all of his "marching orders" from Mr. Belendiuk. This evidence weighed against Belendiuk's exchange on the record raises a material and substantial question of fact as to Nelson's veracity. For instance, Mr. Belendiuk stated that he always consulted "with at least one of the principals of the Management Committee."[54] This calls into question Nelson's testimony that Mr. Belendiuk always spoke to the three SJI members before consulting with Nelson at USCC.[55]

32. Therefore, we believe that a substantial and material question of fact exists as to whether Nelson's testimony about his dealings with La Star counsel, Mr. Belendiuk, was fully candid or truthful. There does not appear to be any record evidence to support Nelson's understanding that Belendiuk had obtained prior

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51 Tr. at 1473-75.

52 Tr. at 1384.

53 La Star Ex. 15, pp. 3-4.

54 Tr. at 755.

55 Tr. at 1386.

approval from SJI Management Committee members. Whereas Nelson testified that Belendiuk told him that he (Belendiuk) obtained the votes of the SJI members before calling him (Nelson), if Nelson was aware that Mr. Belendiuk did not always speak with the three SJI Management Committee members, his testimony is untruthful. There is contradictory evidence in the record on this matter. Nelson's testimony itself is contradictory; on the one hand, Nelson stated that Mr. Belendiuk did not tell him (Nelson) that a vote had been taken of the SJI members on any issue.[56] In the same colloquy, however, he stated that Mr. Belendiuk had told him that the three SJI members voted on whatever issue was at hand.[57] This latter testimony cannot be reconciled with Mr. Belendiuk's statement that he always spoke with at least one member of the Management Committee.

33. There are apparent contradictions in the record itself. We therefore cannot resolve the issue of whether Nelson's testimony was fully truthful and candid. We believe that a substantial and material question of fact exists as to USCC's character in the La Star proceeding. Nelson and USCC had every incentive to suggest that USCC was not in control; thus, there is a strong reason to believe that any inconsistencies and misstatements by Nelson were intentional. If USCC misrepresented facts or lacked candor, this calls into question USCC's, and its parent TDS's, qualifications to be Commission licensees. Accordingly, appropriate issues are designated herein. Furthermore, because we have determined that a substantial and material question of fact exists whether TDS is qualified to be a Commission licensee, we are setting aside the grant issued to TDS in the Wisconsin 8 RSA. We note that TDS has commenced service in this market, and to preserve continuity of this service, we will allow TDS to continue operating on an interim basis.[58] See La Star Cellular Telephone Co., 4 FCC Rcd 3777 (1989), aff'd sub nom., La Star Cellular Telephone Co. v. FCC, 899 F.2d 1233 (D.C. Cir. 1990); 47 C.F.R. 22.32(g).

34. NOCGSA, as well as other parties commenting on USCC's Petition to Delete or Nullify the Effect of Footnote Three,[59] allege that no further proceedings are necessary because the misrepresentations and lack of candor were made on the record and that the Commission need only use the record to make a

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[56] Tr. at 1381-82.

[57] Tr. at 1385-86.

[58] TDS shall be permitted to continue operating on an interim basis until the question of its qualifications is resolved.

[59] Potosi Company in its Opposition to USCC's Petition, does state that it believes that a qualifications hearing appears to be unavoidable. See Potosi Company's Opposition to Petition at 2.

determination of wrongdoing by USCC. We do not agree. Because it is not clear from the record that USCC necessarily engaged in misrepresentation or lack of candor, we believe a further hearing on this issue is appropriate.[60] Therefore, we cannot make a determination that USCC made intentional misrepresentations based on only the existing record now before us.[61]

35. Additionally, although we only discuss Nelson's testimony about the functions of the La Star Management Committee herein, we will not limit the trier of fact to examine this issue only. We outline that subject only as an example of substantial and material questions of fact which exist as to whether USCC lacked candor or misrepresented facts to the Commission. We believe that the presiding administrative law judge should be given authority to examine all of USCC's conduct during the La Star proceeding and not be limited to the single instance described here.

36. Because we herein decide that a substantial and material question of fact exists as to USCC's character in the La Star proceeding, we deny USCC's Petition to Delete or Nullify the Effect of Footnote Three.

37. Section 503(b)(6)(B) of the Communications Act of 1934 prohibits us from imposing a forfeiture penalty on common carriers for violations occurring more than one year prior to the issuance of the notice of apparent liability. Nelson's written direct statement was submitted to the Commission on September 18, 1990, Nelson testified orally on January 24, 1991, and other USCC officials also testified more than one year ago. Therefore, we are prohibited from imposing a forfeiture penalty on USCC if its statements made prior to and at the hearing were not candid or truthful. However, if it is determined that USCC lacked candor or misrepresented facts in its subsequent pleadings filed within a year of this Order, e.g., the Petition to Delete or Nullify the Effect of Footnote Three, the presiding ALJ could determine that USCC or TDS has violated Section 1.17 of the Commission's Rules and impose forfeiture up to the statutory maximum.

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[60] Compare RKO General, Inc. v. FCC, 670 F.2d at 235 (Disqualification for lack of candor during hearing upheld although no separately designated issue where, inter alia, the conduct "is of such a blatant and unacceptable dimension that its existence cannot be denied.")

[61] We note that the Bureau has been conditioning all grants to TDS, or any of its subsidiaries, of licenses for new facilities, modification of facilities, and consent to acquire licensed facilities by assignment or transfer upon to the final resolution of the issues mentioned in footnote 3. Any further grants to these entities will also be conditioned on the outcome of this proceeding.

38. We believe that because NOCGSA was a party to the La Star proceeding and possesses knowledge of the facts and circumstances of the La Star proceeding, NOCGSA should be made a party to the instant proceeding. We believe that NOCGSA's knowledge of the La Star proceedings will further the adduction of evidence in this proceeding. We note further that NOCGSA, through its sister company, Louisiana CGSA, Inc., has continued to assert its rights in seeking a resolution of the character issues by filing a response to USCC's Petition to Delete or Nullify the Effect of Footnote Three. The settling partners, as petitioners in this proceeding, will also be made parties. We recognize that various other parties have raised footnote three issues against either USCC or TDS in other proceedings. Any of those other parties which have pending petitions alleging these character issues may file a petition to intervene in this proceeding pursuant to Section 1.223 of the Commission's Rules.

III. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that the Application for Review filed by Century Cellunet, Inc., et al. IS HEREBY DENIED to the extent indicated herein.

40. IT IS FURTHER ORDERED that the Contingent Application for Review filed by Telephone and Data Systems, Inc., IS HEREBY GRANTED to the extent indicated herein.

41. IT IS FURTHER ORDERED that the grant of the Block B cellular authorization to Telephone and Data Systems, Inc. in the Wisconsin 8 Rural Service Area IS SET ASIDE.

42. IT IS FURTHER ORDERED that INTERIM AUTHORITY IS GRANTED to Telephone and Data Systems, Inc. to continue operating in the Wisconsin 8 Rural Service Area.

43. IT IS FURTHER ORDERED that the Petition to Delete or Nullify the Effect of Footnote Three filed by the United States Cellular Corporation IS HEREBY DENIED.

44. IT IS FURTHER ORDERED that pursuant to Section 309 of the Communications Act of 1934, 47 U.S.C. § 309, the captioned application IS DESIGNATED FOR HEARING on the following issues:

(1) To determine whether United States Cellular Corporation misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and, in this regard, whether United States Cellular Corporation has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

(2) To determine, based on the evidence adduced in issue

1, above, whether Telephone and Data Systems, Inc. possesses the requisite character qualifications to hold the cellular Block B authorization for the Wisconsin 8 (Vernon) Rural Service Area and, accordingly, whether grant of its application would serve the public interest, convenience, and necessity.

45. IT IS FURTHER ORDERED that the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

46. IT IS FURTHER ORDERED that Century Cellunet, Inc., et al., Telephone and Data Systems, Inc., United States Cellular Corporation, New Orleans CGSA, Inc., and the Chief, Common Carrier Bureau, are made parties to this proceeding. The applicants and parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's Rules, 47 C.F.R. § 1.221, within 20 days of the mailing of this Order by the Secretary of the Commission. The notice and other expedited procedures of Section 1.822(b) of the Commission's Rules, 47 C.F.R. § 1.822(b), shall not apply in this case.

47. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act of 1934, 47 U.S.C. § 309(e), that the burden of proceeding with the introduction of evidence and the burden of proof shall be upon Telephone and Data Systems, Inc. and United States Cellular Corporation. We are so assigning the burdens of going forward with the evidence and proof because Telephone and Data Systems, Inc. and United States Cellular Corporation have the particular knowledge of the specific events at issue in this proceeding.

48. IT IS FURTHER ORDERED that it shall be determined, pursuant to Section 503(b)(3) of the Communications Act of 1934, 47 U.S.C. § 503(b)(3), and Section 1.80(g) of the Commission's Rules, 47 C.F.R. § 1.80(g), whether an ORDER OF FORFEITURE shall be issued against either United States Cellular Corporation or Telephone and Data Systems, Inc., in an amount not exceeding the statutory maximum for violations of Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

49. IT IS FURTHER ORDERED that in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, 47 U.S.C. § 503(b)(3). The Commission has determined that, in every case designated for hearing involving denial of an application for alleged violations which also come within the purview of Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion

of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

50. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary