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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In re Application of)
La Star Cellular Telephone Company)
For A construction Permit For)
Facilities Operating on Block B)
in the Domestic Public Cellular)
Radio Telecommunications Service)
in the New Orleans MSA)
and)
New Orleans CGSA, Inc.)
To Amend its Construction Permit)
for Facilities Operating on Block)
B in the Domestic Public Cellular)
Radio Telecommunications Service,)
Call Sign KNKA224 in the New)
Orleans MSA)

94-11

CC Docket No. 90-257

REPLY TO OPPOSITIONS

United States Cellular Corporation ("USCC") hereby replies to the various pleadings filed in opposition to USCC's "Petition To Delete Or Nullify The Effect of Footnote 3" by Potosi Company ("Potosi"), Louisiana CGSA, Inc. ("LCGSA"), Rochester Telephone Mobile Communications ("RTMC") and Kenneth Hardman (collectively "Commenters").¹ Commenters have not contested USCC's factual showing. Instead they have challenged the authority of the Commission to consider USCC's Petition. In addition, Potosi raises a new factual allegation concerning USCC's activities in 1987 and 1988 in connection with the application of La Star Cellular

¹ Potosi's pleading is styled an "Opposition," LCGSA's and RTMC have filed a "Motion To Strike" and "Motion For The Return of" USCC's Petition respectively and Mr. Hardman has filed a letter.

Telephone Company ("La Star"). As shown below, these arguments are unavailing and the USCC Petition should be granted.

I. The Commission Should Reject Commenters' Jurisdictional Arguments And Should Consider And Rule On USCC's Petition

Commenters have offered no substantive contest to USCC's demonstration in its Petition, based on the record in the La Star proceeding, that USCC's conduct with respect to the La Star application may not and should not be considered adversely to the licensee qualifications of USCC or any of its affiliates in any other Commission proceeding. Instead, Commenters ask the Commission to rule that it may not reach the merits of the USCC Petition because that Petition (a) is in reality a petition for reconsideration filed after the time allowed by Section 405 of the Communications Act, 47 USC § 405, and (b) is beyond the Commission's authority to consider because the Commission's 1992 decision in the La Star case has been appealed to the United States Court of Appeals for the District of Columbia Circuit by La Star and USCC, and the case is therefore within the exclusive jurisdiction of that court.

These arguments are entirely misplaced. USCC does not seek reconsideration of the Commission's decision in La Star Cellular Telephone Company, 7 FCC Rcd 3762 (1992) ("La Star"), nor does it seek any other ruling that would affect the case now on appeal. It leaves for that case the merits of the Commission's dismissal of

the La Star application on the ground that a USCC subsidiary, and not the 51 percent shareholder, was in control of La Star.

USCC seeks here a very different ruling: That the Commission's decision and the record in La Star will have no adverse weight when the Commission rules on the qualifications of USCC or its affiliates in other proceedings. The USCC Petition showed that USCC's witnesses were candid with the Commission, that USCC and its affiliates acted in the good faith belief that they were not in control of La Star, and that there are no valid grounds for applying the La Star decision or record against USCC or its affiliates in other proceedings.

It is clear that the Commission is of the view, and that the Commenters agree, that the Commission has full present authority to assess the weight if any to accord the La Star case in other proceedings. The Commission has recently issued authorizations to USCC "conditional on any action the Commission may take concerning the issues raised in [Footnote 3] of La Star," and each of the Commenters has specifically asked the Commission to apply the La Star case against USCC or affiliates of USCC in ruling on their qualifications. None of this is possible without a Commission assessment of the weight to be accorded the La Star case and record in other proceedings involving USCC or one of its affiliates. It follows, therefore, that the Commission and all of the Commenters agree that the Commission has jurisdiction now to make such an assessment. All USCC asks is that the Commission make that very assessment and rule that the adverse effect of La Star in other

proceedings should be zero. That is the essence of the nullification of Footnote 3 that USCC requested in its Petition.

It is of great importance to USCC and its affiliates, and also to the Commission in the administration of its cellular licensing processes, that this matter be resolved promptly, at one time and one place. As the Commission is aware, the efforts by private parties to take advantage of Footnote 3 have expanded into a number of proceedings, thereby complicating and delaying Commission action.² Until the matter is resolved by the Commission it is difficult to see how it could prevent further proliferation.

At the same time, it is apparent that if the Commission were to consider that while the court case is pending it has no authority to rule favorably on the USCC Petition, then by the same token it can have no authority to assess the La Star case or record against USCC or its affiliates in connection with any of the proceedings in which Footnote 3 has been invoked.

The potential adverse effect of the existence of Footnote 3 was not anticipated by USCC or, we submit, by the Commission, until substantially after the time for reconsideration of the La Star decision had passed. Indeed, until the Commission held up action on USCC's unopposed applications, called, in September 1992, for a

² See, e.g., Request For Order To Show Cause of Louisiana CGSA, Inc. in MSD 92-39, filed July 27, 1992, pp. 15-22; Petition To Deny Application of New York RSA No. 4 Limited Partnership of Contel Cellular, Inc., et al. in File No. 11021-CL-P-562-B-89, filed August 3, 1992, p. 29; Supplement To Application For Review of Century Cellunet et al. in File No. 10209-CL-P-715-B-88, filed August 18, 1992; and Second Supplement of Potosi Company in File No. MSD-91-26, filed October 4, 1992.

list of all of the licenses and applications of TDS and its subsidiaries, and began making grants only subject to the possible outcome of the Commission's decision with respect to Footnote 3 did USCC have any idea that Footnote 3 could be intended to mean more than that, as with any other decided case, La Star could be cited in other proceedings. The course that has been taken in the last several months is entirely unprecedented as far as USCC is aware and must be resolved promptly.³ While for the reasons USCC set forth above USCC submits that the Commission has full present authority to act favorably on USCC's Petition now, if the Commission is of the view that the pendency of the La Star case in the Court of Appeals bars immediate action, USCC urges the Commission to ask that the Court remand the case to the Commission or that on some other basis the Court authorize the Commission to proceed with regard to Footnote 3. USCC would of course support and would be willing to join in such a request.

USCC's Petition is an urgent request to the FCC to prevent an untenable and prejudicial interpretation of Footnote 3 from blighting other proceedings in which USCC is involved. The simple

³ We are aware of no other cellular case even remotely like this case in which disqualification in one market has spilled over into other proceedings. For examples of disqualifications which did not reach beyond the decided case, see, e.g. Beehive Cellular, Inc., 66 R.R. 2d 1211 (C.C. Bur. 1987); The Offshore Telephone Company, 63 R.R. 2d 1299 (C.C. Bur. 1987); Montgomery Independent Cellular Telephone Company, Inc., 66 R.R. 2d 215 (1989); and Indian Cellular Telephone Company/NY #4, 70 R.R. 2d 77 (1991), aff'd sub nom. Indian Cellular Telephone Company/NY #4 v. FCC (D.C. Cir.), Case No. 91-1638, Slip Opinion filed December 30, 1992.

fact is that the FCC has made no findings in La Star which are adverse to the character qualifications of USCC or any of its affiliates to be a licensee and neither the La Star decision nor the La Star record can serve as support for such findings in other proceedings. To the extent that Footnote 3 has contrary implications, it is erroneous. The FCC can certainly limit the effect of Footnote 3 to the La Star decision without disturbing the case's procedural posture.

II. H. Donald Nelson's and Arthur Belendiuk's
1987 and 1988 Telephone Conversations With
James and Wade Creekmore Lend No Support To
A Claim That USCC Was In Control of La Star

Pursuing its campaign against USCC into yet another proceeding, Potosi (Opposition, pp. 5-9) claims that "documents" it has "uncovered" support the position that a USCC subsidiary was in control of La Star. Potosi's claim is false, indeed absurd.

The telephone conversations related by Potosi corroborate, and do not refute, USCC's position in its Petition. The documents supplied by Potosi demonstrate that Arthur Belendiuk, La Star's attorney, undertook negotiations on behalf of La Star under the direction of SJI's principals. USCC, a partner of Potosi and a 49% partner in La Star, performed the trivial, forgettable action of introducing La Star's attorney to Potosi, its partner in Biloxi, leaving the key substantive discussions to others.⁴

⁴ It is not improper for a 49% general partner to introduce its 51% partner to a different partner in another market for a discussion of a substantive issue.

The documents which Potosi has produced are contemporaneous notes taken by James and Wade Creekmore, principals in Mississippi Cellular Telephone Company, wireline licensee in the Biloxi-Gulfport, Mississippi MSA, in late 1987 and early 1988 after telephone conversations with H. Donald Nelson, President of USCC and a Vice President of La Star, and Arthur Belendiuk, La Star's attorney.

As is discussed in Mr Nelson's attached Declaration, the reason why Mr. Nelson did not mention those conversations in any of his testimony in the La Star proceeding was that he did not remember that they took place.

After reading Potosi's Opposition and its attachments, Mr. Nelson now does recall that Mr. Belendiuk called him late 1987 to discuss the question of minimizing the projected costs of La Star's proposed interim operation in St. Tammany Parish, Louisiana. In that conversation, the possibility of switch sharing was raised. Biloxi is adjacent to St. Tammany Parish, and a USCC subsidiary was and is a 49 percent owner of the owner of the Biloxi system, which is controlled by the Creekmore family. Mr. Belendiuk therefore asked Mr. Nelson if he would call the Creekmores to introduce the subject and to indicate that other representatives of La Star would be in touch with the Creekmores to have substantive discussions. This is what occurred. No further contact with the Creekmores by Mr. Nelson on the subject is recorded in the documents tendered by Potosi. Mr. Nelson has no recollection of any discussion about 39 dBu extensions into the Biloxi MSA. James Creekmore's notes of his

February 9, 1988 conversation with Mr. Nelson are entirely consistent with this view of the matter. Mr. Nelson merely introduced Mr. Belendiuk, who would handle the actual negotiations.

Mr. Nelson has no memory of an October 23, 1987 conversation with James Creekmore concerning a proposed 39 dBu contour extension into the Biloxi-Gulfport MSA. He assumes now that he simply acted in accordance a request by with Mr. Belendiuk that he contact MCTC to introduce Mark Peabody, La Star's consulting engineer, who would explain and attempt to secure consent of MCTC for the proposed extension.

Mr. Nelson has no knowledge then concerning Mr. Belendiuk's February 17, 1988 conversation with Wade Creekmore discussed in Potosi's Opposition and has no knowledge concerning any "decision" he was allegedly supposed to have made in consequence of that conversation. It is not apparent from the context of Mr. Creekmore's notes what "decision" Mr. Nelson was supposed to make and Potosi suggests none. The context of the conversation would appear to indicate that it was the Creekmores who would have to decide whether to allow La Star to use their switch or to allow incursions into their market.

As discussed in his attached Declaration, Mr. Belendiuk remembers speaking with one of his principals at SJI Cellular, Sinclair Crenshaw, in 1987 about discussing La Star's proposed 39 dBu contour extension from its interim system into the Biloxi MSA and a possible switch sharing arrangement with the Biloxi licensee. He was informed in that conversation that USCC was a partner in the

Biloxi licensee and it was concluded that it would obviously be useful to have Mr. Nelson approach the Creekmores on these matters initially, with the actual negotiations to be handled by Mr. Belendiuk and La Star's consulting engineer, Mark Peabody. Mr. Belendiuk also confirms that Mr Nelson made no decision about the switch or other engineering aspects of La Star's proposal. Mr. Belendiuk deduces that the "decision" to which Wade Creekmore refers may simply have been a decision by Mr. Nelson whether to call Mr Creekmore again on behalf of La Star to seek to persuade him to change his mind about allowing switch sharing. Mr. Nelson evidently did not call Mr. Creekmore back and there the matter has rested, in justified obscurity, until now.

In any case, the documents supplied by Potosi do not demonstrate that USCC controlled La Star. In fact, if anything, they corroborate Mr. Nelson's consistent testimony that to the extent he was involved in La Star matters, he acted at Mr. Belendiuk's direction. Mr. Creekmore recorded the fact that Mr. Belendiuk told him in 1987 that the "contact" people for La Star were Mr. Crenshaw or one of the Bradys who were the SJI members of the La Star Management Committee, and held no positions with USCC or any of its affiliates. All that Mr. Nelson did in this case was act as a "door opener," at the request of the 51 percent owners of La Star, a routine business practice.

Indeed, reading the Creekmores' notes, and reflecting on the aboveboard, innocent, indeed trivial nature of the conversations involved, it is astonishing to realize that it is precisely these

types of routine telephone calls and similar actions on Mr. Nelson's part, which were minor and forgettable aspects of his busy days, which have been mysteriously recast in the La Star proceeding into "proof" of USCC's surreptitious effort improperly to dominate its partner and then as "evidence" of USCC's allegedly defective corporate character across the board. This process has gone completely out of hand, and the time is long overdue for the FCC to say "Enough." That is, in essence, all USCC seeks and it is entirely appropriate that it do so.

Conclusion

For these reasons and those given previously, Footnote 3 should be deleted or otherwise nullified.

Respectfully submitted,

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March 9, 1993

Declaration

I, H. Donald Nelson, declare the following under penalties of perjury:

1. I am the President of United States Cellular Corporation ("USCC"), a member of the Management Committee of La Star Cellular Telephone Company, and a Vice President of Mississippi Cellular Telephone Company ("MCTC") wireline licensee in the Biloxi-Gulfport, Mississippi MSA in a USCC subsidiary owns a 49% interest.

2. Prior to reading the "Opposition" of Potosi Company to USCC's Petition to Delete or Nullify The Effect of Footnote 3, I did not remember having any conversations with James or Wade Creekmore in the 1987-1988 time period concerning either a proposed 39 dBu contour extension by La Star Cellular Telephone Company from a proposed interim operation in the New Orleans MSA or La Star's using MCTC's Biloxi switch. I have no contemporaneous notes or records of those conversations.

3. Having reviewed the Exhibits to that Opposition, I now remember having been called by Arthur Belendiuk, La Star's attorney, sometime during late 1987 or early 1988 concerning the desirability of reducing the projected costs of La Star's interim operation in the New Orleans MSA. Mr. Belendiuk suggested that since USCC was a partner with MCTC in the Biloxi market that it might be helpful if I called James Creekmore and provided Mr. Belendiuk with an "introduction" so that he could attempt to persuade Mr. Creekmore of the merits of the idea. I remember calling Mr. Creekmore and asking him to speak with Mr. Belendiuk, but nothing else about the conversation.

4. I still do not remember the conversation I evidently had with James Creekmore in October, 1987 concerning a proposed 39 dBu contour extension into the Biloxi MSA, but I assume it also came about as a result of Mr. Belendiuk asking me to call Mr. Creekmore to introduce him to La Star's consulting engineer, Mark Peabody. Mr. Peabody was going to discuss the proposed extension.

5. In his Declaration attached to Potosi's Opposition and in his contemporaneous notes of his February 17, 1988 telephone conversation with Arthur Belendiuk about possible switch sharing between La Star and MCTC and 39 dBu contour extensions into MCTC's service area Wade Creekmore refers to a statement by Mr. Belendiuk as to a "decision" that he was to ask me to make in connection with some aspect of that conversation. I was unaware of the existence of that conversation until now and I am certain I made no "decision" in consequence of it.

6. The foregoing is true and correct to the best of my knowledge and belief.


H. Donald Nelson

Executed this 5th day of March, 1993

Declaration

I, Arthur Belendiuk, declare the following under penalties of perjury:

1. I am a principal in the law firm of Smithwick and Belendiuk, P.C., in Washington, D.C. and have been FCC counsel to La Star Cellular Telephone Company since 1984.

2. I vaguely remember the telephone conversations described in the Declarations of James Creekmore and Wade Creekmore attached to Potosi Company's Opposition to USCC's "Petition To Delete or Nullify The Effect of Footnote 3," but have no contemporaneous records of those conversations.

3. I do remember speaking in late 1987 with Sinclair Crenshaw of SJI Cellular, Inc. about La Star Cellular Telephone Company's proposed interim operation in St. Tammany Parish in the New Orleans MSA and discussing the desirability of securing the consent of the Biloxi wireline licensee to a switch sharing arrangement and to a 39 dBu contour extension into the Biloxi MSA. At the time, I understood that USCC had a minority interest in Biloxi and Mr. Crenshaw and I agreed that it might therefore be useful to ask Donald Nelson to make the initial contact with the Creekmores. The actual negotiations concerning switch sharing were to be handled by me. I have no recollection of the part to be played by Mark Peabody of Richard Biby's firm.

4. I then remember calling Mr. Nelson and asking him to call the Creekmores, which I understand he did.

5. After reviewing Wade Creekmore's Declaration and contemporaneous notes of his February 17, 1988 telephone

conversation with me, I cannot identify what "decision" he says I said Donald Nelson would make. I can only deduce though I have no recollection, that it may have been a decision about whether to call Mr. Creekmore again to seek to persuade him to allow La Star to use MCTC's switch, which he had refused to allow.

6. I can state with certainty that Mr. Nelson never made any "decisions" about La Star Cellular Telephone Company's engineering proposals or other aspects of its proposed system. Those decisions were made by SJI Cellular Inc., La Star's 51% owner, in consultation with me and La Star's consultants.

7. The foregoing is true and correct to the best of my knowledge, information and belief.


Arthur Belendiuk

Executed this 6th day of March, 1993

CERTIFICATE OF SERVICE

I, Donna K. Rhudy, a secretary in the law offices of Koteen & Naftalin, hereby certify that true copies of the foregoing "Reply To Oppositions" have been served upon the following by first-class United States mail, postage prepaid, this 9th day of March, 1993:

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