RSA, (c) determining under HDO ¶ 48 that no forfeiture against TDS or USCC is appropriate in light of the resolution of Issue 1, and (d) granting the application of TDS, as amended, for the RSA.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: Nathaniel F. Emmons (MDS)
Nathaniel F. Emmons
Andrew H. Weissman

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UNITED STATES CELLULAR CORPORATION

By: Mark D. Schneider
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WIRELESS TELECOMMUNICATIONS BUREAU

By: Joseph P. Weber
Joseph Paul Weber

Federal Communications Commission
1919 M Street, N.W.
Room 644
Washington, D.C. 20554
(202) 418-1317

Dated: July 31, 1995

ATTACHMENT 1

Stipulation Regarding Evidence

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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	)	

To: Hon. Joseph P. Gonzalez
Administrative Law Judge

STIPULATION REGARDING EVIDENCE

Telephone and Data Systems, Inc. ("TDS"), United States Cellular Corporation ("USCC") and the Wireless Telecommunications Bureau (the "Bureau") hereby respectfully submit, in conjunction with the filing on this date of a Joint Motion for Summary Decision, the attached stipulation entitled **"WTB and TDS/USCC Joint Exhibit 2"** regarding evidence presented in the above-captioned proceeding.

At the admission session held on March 7-8, 1995, certain portions of the TDS/USCC direct case testimony were stricken or reformed on the record. TDS, USCC and the Bureau also agreed at that time to reform other portions of the TDS/USCC direct case testimony. The attached stipulation accomplishes that purpose.

The Presiding Judge is respectfully asked to accept **WTB and TDS/USCC Joint Exhibit 2** into the record of the proceeding.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: _____
Nathaniel F. Emmons
Andrew H. Weissman

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(202) 418-1317

July 31, 1995

WTB AND TDS/USCC JOINT EXHIBIT 2

Stipulation

The Wireless Telecommunications Bureau ("Bureau"), Telephone and Data Systems, Inc. ("TDS"), and United States Cellular Corporation ("USCC") stipulate that, in addition to the portions stricken or reformed on the record at the admission session held March 7-8, 1995, the direct case testimony of TDS/USCC is further reformed as indicated:

I. TDS/USCC Exhibit 2 (**Testimony of H. Donald Nelson**)

a. In ¶16, add the clause "gave what I understood to be" before the word "majority" in the first sentence.

b. In ¶24, change the letter "**E**" to the letter "**C**" in the last sentence.

c. In ¶28, in the fifth sentence (the first sentence after the portions stricken at the admission session), strike the words "the material" and add the clause "a September 15, 1987 cover letter and enclosures that I received from Dr. Andy Anderson (**Tab F**)" before the words "to others".

II. TDS/USCC Exhibit 10 (**Testimony of Herbert D. Miller, Jr.**)

a. In ¶4, strike the third sentence ("As Mr. Belendiuk ... as described above") and the last sentence ("It was my impression ... La Star's application") in their entirety.

b. In ¶7, strike the clause ", because I believed that the testimony was fully candid" in the last sentence.

c. In ¶9, strike the last two sentences ("In paragraphs 10-21 ... at the hearing") in their entirety.

d. Strike ¶¶10-21 in their entirety.

e. In ¶24, strike the clause ", and at no point did I believe that any of them was testifying untruthfully

or less than candidly. Accordingly," from the third and fourth sentences.

f. In ¶25, strike the last two sentences ("The Bill of Particulars ... paragraphs 26-31, below") in their entirety.

g. Strike ¶¶26-31 in their entirety.

h. In ¶36, last sentence, strike the word "such" and the clause "not otherwise addressed in this testimony" and insert the clause "some of those" before the word "assertions."

i. Strike ¶38 in its entirety.

j. In ¶39, strike the last two sentences ("We knew that ... produced in discovery") in their entirety.

k. In ¶40, strike the clause ", as discussed at paragraph 31 above" in the last sentence.

l. Strike ¶41 in its entirety.

m. In ¶42, second to last sentence, replace the words "Our" and "in" with the words "The" and "of", respectively; and strike the last sentence ("Based on my ... was completely accurate") in its entirety.

n. Strike ¶43 in its entirety.

o. In ¶44, strike the last sentence ("I knew of no evidence to the contrary") in its entirety.

p. Strike ¶¶45-47 in their entirety.

q. In ¶48, strike the last two sentences ("I believed the ... filed these documents") in their entirety.

r. Strike ¶¶49-50 in their entirety.

s. In ¶51, first sentence, replace the clause " 's next quotation" with the clause "quotes language from the petition that"; and strike the last sentence ("I believed that ... the record facts") in its entirety.

t. In ¶52, strike the last sentence ("It was my ... statement was true") in its entirety.

u. Strike ¶53 in its entirety.

v. In ¶54, strike the last sentence ("I believed each ... with the record") in its entirety.

w. In ¶55, strike the first sentence ("At no time ... of La Star") in its entirety; strike the clauses "Arthur Belendiuk or" and ", or Sidley & Austin," from the third sentence; and add the word "or" before "USCC" in the third sentence.

x. In ¶56, strike the first two sentences and the first 12 words of the third sentence ("At no point ... lack of candor,"); strike the word "such" from the third sentence; add the word "candor" before "problem" and the clause "with any statements or testimony of any USCC witness" after "problem" in the third sentence; and strike the last sentence ("When NOCGSA included ... by the allegations") in its entirety.

ATTACHMENT 2

Draft Proposed Order and Decision

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

CC Docket No. 94-11

In re Application of

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

Appearances

Nathaniel F. Emmons and *Andrew H. Weissman* on behalf of Telephone and Data Systems, Inc.; *R. Clark Wadlow, Mark D. Schneider, Thomas P. Van Wazer* and *Michael D. Warden* on behalf of United States Cellular Corporation; *Howard J. Symons* and *James A. Kirkland* on behalf of SJI, Inc.; *William H. Crispin* and *Dean R. Brenner* on behalf of Arthur V. Belendiuk; *Kenneth E. Hardman* on behalf of the Wisconsin 8 Settlement Group; *L. Andrew Tollin* and *Luisa L. Lancetti* on behalf of BellSouth Mobility Inc; and *Joseph P. Weber* on behalf of the Wireless Telecommunications Bureau.

DECISION OF ADMINISTRATIVE
LAW JUDGE JOSEPH P. GONZALEZ

1. This proceeding involves the application of Telephone and Data Systems, Inc. (TDS), for an authorization to construct and operate a cellular system on the wireline frequency block in the Wisconsin 8 - Vernon Rural Service Area (RSA). The matter was designated for hearing by an *Order* of the Commission, *Telephone and Data Systems, Inc.*, 9 FCC Rcd. 938 (1994) (*HDO*), released on February 1, 1994.

2. Although this proceeding involves TDS's application for the RSA, the Commission here seeks to resolve issues that arose from a prior comparative cellular proceeding. That proceeding involved the mutually exclusive applications of La Star Cellular Telephone Company (La Star) and New Orleans CGSA, Inc. (NOCGSA), for an authorization to provide cellular service to portions of the New Orleans MSA (the *La Star* proceeding). *HDO*, 9 FCC Rcd.

at 940. United States Cellular Corporation (USCC), a subsidiary of TDS, was a joint venturer in La Star, and officers and employees of USCC provided testimony in the *La Star* proceeding. *Id.* at 940, 944.

3. The *HDO* setting this matter for hearing specified the following Issues concerning conduct in the *La Star* proceeding and its effect on TDS's application for the RSA:

> (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.

HDO, 9 FCC Rcd. at 959-60. The Commission also directed that a determination be made as to:

> 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.

Id. at 960. After the admission of the written direct cases in this proceeding, TDS, USCC and the Wireless Telecommunications Bureau (Bureau) jointly moved for the issuance of a summary decision on the Issues based upon the written direct cases.

BACKGROUND OF THIS PROCEEDING

The *La Star* Proceeding

4. The *La Star* proceeding involved the mutually exclusive applications of La Star and NOCGSA, a subsidiary of BellSouth Mobility Inc (BellSouth), for an authorization to provide cellular service on the wireline frequency block to unserved portions of the New Orleans MSA, including St. Tammany Parish. *HDO*, 9 FCC Rcd. at 940. NOCGSA was the licensee providing

wireline cellular service in the New Orleans MSA. In 1983, La Star applied to the FCC for authority to serve portions of the New Orleans MSA that were not yet being served by NOCGSA. *Id.*[1]

5. La Star was a joint venture of two partners. The majority partner was SJI Cellular, Inc. (SJI), which held a 51% interest in La Star. *HDO*, 9 FCC Rcd. at 940. The minority partner was Star Cellular Telephone Company ("Star"), which, at the time of its formation in 1983, was indirectly owned by Maxcell Telecom Plus ("Maxcell") and Star Telephone Company ("STC"). *Id.* at 940 & n.6. In August of 1987, by acquiring these ownership interests in Star, USCC acquired Star. *Id.* Thus, from approximately August 1, 1987 to the present, La Star's 49% minority partner was indirectly owned by USCC, TDS's subsidiary. *Id.* at 940 & n.6.

6. In designating the applications of La Star and NOCGSA for a comparative hearing in May of 1990, the Commission specified a threshold issue concerning La Star's eligibility to apply for the construction permit.[2] To be eligible for the wireline (Block B) authorization, applicants such as La Star were required to be controlled by an entity that had a wireline presence in the market. *See* 47 C.F.R. § 22.902(b) (1984). SJI, but not Star, had the requisite wireline presence in the New Orleans MSA. *HDO*, 9 FCC Rcd. at 941 n.7. In designating the eligibility issue, the Commission sought to determine whether USCC, the minority partner, controlled La Star. *Id.* at 940-41.

7. In an *Initial Decision*, the Presiding Judge in the *La Star* proceeding held that USCC controlled La Star.[3] The Commission affirmed that finding.[4] The question of control of La Star, therefore, is not at issue in this proceeding. At

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[1] The Commission originally dismissed La Star's application, but the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's decision and ordered the FCC to reinstate La Star's application. *See Maxcell Telecom Plus* v. *FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

[2] *La Star Cellular Telephone Company*, 5 FCC Rcd. 3286, 3290 (1990) (*La Star HDO*).

[3] *La Star Cellular Telephone Company*, 6 FCC Rcd. 6860 (Chachkin, ALJ 1991).

[4] *See La Star Cellular Telephone Company*, 7 FCC Rcd. 3762 (1992) (*La Star I*), *vacated sub nom. Telephone and Data Systems, Inc.*, v. *FCC*, 19 F.3d 655 (D.C. Cir. 1994), *aff'd on remand sub nom. La Star Cellular Telephone Company*, 9 FCC Rcd. 7108 (1994) (*La Star II*). La Star and USCC filed petitions for reconsideration of the Commission's decision in *La Star II*.

issue here instead is the candor of USCC and its personnel in providing testimony in the *La Star* proceeding.

8. Although NOCGSA prevailed on the eligibility and comparative issues designated in the *La Star* proceeding, it nonetheless filed exceptions to the *Initial Decision* in that case. *HDO*, 9 FCC Rcd. at 941. Specifically, NOCGSA alleged that the Presiding Judge in the *La Star* proceeding should have adopted findings that principals of USCC and SJI had misrepresented facts and lacked candor in their testimony. *Id.* at 941 & n.12. The Commission dismissed those exceptions as moot, but reserved the possibility that the claims concerning candor could be raised in future proceedings.[5]

The Wisconsin 8 Proceeding

9. Allegations concerning the candor of USCC's principals in the *La Star* proceeding subsequently were raised in other proceedings, including this proceeding concerning TDS's

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[5] Footnote 3 to the decision in *La Star I* stated:

> Because our conclusion in this regard results in the dismissal of La Star's application, we do not reach the question raised in NOCGSA's exceptions of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star. NOCGSA's exceptions and La Star's motion to strike those exceptions will be dismissed as moot. Questions 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 I, 7 FCC Rcd. at 3767 n.3.

application for the RSA.[6] The Commission issued the *HDO* to resolve all such allegations.[7]

10. At a prehearing conference held on March 15, 1994, a discovery schedule was established with discovery to commence immediately and to conclude on August 5, 1994. Pursuant to the discovery schedule, the Bureau and other parties[8] requested documents and answers to interrogatories from TDS, USCC and other principals and consultants of La Star.[9] The Bureau and other parties also requested the taking of depositions of principals and consultants of TDS, USCC and La Star.

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[6] The Wisconsin 8 Settlement Group (Settlement Group), a group of other original applicants for the RSA, originally had petitioned to deny the grant of TDS's application for the RSA based on allegations that TDS improperly had obtained attributable interests in more than one application for the RSA. *See HDO*, 9 FCC Rcd. at 939-40, 942-44. While the Settlement Group's application for review of the denial of their petition was pending before the full Commission, the Settlement Group supplemented their challenge with the allegations concerning USCC's activities in the *La Star* proceeding. *Id.* at 940.

[7] The Commission has conditioned the grants of various applications filed by TDS and USCC on the outcome of this proceeding. *See HDO*, 9 FCC Rcd. at 958 n.61. The Commission, however, stressed that it had not reached any conclusion or judgment concerning USCC's candor, stating that "we cannot make a determination that USCC made intentional misrepresentations based on only the existing record now before us [in the *La Star* proceeding]." *HDO*, 9 FCC Rcd. at 958.

[8] In addition to the Settlement Group, in the *HDO* the Commission also had made BellSouth a party to this proceeding. *HDO*, 9 FCC Rcd. at 959. Subsequently, GTE Mobilnet Incorporated (GTE), an applicant for the RSA, moved for leave to intervene and was admitted as a party. *See Order*, FCC 94M-211, released April 4, 1994. Additionally, Portland Cellular Partnership (PortCell), an applicant that had raised the *La Star* issues in a proceeding for a cellular authorization in another market, also moved for leave to intervene and was admitted as a party. *See Order*, FCC 94M-190, released March 25, 1994.

[9] Pursuant to its motion, SJI, Inc., the parent of SJI Cellular, the 51% joint venturer in La Star, was made a party to this proceeding. *See Order*, FCC 94M-214, released April 4, 1994. Arthur V. Belendiuk, La Star's counsel, also sought leave to intervene in the proceeding and was granted status as a party. *See Order*, FCC 94M-388, released June 3, 1994.

11. The Bureau, TDS, USCC and the other parties attempted to resolve all discovery disputes, and on June 1, 1994, the Presiding Judge approved an Agreement Regarding Discovery Scope and Procedures entered into by the parties. *See Order*, FCC 94M-387, released June 2, 1994.[10] Between June 3 and July 15, 1994, TDS and USCC produced approximately twenty thousand pages of documents to the Bureau and other parties in this proceeding.[11] On June 17, 1994, TDS and USCC also served answers to interrogatories propounded by GTE and other parties in the proceeding. Between July 11 and August 5, 1994, counsel for the Bureau and other parties conducted seventeen depositions of current and former officers, directors, employees and consultants to La Star, TDS, USCC and SJI.[12]

12. At the prehearing conference held on March 15, 1994, the Presiding Judge directed the Bureau and adverse parties to serve a bill of particulars on TDS and USCC subsequent to the conclusion of discovery to give notice of which statements in the *La Star* proceeding raised questions of alleged misrepresentation or lack of candor. Tr. 7-8. The Bureau filed a Bill of Particulars on January 13, 1995.[13]

13. Written direct case testimony was exchanged by TDS, USCC, the Bureau and the Settlement Group on February 7, 1995.[14]

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[10] In later Orders, the Presiding Judge resolved remaining discovery disputes. *See, e.g., Order*, FCC 94M-410, released June 21, 1994; *Order*, FCC 94M-444, released July 14, 1994; *Order*, FCC 94M-519, released September 12, 1994.

[11] La Star, SJI and Mr. Belendiuk cooperated in the production of documents and providing answers to interrogatories.

[12] To permit development of a full record on the designated issues and pursuant to the agreement among the parties approved by the Presiding Judge, TDS, USCC and La Star waived the attorney-client privilege as to certain counsel for La Star, TDS and USCC with respect to relevant matters involving the conduct in the *La Star* proceeding during the hearing.

[13] Bill of Particulars of the Wireless Telecommunications Bureau, January 13, 1995 (*B/P*).

[14] TDS and USCC reached a settlement agreement with GTE resulting in GTE's dismissal of its application for the RSA and its withdrawal from the proceeding. *See* Public Notice, Report No. CL-95-45, released February 3, 1995; *Order*, FCC 95M-51, released February 15, 1995. TDS and USCC similarly reached a settlement agreement with PortCell resulting in PortCell's withdrawal from the proceeding. *See Order*, FCC 95M-79, released March 21, 1995.

To meet its burden of proceeding and proof, TDS and USCC submitted the sworn written testimony of eleven witnesses and associated documents. The Bureau also offered documents into the record as evidence. At an admission session held on March 7 and March 8, 1995, this evidence was received into the record, with certain exceptions where objections were sustained. Tr. 65-374.[15]

14. After the admission session and before the scheduled commencement of the hearing, at a prehearing conference held on March 14, 1995, TDS, USCC and the Bureau informed the Presiding Judge that they believed the record warranted summary decision in favor of TDS and USCC on the designated issues. Tr. 375-384.[16] Accordingly, the Presiding Judge suspended the procedural dates to allow the parties time to prepare and file a motion for summary decision and any necessary requests for approval of settlement agreements. Tr. 384; *Order*, FCC 95M-74, released March 16, 1995. The Joint Motion For Summary Decision (Joint Motion) was filed on July 31, 1995.[17]

The Issues

15. The issues designated by the Commission in this proceeding involve whether USCC and its principals misrepresented facts or lacked candor before the Commission in the *La Star* proceeding. Misrepresentation involves false statements of fact, while lack of candor involves concealment, evasion, and other failures to be fully informative.[18] An

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[15] At the admission session, the Bureau, TDS and USCC agreed to attempt to resolve certain objections to TDS/USCC Exhibit 2 and TDS/USCC Exhibit 10. Those parties reached such stipulation and submitted it with the Joint Motion For Summary Decision. The stipulation is hereby accepted.

[16] TDS, USCC, the Bureau, the Settlement Group and BellSouth also advised the Presiding Judge that TDS and USCC had reach settlement agreements with the Settlement Group and BellSouth. Tr. at 375-384.

[17] TDS, USCC and BellSouth filed a Joint Request For Approval Of Settlement Agreement and related documents on March 30, 1995. TDS, USCC and the Settlement Group filed a Joint Request For Approval Of Settlement Agreement on July 28, 1995.

[18] *Fox Television Stations, Inc.*, FCC 95-188, released May 4, 1995, ¶ 59 (*Fox TV*); *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983).

essential element of misrepresentation and lack of candor is a party's intent to deceive.[19]

16. The *HDO* and the Bill of Particulars submitted by the Bureau together comprehensively set forth the statements made by USCC and its principals that require review for their candor. These statements generally fall into six categories:

(1) statements concerning the purpose of the acquisitions by TDS and USCC of their interest in La Star;

(2) statements to the effect that USCC did not believe it controlled or did not intend to control La Star;

(3) statements about the functioning of La Star's Management Committee as the governing body of La Star;

(4) statements about the nature and extent of USCC's activities with respect to La Star;

(5) statements about SJI's involvement in activities related to La Star; and

(6) statements that La Star's proposed subscriber charges were cost-based.

In reviewing these statements to assess the candor of USCC and its principals, the Commission recognizes that omissions or inconsistencies that are unaccompanied by an intent to deceive will not be sufficient to warrant a finding of misrepresentation or lack of candor.[20] Negligence, inadvertence, and imprecision without intent to deceive do not amount to misrepresentation or lack of candor.[21] Moreover, where a party already has disclosed

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[19] *Fox TV*, ¶ 60; *see Weyburn Broadcasting Ltd. Partnership* v. *FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd. 6412, 6415 (Rev. Bd. 1994).

[20] *See Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 639 (Rev. Bd. 1984); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1209 (1986), *recon. denied*, 1 FCC Rcd. 421 (1986) (*Character Policy Statement*).

[21] *See Swan Creek Communications, Inc.* v. *FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd. 6412, 6415 (Rev. Bd. 1994). In *Calvary*, the Review Board stated that the provision of inaccurate or ambiguous information to the Commission "resulting from carelessness, exaggeration, faulty recollection, or merely

(continued...)

the information which it is later charged with attempting to conceal, the Commission has found an absence of intent to make misrepresentations or lack candor.[22]

17. In assessing candor, the Commission also has recognized that inconsistencies in testimony that reflect the varying perceptions of witnesses do not necessarily demonstrate intentionally false testimony.[23] Witnesses commonly recall the details of conversations differently, particularly when the conversations at issue took place several years before the testimony.[24] Adverse conclusions need not be drawn from the fact that an individual witness's own testimony is inconsistent because of the difficulty of remembering fully conversations that occurred years before the testimony.[25]

FINDINGS OF FACT

18. In the *La Star* proceeding, various principals of USCC provided testimony in support of La Star's application. This testimony included declarations, deposition testimony, written direct testimony, and testimony on cross-examination. The principals who provided the testimony at issue were H. Donald Nelson (USCC's President and Chief Executive Officer), Richard

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[21](...continued)
falling short of the punctilio normally required by the Commission . . . falls short" of the deceptive intent required for a lack of candor or misrepresentation. 9 FCC Rcd. at 6415.

[22] *See, e.g., Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd. 6412, 6420 (Rev. Bd. 1994); *Valley Broadcasting Co.*, 4 FCC Rcd. 2611, 2614-15 (Rev. Bd. 1989); *Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 639 (Rev. Bd. 1984); *Superior Broadcasting of California*, 94 F.C.C.2d 904, 909 (Rev. Bd. 1983).

[23] *Elizabeth M. Younts*, 8 FCC Rcd. 1714, 1714 n.5 (1993).

[24] *See Signal Ministries, Inc.*, 104 F.C.C.2d 1481, 1487-88 (Rev. Bd. 1986); *Ultravision Broadcasting Co.*, 11 F.C.C.2d 394, 404 (1968); *Benedict P. Cottone*, 63 F.C.C.2d 596, 606 (1977) ("[i]t is not unusual for witnesses to recall the details of conversations differently").

[25] *See Grenco, Inc.*, 39 F.C.C.2d 732, 736-37 (1973); *Vogel-Ellington Corp.*, 41 F.C.C.2d 1005, 1011 (Rev. Bd. 1973); *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd. 6412, 6417 n.3 (Rev. Bd. 1994); *Merrimack Valley Broadcasting, Inc.*, 92 F.C.C.2d 506, 519 (Rev. Bd. 1982); *WIOO, Inc.*, 54 F.C.C.2d 712, 729 (Initial Decision 1974).

W. Goehring (USCC's Vice President of Engineering and Network Operations), and Mark A. Krohse (an Accounting Manager with USCC). *See, e.g.*, TDS/USCC Ex. 2, Tabs I, J, R, T, U; TDS/USCC Ex. 7, Tabs C, D, E, F; TDS/USCC Ex. 8, Tabs L, N, O, R. Additionally, USCC, by its counsel Koteen & Naftalin, filed pleadings in the *La Star* proceeding, including a Petition To Delete Or Nullify The Effect Of Footnote Three (Petition To Delete Footnote Three), which made assertions based on the testimony of USCC's principals. TDS/USCC Ex. 10, Tab A.[26]

1. The Acquisition Of The Interest In La Star.

19. In testimony provided in the *La Star* proceeding, USCC maintained that the acquisition of its interest in La Star was ancillary to its acquisition of interests in other Louisiana cellular properties. Specifically, for example, the written testimony of Donald Nelson submitted as USCC Exhibit 1 stated:

> *In addition to its interest in the Baton Rouge wireline cellular system, Star owned a minority (49 percent) interest in a joint venture, La Star Cellular Telephone Company. That interest, which USCC acquired incident to acquisition of the Baton Rouge interest, was (and remains) far less important than the Baton Rouge interest.*

TDS/USCC Ex. 2, Tab U. The undisputed facts demonstrate that USCC acquired its interest in Star primarily to obtain the Baton Rouge interests and that the interest it acquired in La Star was an ancillary part of its acquisition of interests in the Baton Rouge licensee.

20. As set forth above, *see supra* ¶ 5, La Star was a joint venture formed in 1983 between SJI (51%) and Star (49%). John A. Brady, Jr., is the President of SJI; James P. (Pat) Brady, his brother, is Chairman of SJI's Board; Sinclair (Kit) Crenshaw is SJI's Vice President and coordinator of legal and regulatory affairs. TDS/USCC Ex. 3, ¶¶ 3, 6; TDS/USCC Ex. 4, ¶¶ 3-5.

21. At the time of its formation in 1983, Star was indirectly owned by Maxcell and STC. *HDO*, 9 FCC Rcd. at 940 & n.6. In separate transactions in August of 1987, USCC acquired various interests in companies that held cellular interests in Louisiana, including a limited partnership interest in the Baton Rouge MSA. TDS/USCC Ex. 9, ¶ 4. In acquiring the corporations that held these interests, USCC also acquired the interests of Maxcell and STC in Star. *Id.* TDS is the parent company of

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[26] La Star, through its counsel Arthur V. Belendiuk, also filed pleadings based on the testimony of La Star's principals, which include the principals of USCC.

USCC, owning more than 80% of its stock. TDS/USCC Ex. 2, ¶ 2; TDS/USCC Ex. 9, ¶ 1.[27]

22. LeRoy T. Carlson, Sr., is the Chairman of TDS, which he founded in 1969; he is also a director of USCC. TDS/USCC Ex. 9, ¶¶ 1-2. Mr. Carlson is the individual primarily responsible for business development and growth of TDS and USCC through the negotiation of acquisitions, including cellular acquisitions. Id. ¶ 3.[28]

23. Mr. Carlson conducted the negotiations that led to USCC's acquisition of the companies that owned Star. *Id.* Those negotiations took place in the context of discussions with representatives of Maxcell and other cellular service providers in 1986 and 1987. Following these negotiations, USCC acquired minority cellular interests from Maxcell in numerous markets, including Baton Rouge, which TDS considered to be a valuable market. *Id.* In addition, TDS acquired several other cellular interests in Louisiana, including another limited partnership interest in Baton Rouge. *Id.* In acquiring the companies that owned Star, USCC acquired a 52% limited partnership interest in the operating Baton Rouge cellular system. *Id.* ¶¶ 4-5.

24. H. Donald Nelson is the President and Chief Executive Officer of USCC. TDS/USCC Ex. 2, ¶ 1.[29] Mr. Nelson's principal responsibilities at USCC from 1987 through 1990 were to manage and oversee the rapidly expanding development and operation of USCC's cellular systems. *Id.* ¶ 5.[30] Mr. Nelson's principal

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[27] USCC was created in 1983 as a wholly-owned subsidiary of TDS. TDS/USCC Ex. 2, ¶ 4. USCC's stock was first offered to the public in 1988, and approximately 15% of USCC's stock currently is publicly traded. *Id.*

[28] Mr. Carlson's responsibilities in the cellular area include identifying potential markets for acquisition, meeting and negotiating with other parties regarding acquisitions, and deciding whether to close an acquisition and what purchase price to pay. *See* TDS/USCC Ex. 2, ¶ 6; TDS/USCC Ex. 9, ¶ 3.

[29] In 1983, Mr. Nelson was hired by TDS to assist with USCC's cellular filings and to develop its cellular operations. TDS/USCC Ex. 2, ¶¶ 4-5. He became Vice President of USCC when it was created in 1983 and later became its President and Chief Executive Officer. *Id.*

[30] From 1987 through 1990, USCC was growing quickly, effectively doubling in size each year. TDS/USCC Ex. 2, ¶ 7. During that period, USCC put 43 new cellular systems into operation and grew from approximately 50 employees to more than 650 employees. *Id.*

(continued...)

responsibility was to manage USCC's ongoing cellular operations and marketing and not to oversee acquisitions of new ventures or markets; he therefore did not have any significant involvement in USCC's acquisition of its 49% interest in La Star. *Id.* ¶ 5.

25. In mid-1987, Mr. Carlson informed Mr. Nelson of the potential acquisition of partnership interests in the Baton Rouge wireline cellular system, which was already licensed by the FCC and being operated by a partnership controlled by an affiliate of BellSouth. TDS/USCC Ex. 2, ¶ 10. Not until after Mr. Carlson and USCC sought out the potential acquisition of the Baton Rouge interest did USCC realize that this acquisition included a minority joint venture interest in an applicant for part of the New Orleans MSA. TDS/USCC Ex. 2, ¶ 12; TDS/USCC Ex. 9, ¶ 4. Mr. Carlson and USCC decided to complete the acquisitions based on the desire to acquire an interest in the operating Baton Rouge cellular system. TDS/USCC Ex. 9, ¶ 4. Mr. Nelson viewed the transactions as the purchase of companies holding limited partnership interests in Baton Rouge. TDS/USCC Ex. 2, ¶ 11.

26. USCC's contemporaneous allocation of the purchase price for these acquisitions confirms Mr. Nelson's testimony that the acquisition of an interest in La Star was incidental to, and far less important than, the acquisition of interests in the Baton Rouge licensee. In 1987, USCC allocated approximately $2,460,000 for the acquisition of one interest in the Baton Rouge limited partnership and $300,000 for the acquisition of the interest in La Star -- approximately one-eighth the Baton Rouge interest. TDS/USCC Ex. 8, ¶ 5; TDS/USCC Ex. 2, Tab U, p. 10. When all the acquisitions in Louisiana involving interests in the Baton Rouge licensee are considered, TDS allocated more than $5,000,000 to the interests in the operating Baton Rouge licensee and approximately $300,000 to the interests in La Star -- approximately one-sixteenth the Baton Rouge interest. TDS/USCC Ex. 2, Tab U, pp. 9-11.

27. The sums contributed to the expenses of the Baton Rouge and La Star ventures also confirm that the Baton Rouge interest was the more important asset. At the time of the hearing in the *La Star* proceeding, USCC had contributed almost $5,900,000 to the construction, operation and management of the Baton Rouge cellular system and approximately $500,000 to the costs of La Star's litigation and other expenses. TDS/USCC Ex. 2, Tab U, pp. 9-11. The operational costs in Baton Rouge thus amounted to more than ten times the litigation costs of La Star.

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[30] (...continued)
Its annual service revenues increased from approximately $8 million in 1987 to approximately $55 million in 1990. *Id.*

28. In sum, USCC's statements regarding the reason for its purchase of the Star's parent companies were true and accurate. Acquisition of the La Star interest was incidental to a larger deal in which USCC had as its primary goal obtaining a valuable limited partnership interest in the Baton Rouge market.

2. The Belief And Intention Regarding Control Of La Star.

29. Throughout the *La Star* proceeding, USCC and its principals consistently maintained the belief that USCC did not control La Star. Such statements include:

> *USCC purchased the stock of Star in August 1987 with the understanding that it was buying nothing more than a minority non-controlling interest in La Star.*[31]
>
> - - - - -
>
> *USCC purchased its 49% interest in La Star with the clear understanding that La Star was controlled by its 51% shareholder, SJI Cellular, Inc. (SJI).*[32]
>
> - - - - -
>
> *USCC has . . . [not] acted in any way to assert control over any of the activities of La Star, beyond its actions in appointing a minority of the Management Committee.*[33]
>
> - - - - -
>
> *It has always been the intention of La Star's venturers that La Star would be controlled by its Management Committee, which is ultimately controlled by SJI Cellular.*[34]
>
> - - - - -
>
> *While USCC has historically been active in increasing its cellular holdings throughout the country, and*

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[31] TDS/USCC Ex. 1, Tab C, at 7, Reply to Petition of New Orleans CGSA, Inc. to Dismiss and Deny the Application and Amendments of La Star Cellular Telephone Company, filed March 2, 1988 (March 1988 Reply).

[32] TDS/USCC Ex. 2, Tab M, at 1 Affidavit of H. Donald Nelson submitted with March 1988 Reply.

[33] TDS/USCC Ex. 2, Tab M, at 1 Affidavit of H. Donald Nelson submitted with March 1988 Reply.

[34] TDS/USCC Ex. 1, Tab G, at 26, Motion for Summary Decision filed August 15, 1990 (Summary Decision Motion).

would most likely consider an offer by SJI (or, for that matter, anyone else) to sell any or all of its cellular holdings at reasonable prices, we have never had any wish to usurp control of La Star.[35]

30. Although the Commission concluded in the *La Star* proceeding that USCC controlled La Star, the Commission made no finding that USCC believed that it controlled the joint venture. The undisputed facts developed in this proceeding demonstrate that TDS, USCC and their principals, including LeRoy Carlson and H. Donald Nelson, believed that USCC did not control La Star, notwithstanding the Commission's conclusion to the contrary under its legal criteria for analyzing control.

31. Mr. Carlson understood from the outset that USCC was "acquiring only a minority interest" in La Star and that "the Bradys [SJI] would be in control and would operate" La Star's cellular system if La Star's application were ultimately granted. TDS/USCC Ex. 9. ¶¶ 5, 12-13. He had been pleased when he learned that the Brady family was the principal owner of La Star because he had a high professional regard for John Brady, Sr., with whom he had worked in the past. *Id.*

32. Mr. Carlson's assertion that he believed the Bradys controlled La Star is corroborated by contemporaneous private handwritten notes that he wrote on a copy of the *La Star HDO*. *Id.* ¶ 11 and Tab B. Mr. Carlson was astonished by the designation of the control issue because to him the notion that USCC controlled La Star seemed completely unfounded. *Id.* ¶ 11. In the bottom margin of one page of the *La Star HDO*, he wrote: **"Everyone who knows John B. knows he will hold on to control."** *Id.* Tab B, at 3. On the following page in the righthand margin Mr. Carlson wrote: **"Must tell history of John Brady family - 'Control.'"** *Id.* Tab B, at 4. By that comment, Mr. Carlson was expressing his belief that the Brady sons were strong independent telephone people who were in control of La Star. *Id.* ¶ 13.

33. Mr. Carlson had informed both H. Donald Nelson and Alan Naftalin (USCC's FCC counsel) that the Bradys were in control of La Star and that USCC was acquiring only a minority interest in the joint venture. *Id.* ¶¶ 5, 12 (Carlson testimony); TDS/USCC Ex. 2, ¶ 12 (Nelson testimony); TDS/USCC Ex. 11, ¶ 22 (Naftalin testimony). Neither Mr. Naftalin nor anyone else at Koteen & Naftalin ever advised TDS or USCC that USCC's activities placed USCC in control of La Star, and in fact, Mr. Naftalin and others at his firm expressed the view to Mr. Carlson and Mr. Nelson that USCC did not control La Star.

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[35] TDS/USCC Ex. 2, Tab U, at 13, USCC Exhibit 1 (Testimony of H. Donald Nelson).

TDS/USCC Ex. 9, ¶ 14; TDS/USCC Ex. 11, ¶ 22. As one example, when NOCGSA first raised the control issue in a petition in February 1988, Peter Connolly of Koteen & Naftalin flatly told Mr. Carlson, in a letter also sent to Mr. Nelson, "We can . . . demonstrate that TDS doesn't control La Star." TDS/USCC Ex. 11, Tab D, 1.

34. Mr. Nelson similarly believed that USCC had acquired a 49% non-controlling interest in La Star. TDS/USCC Ex. 2, ¶ 11. When Roy Carlson introduced Mr. Nelson to the Bradys in Chicago in August of 1987, Mr. Carlson told him that the Bradys had "the majority" and "would run the system." *Id.* ¶¶ 12, 19.[36] This made sense to Mr. Nelson because the Bradys had a local Louisiana background and connections and significant wireline telephone experience. TDS/USCC Ex. 2, ¶ 19.

35. Mr. Nelson's belief that SJI, not USCC, controlled La Star is confirmed by the evidence submitted in this proceeding to support his candor on individual statements in his written and oral testimony. Specifically, his explanation of his perspective on the functioning of the Management Committee confirms his belief that SJI was communicating with La Star's counsel, Mr. Belendiuk, and that SJI was approving La Star's actions. *See infra*, ¶¶ 41-44. Additionally, his testimony concerning USCC's activities with respect to La Star confirm his belief that those activities were ministerial in nature and not actions governing La Star. *See infra* ¶¶ 59-64.

36. In sum, the record demonstrates that LeRoy Carlson and H. Donald Nelson, the two senior officers of TDS and USCC respectively, believed that USCC did not control La Star. Throughout the *La Star* proceeding, the principals of TDS and USCC maintained a good faith belief and understanding that USCC was a minority partner not in control of La Star, notwithstanding the contrary conclusion reached by the Commission in that proceeding pursuant to its legal criteria.

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[36] On August 19, 1987, after the closing on USCC's acquisition of its interest in La Star, the principals of SJI, TDS and USCC met in Chicago. TDS/USCC Ex. 1, ¶ 4; TDS/USCC Ex. 2, ¶ 12; TDS/USCC Ex. 3, ¶ 5; TDS/USCC Ex. 9, ¶ 6; TDS/USCC Ex. 4, ¶ 3. Mr. Carlson had asked Mr. Nelson to drop by the meeting, which was in progress when Mr. Nelson arrived. TDS/USCC Ex. 2, ¶ 12. Mr. Nelson stayed at the meeting for approximately 15 minutes. TDS/USCC Ex. 2, ¶ 12; TDS/USCC Ex. 1 ¶ 4. Mr. Carlson told Mr. Nelson that the Bradys had the majority and controlling interest in La Star, that Mr. Nelson should provide whatever assistance La Star requested for its application, that La Star's counsel was Arthur Belendiuk, who would call Mr. Nelson with questions to which Mr. Nelson should respond, and that USCC would pay the bills for La Star. TDS/USCC Ex. 2, ¶ 12.

3. The Functioning of the Management Committee.

37. In the *La Star* proceeding, a number of statements were made referencing La Star's Management Committee. Specifically, testimony of H. Donald Nelson, pleadings filed on behalf of USCC by its counsel, Koteen & Naftalin, and pleadings and filings of La Star, all described the role of La Star's Management Committee. At its foundation, the issue is whether USCC was seeking to overstate the role of the Management Committee in an effort to conceal or downplay USCC's role in La Star. *See HDO*, 9 FCC Rcd. at 945-955. The record in this proceeding now establishes that the statements made by USCC and its principals reflected their genuine understanding of the powers of the Management Committee, its informal method of operation during the licensing proceeding, and the locus of control of La Star. To the extent that the testimony or pleadings created an impression that the Management Committee acted frequently or formally, the evidence in this proceeding establishes that neither Mr. Nelson nor any other person associated with USCC had any intention of misleading the Commission.

Statements of H. Donald Nelson

38. In various declarations that accompanied pleadings and in his testimony submitted in the *La Star* proceeding, Mr. Nelson made various statements regarding the operation of La Star's Management Committee. Illustrative of such statements are the following:

MR. TOLLIN: *To your knowledge, does the management committee for La Star have complete and exclusive power to direct and control La Star's activities?*

MR. NELSON: *Yes.*[37]

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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.[38]

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[37] TDS/USCC Ex. 2, Tab I, at 12, July 1990 deposition testimony of H. Donald Nelson.

[38] TDS/USCC Ex. 2, Tab R, at 2, August 1990 Declaration of H. Donald Nelson.