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

In Re Application of

ELLIS THOMPSON CORPORATION

For Facilities in the Domestic Public Cellular
Radio Telecommunications Service on
Frequency Block A in Market No. 134,
Atlantic City, New Jersey

CC DOCKET NO. 94-136

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To: The Commission

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JOINT OPPOSITION TO AMERITEL APPLICATION FOR REVIEW

The Wireless Telecommunications Bureau ("Bureau"), Telephone and Data Systems, Inc. ("TDS"), Ellis Thompson Corporation ("ETC") and American Cellular Network Corp. d/b/a Comcast Cellular ("Amcell") (collectively, the "Parties") file herewith, by their attorneys and pursuant to Section 1.115 of the Commission's Rules, their Joint Opposition to Ameritel's Application for Review ("Application") of the Review Board Memorandum Opinion and Order, FCC 95R-13, released July 7, 1995, affirming the denial by Presiding Judge Chachkin of Ameritel's Petition for Leave to Intervene ("Petition") in this proceeding.

I. PROCEDURAL BACKGROUND

On November 28, 1994, following a remand from the United States Court of Appeals for the District of Columbia Circuit,¹ the application of ETC, which had initially been granted in June of 1988,² was designated for hearing. Ellis Thompson Corporation, 9 FCC Rcd 7138 (1994). The sole issue was to determine whether at all times during the nine-year prosecution

¹ Telephone and Data Systems, Inc. v. FCC, 19 F.3d 43 (D.C. Cir. 1994).

² Ellis Thompson, 3 FCC Rcd 3962 (Mobile Serv. Div. 1988).

of the application (including a seven year term where ETC was an operating licensee) one Ellis Thompson remained the real-party-in-interest.³ Following extensive discovery, a Joint Motion for Summary Decision was filed by the Bureau, ETC and Amcell on July 14, 1995, which is unopposed. If granted, it will resolve the sole designated issue.

Ameritel filed its Petition on February 6, 1995. It was denied by the Presiding Judge on March 7, 1995. Memorandum Opinion and Order, FCC 95M-68, released March 7, 1995. The Presiding Judge found that "Ameritel ha[d] failed to establish that it is the successor-in-interest to" a party in interest to the proceeding, and thus did not meet the requirements for intervention as of right set forth in Section 1.223(a). The Presiding Judge also found that Ameritel had not met the requirements for permissive intervention under Section 1.223(b). On March 24, 1995, the Presiding Judge dismissed as untimely Ameritel's March 21, 1995 "Response" to oppositions and comments⁴ filed with respect to its Petition by the existing parties. Order, FCC 95M-84, released March 24, 1995.⁵ In its "Response" Ameritel attempted to furnish facts omitted from its Petition designed to demonstrate the basis of its claim to party status. On March 27, 1995, Ameritel appealed the Presiding Judge's order denying its

³ Ellis Thompson Corporation, 9 FCC Rcd at 7143. Pending the outcome of the hearing, the Commission set the grant of the application aside and ETC currently operates Station KNKA 791 under interim operating authority. Id. The station was constructed by Mr. Thompson in early 1989. Joint Motion for Summary Decision at 33. It currently operates with eleven cell sites and serves well over 10,000 customers. Id. at 36-37.

⁴ On February 15, the Bureau and TDS filed joint "Comments on Petition to Intervene," and Amcell filed an "Opposition to Petition for Leave to Intervene." On February 21, ETC submitted its "Opposition to Petition to Intervene."

⁵ The Response was filed some thirty days after the last of the oppositions was filed and fourteen days after the release of the Presiding Judge's ruling denying Ameritel's intervention. In any case, the Commission's Rules do not authorize the filing of such pleadings. See 47 C.F.R. § 1.294(b) ("[R]eplies to oppositions [to interlocutory requests] will not be entertained."). Ameritel provided no justification for its impermissible filing or for its lateness. Order at 1 n. 1.

intervention, asserting that it "clearly stated its status and its right to intervene" in its Petition and that this showing was "unequivocally supported" by the accompanying Declaration of Richard Rowley. Appeal at 3. The Review Board denied Ameritel's appeal, reasoning that:

Ameritel's argument ignores a fatal legal flaw in its original petition to intervene: its petition did not contain specific allegations of fact sufficient to show that Ameritel was the successor-in-interest to Ameritel, Inc., a mutually exclusive applicant, and, therefore, a party-in-interest. . . . The ALJ correctly held that Ameritel's allegation . . . that it was the successor-in-interest to Ameritel, Inc. rested 'solely on the bare declaration of Richard Rowley' and offered 'no supporting evidence for Rowley's assertion.' Rowley did not offer any explanation about how, when, and by whom Ameritel, Inc., a corporation, had been changed to a partnership. Nor did Ameritel's petition incorporate, or ask the ALJ to take official notice of, any documents which supported the legal conclusion that it was the successor-in-interest to Ameritel, Inc.

Memorandum Opinion and Order, FCC 95R-13, released July 7, 1995, at 2.

Ameritel now asks the Commission to reverse the Review Board's affirmance of the Presiding Judge's denial of intervention as of right.⁶ However, as demonstrated below, the Board correctly held that Ameritel's Petition was properly denied because Ameritel failed to show that it was entitled to intervene as of right under Section 1.223(a) of the Rules, and Ameritel fails to advance any argument in the instant Application warranting a different result. Even if the Commission were to consider the merits of Ameritel's request for intervention -- a process which it should not undertake -- a review of the unauthorized Ameritel "Response" shows conclusively that Ameritel cannot be accorded status as a party to the proceeding.

II. THE REVIEW BOARD CORRECTLY HELD THAT AMERITEL FAILED TO MEET THE REQUIREMENTS FOR INTERVENTION

Under Section 1.223(a), an entity seeking to intervene as of right must file "a petition for intervention showing the basis of its interest." 47 C.F.R. § 1.223(a). Section 309(e) of the

⁶ Ameritel has abandoned its claim that it is entitled to discretionary intervention under Section 1.223(b). Application at 1 n. 4.

Communications Act of 1934, as amended (the "Act") is to the same effect. 47 U.S.C. § 309(e). It is by now well settled that the "legislative purpose in requiring petitioners for intervention to show 'the basis for their interest' is to enable the Commission to determine whether the petitioners' allegations show them to be 'parties in interest.'" Elm City Broadcasting Corporation v. United States, 235 F.2d 811, 816 (D.C. Cir. 1956) (emphasis added). Where, as here, a would-be intervenor is a completely different legal entity than the original applicant and simply asserts that it is a party without providing any supporting facts, the Commission can in no sense be deemed to have sufficient information to carry out the legislative intent, i.e. it cannot "determine" whether that entity is a party.

In this case, Ameritel conceded at the outset that it never was an applicant for the Atlantic City non-wireline cellular authorization. Rather, it asserted that it was a "successor-in-interest" to another entity, Ameritel, Inc., which had been the fifth selected applicant (i.e. the fourth runner-up) in the lottery: "It should be noted that the petitioner herein, Ameritel, is an Ohio general partnership that is the successor-in-interest to Ameritel, Inc." Petition at 2 n. 7. The only support for this conclusory assertion was the Declaration of Richard Rowley attached to the Petition, which blandly recites that "I am a general partner in Ameritel ('Ameritel'), successor-in-interest to Ameritel, Inc." Petition, Exhibit 2 at 1. Because Ameritel presented no more than this conclusory allegation of its relationship to the former corporate applicant, Ameritel utterly failed to meet its burden of demonstrating party-in-interest status under Section 1.223(a) of the Rules and Section 309(e) of the Act, and its Petition was properly denied. See GAF Broadcasting Co., Inc., 54 Rad. Reg. 2d (P&F) 94 and 96.

III. AMERITEL'S ARGUMENTS IN SUPPORT OF ITS APPLICATION FOR REVIEW ARE MERITLESS

Ameritel's Application for Review fails to provide any basis for the Commission to upset the Presiding Judge's denial of Ameritel's Petition or the Review Board's affirmance. Section 1.115(b)(5) of the Rules specifies the requirements for an application for review of a final order of the Review Board. Ameritel does not even reference these requirements in its Application, let alone satisfy them. Such failure to specify the factors warranting review of the Board's decision renders the Application fatally defective. See Chapman S. Root Revocable Trust, 8 FCC Rcd 4223, 4224 ¶ 7 (1993).

Ameritel's three arguments for reversal of the Review Board's Memorandum Opinion and Order are as follows. First, Ameritel argues that the Review Board applied the wrong standard under Section 309 of the Act in deciding that Ameritel had failed to meet the requirements for intervention under Section 1.223(a). Second, in what amounts to a rehash of its first point under a different heading,⁷ Ameritel contends that the Review Board's holding "involves a question of law which has not previously been resolved by the Commission because it required Ameritel to establish in its Petition more than a showing of the basis for its interest." Application at 4 (emphasis in the original). Third, Ameritel argues that the Review Board's ruling was founded on erroneous findings as to the underlying facts. As is shown below, all of these arguments are utterly without merit and should be rejected by the Commission.

A. The Review Board Applied the Correct Standard in Determining that Ameritel Had Not Met the Requirements for Intervention under Section 1.223(a)

At the heart of Ameritel's Application is the contention that the Review Board improperly

⁷ Because this point is inextricably intertwined with Ameritel's first argument, the Parties address both arguments together in subsection (A) infra.

denied the appeal because it held Ameritel to the standards set forth in Section 309(d) of the Act in determining the sufficiency of Ameritel's showing of party-in-interest status. According to Ameritel, Section 309(e) of the Act, 47 U.S.C. § 309(e), which provides the statutory basis for Section 1.223(a) of the Commission's Rules, requires only a "showing [of] the basis [for the petitioner's] interest." Application at 3. In contrast, Section 309(d) of the Act, 47 U.S.C. § 309(d), pertaining to petitions to deny, requires "specific allegations of fact sufficient to show that the petitioner is a party in interest." Therefore, according to Ameritel, a less rigorous showing of party-in-interest status is required for intervention as of right in a hearing than for establishing standing to file a petition to deny.⁸

Ameritel cites no authority for its conclusion that different showings are required under 47 U.S.C. §§ 309(d) and (e). In point of fact, Commission precedent is clearly to the contrary. In St. Louis Telecast, Inc., 10 Rad. Reg. 2d (P&F) 1185, 1187 (1954), the Commission held:

It seems clear from the various decisions by the courts that the standards are the same for determining whether a person is a "party in interest" for the purposes of intervening in a hearing under [then] Section 309(b) of the Act, for the purposes of maintaining a protest under [then] Section 309(c), or for the purposes of maintaining an appeal to the courts from a Commission decision under Section 402 of the Act.

Applying the same reasoning, the Commission held in Radio Lares, 63 FCC 2d 305, 306 (1977), that the standards applicable under Sections 309(d) and (e) are "the same in both instances."⁹

⁸ Ameritel also argues that showings of party-in-interest status under 47 U.S.C. § 309(e) are not required to be made under oath, even though Ameritel recognizes that Section 1.223(a) of the Commission's Rules requires that such showings be under oath. Application at 3 n. 5. This point is a red herring because the Rowley Declaration was made under oath. Its deficiency was in its lack of substance, not in its form.

⁹ See also RKO General Inc., 89 FCC 2d 297, 326 n. 125 (1982) ("A party in interest for purposes of advocating a petition to deny is also a party in interest for purposes of intervening . . ."); Juarez Communications Corp., 56 Rad. Reg. (P&F) 961, 962 (Review Board 1984).

Because the standards under 47 U.S.C. §§ 309(d) and (e) are the same, Ameritel is obviously in error in claiming that "the Review Board MM&O conflicts with 47 U.S.C. 309(e) and 47 C.F.R. 1.223(a) because the Review Board applied the stricter standard of 47 U.S.C. § 309(d)" Application at 3. Accordingly, Ameritel's failure to present facts in its Petition sufficient to show that it was the successor-in-interest to the original corporate applicant rendered the Petition defective.

B. The Review Board Did Not Rely on Any of the Facts Alleged To Be Erroneous by Ameritel

The remainder of Ameritel's Application (pp. 5-7) is devoted to its meritless claim that the Review Board's affirmance was expressly premised on allegedly erroneous findings of the Presiding Judge. Ameritel's contention is that the Presiding Judge's denial of intervention was erroneous because it was based on mistaken conclusions regarding the effect on the applicant's continued existence of the following "important and material questions of fact": (i) Ameritel, Inc.'s merger into another entity, (ii) the failure of the Ameritel partnership to make a fictitious name registration, and (iii) the existence of a new Ohio corporation named Ameritel, Inc. Application at 5-6.

Regardless of whether the facts cited by the Presiding Judge were in error, they did not form the basis for his decision. Rather, the Presiding Judge reasoned that Ameritel's successor-in-interest claim rested solely on a bare, unsupported Declaration of Richard Rowley, and, on that basis alone, the Review Board affirmed the decision. The Review Board did not even comment, favorably or unfavorably, on any of the Presiding Judge's findings cited by Ameritel,¹⁰ and they form no part of the basis for the Board's decision. In fact, the Review

¹⁰ It is also noteworthy that none of the Presiding Judge's findings, whether right or wrong, affect the unassailable fact, admitted by Ameritel, that without Commission consent 51% of the ownership of the corporate applicant was alienated. See section IV infra.

Board declined to consider the untimely and unauthorized pleading in which Ameritel belatedly attempted to explain its relationship to the original corporate applicant. Memorandum Opinion and Order, FCC 95R-13, released July 7, 1995, at 2.

IV. EVEN IF THE COMMISSION REACHES THE MERITS OF AMERITEL'S REQUEST, THE LATE-FILED AND UNAUTHORIZED RESPONSE SHOWS CONCLUSIVELY THAT AMERITEL IS NOT A PARTY-IN-INTEREST TO THE PROCEEDING

In addition to the foregoing infirmities in Ameritel's Application -- which alone require its rejection -- the scant facts produced by Ameritel confirm that its intervention claim also fails on the merits. The Affidavit of Thomas E. Rawlings attached to the March 21, 1995 Ameritel Response states:

In April of 1987 AMERITEL (OH) redeemed the stock owned by all of its then current shareholders except for Gene A. Folden, Thomas E. Rawlings, David C. Rowley and Richard D. Rowley (hereinafter collectively called the "Shareholders").

Rawlings Affidavit at 2. But Ameritel, Inc. reported in Exhibit 1 to its Daytona Beach, Florida application that, as of February 25, 1986,¹¹ those four named individuals each held a 12.25 percent interest in Ameritel, Inc. Therefore, collectively, those four individuals held a 49 percent, non-controlling interest. See Attachment A to the TDS-Bureau February 15, 1995 Comments. The remaining stockholders -- whose interests Ameritel, Inc. redeemed -- owned the remaining and controlling 51 percent. Therefore, the Ameritel partnership is made up of four individuals who held less than a controlling interest in Ameritel, Inc.

The unauthorized redemption of Ameritel, Inc.'s controlling stockholder interests

¹¹ This was only 19 days after the Ameritel, Inc. Atlantic City application had been filed on February 6, 1986 and only four days after Ameritel, Inc. came into existence on February 21, 1986. See TDS-Bureau Comments at 2 (citing Ameritel, Inc.'s Application for an Initial Cellular Authorization to Construct for the Daytona Beach, Florida MSA, reporting Ameritel, Inc.'s other pending applications, including Atlantic City; the Atlantic City application has been purged from the Commission's files).

constituted a prohibited transfer of control of a pending application, which the Commission was never asked to approve, and never did approve.¹² Moreover, it is now clear that Ameritel, Inc. did not even come into existence as a corporation until February 21, 1986, fifteen days after its Atlantic City application was filed on February 6, 1986. See Rawlings Affidavit at 1-2. That fact indicates that a misrepresentation as to legal status was made at the time of filing. The prohibited transfer of control in 1987 of the corporate applicant, which incidentally did not even exist when the Atlantic City application was filed, would prevent grant of either an Ameritel, Inc. or an Ameritel application. Therefore, neither Ameritel, nor Ameritel, Inc. (if it still existed), has any legally cognizable interest in this proceeding and neither is a party.

V. CONCLUSION AND REQUEST FOR EXPEDITIOUS CONSIDERATION

The hearing in which Ameritel seeks to intervene involves an application which has been pending for over nine years and a cellular system operating for approximately seven years. During that time, there have been challenges to the grant at every level of the Commission.¹³

¹² It was Commission policy at the time that a "tentative selectee must retain majority ownership and control of its application after the lottery." Public Notice, Guidelines for Settlements and Changes in Ownership of Cellular Systems, 59 Rad. Reg. (P&F) 1450, 1451 (Common Car. Bur. 1986). See 47 C.F.R. §§ 22.23(c)(4), (g) (1986) (substantial changes in ownership of applicant result in applicant being considered newly filed as of date of amendment). Such an amendment tendered after the cut-off date would subject the application to dismissal. 47 C.F.R. § 22.20(b)(7) (1986). Obviously, the same policy governed lesser-ranked applicants such as Ameritel, Inc. Moreover, the then operative Commission rule concerning transfers of control provided that a "change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control." 47 C.F.R. § 22.39 (1986). See also McCaw Cellular Communications, Inc., 4 FCC Rcd 3784, 3788 (Common Car. Bur. 1989) (any transfer which involves the movement of 50% or more of a licensee's stock is a substantial change of control).

¹³ Subject to a favorable outcome of the outstanding hearing, Amcell, ETC and TDS have reached a settlement of protracted civil litigation before state and federal courts. See Joint Motion for Summary Decision at 28. Prompt Commission action will therefore facilitate a final resolution of these contentious related disputes.

In none of those proceedings has there been a submission by Ameritel or its purported predecessor-in-interest. Now, with the subject application designated for hearing, extensive discovery completed, and a motion for summary decision (joined by the Bureau) pending before the Presiding Judge, Ameritel's belated and defective attempt at intervention should not be allowed to further delay the proceeding's resolution. Therefore, the parties respectfully request that the Commission act expeditiously to deny Ameritel's Application for Review.

Respectfully submitted,

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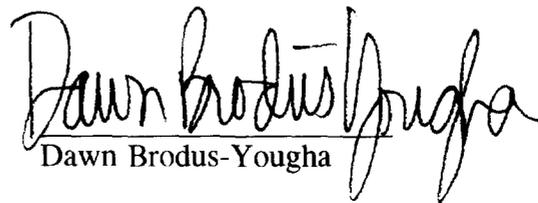
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August 22, 1995

Certificate of Service

I, Dawn Brodus-Yougha, a secretary in the law firm of Gurman, Blask & Freedman, Chartered, hereby certify that I have sent by First Class United States mail, postage prepaid, copies of the foregoing to the following:

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August 22, 1995

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