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 Federal Communications Commission  
 Washington, D.C. 20554

DISPATCH

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.

**INITIAL DECISION OF ADMINISTRATIVE LAW  
 JUDGE JOSEPH P. GONZALEZ**

Issued: September 19, 1995; Released: September 27, 1995

1. This proceeding involves the application of Telephone and Data Systems, Inc. (TDS), for authority 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*, which set this matter for hearing specified 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.

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

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 move for the issuance of a summary decision on the above set forth 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 in the New Orleans, Louisiana, metropolitan statistical area (MSA). *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.*<sup>1</sup>

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 Communications Co. ("Star"), which, at the time of its formation in 1983, was controlled by Maxcell Telecom Plus ("Maxcell"). *Id.* at 940 & n.6. In August of 1987, USCC acquired Star. *Id.* Thus, from ap-

<sup>1</sup> 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 or-

dered the FCC to reinstate La Star's application. See *Maxcell Telecom Plus v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

proximately August 1, 1987 to the present, La Star's 49% minority partner was 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.<sup>2</sup> 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.<sup>3</sup> The Commission affirmed that finding.<sup>4</sup> The question of control of La Star, therefore, is not at issue in this proceeding. At 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.<sup>5</sup>

<sup>2</sup> *La Star Cellular Telephone Company*, 5 FCC Rcd. 3286, 3290 (1990) (*La Star HDO*).

<sup>3</sup> *La Star Cellular Telephone Company*, 6 FCC Rcd. 6860, 6888 (Chachkin, ALJ 1991).

<sup>4</sup> 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*.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> The Commission has conditioned the grants of various ap-

### 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 application for the RSA.<sup>6</sup> The Commission issued the *HDO* to resolve all such allegations.<sup>7</sup>

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<sup>8</sup> requested documents and answers to interrogatories from TDS, USCC and other principals and consultants of La Star.<sup>9</sup> The Bureau and other parties also requested the taking of depositions of principals and consultants of TDS, USCC and La Star.

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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

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.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> La Star, SJI and Mr. Belendiuk cooperated in the production of documents and provided answers to interrogatories.

<sup>12</sup> To permit development of a full record on the designated issues and pursuant to an agreement among the parties approved by the Presiding Judge, TDS, USCC and La Star waived

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.<sup>13</sup>

13. Written direct case testimony was exchanged by TDS, USCC, the Bureau and the Settlement Group on February 7, 1995.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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. 382; *Order*, FCC 95M-74, released March 16, 1995. The Joint Motion For Summary Decision (Joint Motion) was filed on July 31, 1995.<sup>17</sup>

#### 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.<sup>18</sup> An essential element of misrepresentation and lack of candor is a party's intent to deceive.<sup>19</sup>

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.<sup>20</sup> Negligence, inadvertence, and imprecision without intent to deceive do not amount to misrepresentation or lack of candor.<sup>21</sup> Moreover, where a party already has disclosed 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.<sup>22</sup>

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.<sup>23</sup> Witnesses commonly recall the details of conversations differently, particularly when the conversations at issue took place several years before

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.

<sup>13</sup> Bill of Particulars of the Wireless Telecommunications Bureau, January 13, 1995 (*B/P*).

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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 375-383.

<sup>17</sup> 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 31, 1995.

<sup>18</sup> *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).

<sup>19</sup> *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).

<sup>20</sup> See *Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 639 (Rev. Bd. 1984).

<sup>21</sup> See *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1221 (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 falling short of the punctilio normally required by the Commission falls short" of the deceptive intent required for disqualification." 9 FCC Rcd. at 6415.

<sup>22</sup> 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).

<sup>23</sup> *Elizabeth M. Younts*, 8 FCC Rcd. 1714, 1714 n.5 (1993).

the testimony.<sup>24</sup> 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.<sup>25</sup>

#### 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 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.<sup>26</sup>

#### 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, at 915. 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.

<sup>24</sup> 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. Couone*, 63 F.C.C. 2d 596, 606 (1977) ("[i]t is not unusual for witnesses to recall the details of conversations differently").

<sup>25</sup> See *Grenco, Inc.*, 39 F.C.C. 2d 732, 736-37 (1973); *Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd. 6412, 6417 n.13 (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).

<sup>26</sup> *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.

<sup>27</sup> Mr. Carlson's responsibilities in the cellular area include identifying potential markets for acquisition, meeting and nego-

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; TDS/USCC Ex. 4, ¶ 4.

21. At the time of its formation in 1983, *Star* was controlled by Maxcell. 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 in *Star*. *Id.* TDS is the parent company of USCC, owning more than 80% of its stock. TDS/USCC Ex. 2, ¶ 2.

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. 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.<sup>27</sup>

23. Mr. Carlson conducted the negotiations that led to USCC's acquisition of the companies that owned *Star*. *Id.* at 4. 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.* at 4.

24. H. Donald Nelson is the President and Chief Executive Officer of USCC. TDS/USCC Ex. 2, ¶ 1.<sup>28</sup> 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.<sup>29</sup> The responsibility for the acquisition of new cellular markets rested primarily with Roy Carlson and his management team. *Id.* ¶ ¶ 5, 6.

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 on the air. 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 ven-

tuating 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.

<sup>28</sup> 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, ¶ ¶ 3-5. He became Vice President of USCC when it was created in 1983 and later became its President and Chief Executive Officer. *Id.* at 4.

<sup>29</sup> From 1987 through 1990, USCC was growing quickly. During that period, USCC put 43 new cellular systems into operation and grew from approximately 50 employees to more than 650 employees. *Id.* TDS/USCC Ex. 2, ¶ 5. Its annual service revenues increased from approximately \$8 million in 1987 to approximately \$55 million in 1990. *Id.*

ture interest in an applicant for part of the New Orleans MSA. TDS/USCC Ex. 2, ¶ 10; 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.

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.<sup>30</sup>

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).<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

While USCC has historically been active in increasing its cellular holdings throughout the country, and 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.<sup>34</sup>

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.

<sup>30</sup> TDS/USCC Ex. 1, Tab C, at 11, n.4, 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).

<sup>31</sup> TDS/USCC Ex. 2, Tab M, at 1 Affidavit of H. Donald Nelson

submitted with March 1988 Reply.

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

<sup>33</sup> TDS/USCC Ex. 1, Tab G, at 30, Motion for Summary Decision filed August 15, 1990 (Summary Decision Motion).

<sup>34</sup> TDS/USCC Ex. 2, Tab U, at 14, USCC Exhibit 1 (Testimony of H. Donald Nelson).

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. 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.<sup>35</sup> 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.

### 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.<sup>36</sup>

*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.<sup>37</sup>*

*I understood that [Mr. Belendiuk] had first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular. In these circumstances, I did not believe that my approval was necessary, since three members of the Management Committee had already given theirs.<sup>38</sup>*

<sup>35</sup> 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. Nel-

son with questions to which Mr. Nelson should respond, and that USCC would pay the bills for La Star. TDS/USCC Ex. 2, ¶¶ 12-13.

<sup>36</sup> TDS/USCC Ex. 2, Tab I, at 12, July 1990 deposition testimony of H. Donald Nelson.

<sup>37</sup> TDS/USCC Ex. 2, Tab R, at 3, August 1990 Declaration of H. Donald Nelson.

<sup>38</sup> TDS/USCC Ex. 2, Tab R, at 4, August 1990 Declaration of H. Donald Nelson.

*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 interests of the two venturers, a telephone conference was held.<sup>39</sup>*

The evidence in this proceeding demonstrates that Mr. Nelson's statements were true to the best of his knowledge and belief and that he had no intent to mislead the Commission.

39. First, Mr. Nelson genuinely believed that SJI, not USCC, controlled La Star. See *supra* ¶¶ 34-35. He believed that the La Star's Joint Venture Agreement vested control of La Star in SJI and that the SJI principals were consulted on and approved La Star's actions. See *infra*, ¶¶ 40-44. Many of Mr. Nelson's statements merely described the provisions of the Joint Venture Agreement with respect to the operation and control of the joint venture, which he genuinely believed had been assumed by USCC in good faith.

40. For example, when Mr. Nelson testified in the *La Star* proceeding that the Management Committee was "controlled by the three members appointed by SJI Cellular," he was describing the composition of the Committee, not its activities. TDS/USCC Ex. 2, ¶ 58. The paragraph containing that statement refers to the constitution of the Management Committee, not to the nature or extent of the Committee's activity.<sup>40</sup> Additionally, at his deposition in the *La Star* proceeding, Mr. Nelson answered "yes" to the question whether the Management Committee had "the complete and exclusive power to direct and control La Star's activities." TDS/USCC Ex. 2, Tab I, p. 12. In Mr. Nelson's view, the Management Committee had such legal power and could direct and control La Star's affairs. TDS/USCC Ex. 14, at 109-134 (Joint Venture Agreement).

41. Mr. Nelson genuinely believed that the Management Committee's power to control La Star's affairs was exercised in an informal manner through discussions between La Star's counsel and the principals of the joint venture, including SJI's principals.<sup>41</sup> Mr. Nelson understood that La Star's counsel, Arthur Belendiuk, used telephone polling to seek approval for a proposed course of action. TDS/USCC Ex. 2, ¶¶ 23, 24. When he wanted authorization, Mr. Belendiuk first typically called John

Brady or Kit Crenshaw, or both, to seek approval for and to discuss proposed courses of action. TDS/USCC Ex. 1, ¶ 30; TDS/USCC Ex. 3, ¶ 12; TDS/USCC Ex. 4, ¶ 14. SJI's principals then approved the proposed course of action.<sup>42</sup>

42. Mr. Belendiuk typically called Mr. Nelson next to seek USCC's consent. TDS/USCC Ex. 1, ¶ 30. Mr. Belendiuk usually told Mr. Nelson that the people down South, or the folks at SJI, or the Bradys, had already approved the proposal; he then asked Mr. Nelson for his views. TDS/USCC Ex. 2, ¶¶ 22-24; TDS/USCC Ex. 1, ¶ 30. Mr. Nelson would respond in substance that the proposed action was fine. TDS/USCC Ex. 2, ¶ 23. As was the case with SJI, Mr. Belendiuk understood that when Mr. Nelson or Mr. Carlson spoke, that individual was speaking for USCC. TDS/USCC Ex. 1, ¶ 32. All decisions thus were resolved through informal discussions, and there was no need for any formal meeting or vote of the Management Committee. TDS/USCC Ex. 1, ¶ 30; TDS/USCC Ex. 3, ¶ 10.<sup>43</sup>

43. Telephone records submitted in this proceeding demonstrate communications between SJI and La Star's counsel, reflecting a minimum of 163 telephone calls totaling 871 minutes between La Star's counsel's office and SJI between October 1987 and April 1991. TDS/USCC Ex. 1, Tab H; TDS/USCC Ex. 3, Tab A. In addition, at least 32 items of correspondence sent to Mr. Nelson from 1987 to 1990 reflected on their face that Mr. Belendiuk was regularly communicating with John Brady and Sinclair Crenshaw of SJI. TDS/USCC Ex. 2, ¶ 24 and Tabs D and E. Finally, Mr. Nelson saw invoices submitted by Mr. Belendiuk for legal fees and expenses, which frequently listed conferences with Mr. Brady or Mr. Crenshaw in the description of services. TDS/USCC Ex. 2, ¶ 24 & Tab E.

44. The evidence thus supports Mr. Nelson's testimony that he understood that La Star's counsel, in directing the prosecution of La Star's FCC application, was consulting with the SJI members of the Management Committee and seeking their approval of a proposed action. Mr. Nelson's written testimony in the *La Star* proceeding was truthful and accurate in stating that he understood that Mr. Belendiuk had first spoken to someone at SJI Cellular, and that the proposed course of action had already been approved by SJI Cellular. The evidence also, therefore, confirms the veracity of Mr. Nelson's assertion, questioned in the *HDO*, that La Star's counsel had informed him that the SJI representatives on the Management Committee had previously approved a proposed course of action. See *HDO*, 9 FCC Rcd. at 947-54.<sup>44</sup>

<sup>39</sup> TDS/USCC Ex. 2, Tab R, at 4, August 1990 Declaration of H. Donald Nelson.

<sup>40</sup> The Joint Venture Agreement gave SJI three of the five seats on the Management Committee and, in Mr. Nelson's view, majority control of the Committee. TDS/USCC Ex. 14, at 109-134; TDS/USCC Ex. 2, ¶¶ 16, 58. SJI appointed John Brady, Pat Brady, and Mr. Crenshaw as its three representatives on the Committee. TDS/USCC Ex. 1, ¶ 4; TDS/USCC Ex. 2, ¶ 16 & Tab B. By letter dated September 14, 1987, USCC formally appointed Kenneth R. Meyers and Mr. Nelson as its representatives on the Committee. TDS/USCC Ex. 2, ¶ 16 & Tab B.

<sup>41</sup> Mr. Nelson explicitly acknowledged in his August 1990 Declaration that, "Since August 1987, La Star's Management Committee has functioned on an informal basis." TDS/USCC Ex. 2, Tab R, at 3 (emphasis added). He repeated the same statement verbatim in his written direct hearing testimony submitted in September 1990. TDS/USCC Ex. 2, Tab T, at 4.

<sup>42</sup> Mr. Belendiuk understood that when either Mr. Brady or Mr. Crenshaw gave such approval, that person was speaking for SJI. TDS/USCC Ex. 1, ¶ 30; TDS/USCC Ex. 3 ¶ 12.

<sup>43</sup> Mr. Nelson contemplated that the Management Committee would take a more active and formal role in directing the affairs of La Star once a construction permit was issued and La Star needed to incur substantial expenditures for its fixed assets to construct a cellular system. TDS/USCC Ex. 2, ¶ 20.

<sup>44</sup> Mr. Nelson's written testimony to the effect that he did not believe that his approval was necessary was accurate, since three members of the Management Committee had already given their approval. It was Mr. Nelson's understanding that SJI has approved the action. See *supra*, ¶¶ 41-43; and he believed that his approval was unnecessary since, even if he had opposed the action favored by SJI, the SJI position would prevail because SJI outnumbered USCC on the Management Committee by three to two. TDS/USCC Ex. 2, ¶ 61.

45. In the *HDO*, the Commission also questioned Mr. Nelson's references to the Management Committee in his written testimony because "Nelson's testimony does not disclose that the Management Committee only met once and that there were never any votes taken." *Id.* at 956.<sup>45</sup> In his deposition testimony several months earlier, however, in July 1990, Mr. Nelson had disclosed those facts:

Q. How often and where has the committee met?

A. I remember the original meeting here in Chicago, but any other meetings have been over the phone or through Mr. Belendiuk.

TDS/USCC Ex. 2, Tab I, p. 16.

Q. Okay. Have any actions been taken by the management committee which required a vote, formal vote? Can you remember any votes that have been taken while you've been on the management committee?

A. I don't recall any.

*Id.* at 18.

Q. Okay. Is it your testimony that you cannot recall ever holding a formal vote since you've been a management committee member?

A. I don't recall a formal vote.

*Id.* at 19. When he executed the declarations at issue, Mr. Nelson knew that he had already testified to these facts two months earlier. TDS/USCC Ex. 2, ¶ 60.<sup>46</sup> Having already disclosed the information in response to deposition questions from opposing counsel, Mr. Nelson cannot have intended to conceal that information when he provided his written testimony for the hearing.<sup>47</sup> While Mr. Nelson's written statement could have been more precise, the record demonstrates that he was not attempting to be less than truthful.

<sup>45</sup> The referenced testimony is Mr. Nelson's direct written testimony submitted in September 1990 as La Star Exhibit 15. TDS/USCC Ex. 2, Tab T.

<sup>46</sup> Moreover, Kenneth R. Meyers, USCC's other representative on the Management Committee, testified at his deposition in the *La Star* proceeding that there were no meetings of the Committee. TDS/USCC Ex. 12, at 10. Indeed, *La Star* and NOCGSA had stipulated that there were no formal meetings of the Management Committee. TDS/USCC Ex. 13, at 12-13.

<sup>47</sup> Commission law is quite clear that under such circumstances no deceptive intent will be found. See *supra*, ¶ 16: *WWOR-TV, Inc.*, 6 FCC Rcd. 193, 206 (1990) ("We do not infer an intent to deceive when an applicant has disclosed information on the public record"); *Intercontinental Radio, Inc.*, 98 F.C.C.2d 608, 639-40 (1984) (submission of inaccurate statement does not indicate intent to deceive when accurate information previously supplied by party is a matter of record); *Calvary Educational Broadcasting, Inc.*, 9 FCC Rcd. 6412, 6420 (Rev. Bd. 1994); *Barry Skidelsky*, 7 FCC Rcd. 1, 3 (Rev. Bd. 1992) (no intent to deceive where applicant had produced documents that

disclosed the allegedly withheld information); *Valley Broadcasting Company*, 4 FCC Rcd. 2611, 2615-16 (Rev. Bd. 1989) (no intent to mislead where applicant had previously disclosed the information in another FCC proceeding); *Omaha Channel 54 Broadcasting Group Limited Partnership*, 3 FCC Rcd. 870, 871 (Rev. Bd. 1988) (no intent to deceive at hearing where applicant clearly disclosed the relevant information in pre-hearing discovery).

<sup>48</sup> Mr. Nelson also allegedly implied that he had contacts with the Management Committee other than Mr. Belendiuk when he testified that his "primary contact during the time [he was] a member of La Star's Management Committee [was] with La Star's attorney, Arthur V. Belendiuk." TDS/USCC Ex. 2, Tab T, at 4. Mr. Belendiuk was Mr. Nelson's usual contact on La Star matters and Mr. Nelson's written testimony accurately reflected that fact. In his testimony, Mr. Nelson did not intend to suggest that his other contacts were with the Management Committee. TDS/USCC Ex. 2, ¶¶ 70-73. He had other contacts with Andy Anderson, one of La Star's consultants. *Id.* & Tab I at 36-37.

Mr. TOLLIN:

*How often and where has the committee met?*

Mr. NELSON:

*I remember the original meeting here in Chicago, but any other meetings have been over the phone or through communications through Mr. Belendiuk.*

Mr. TOLLIN:

*Any recollection of how many telephone conferences there were?*

Mr. NELSON:

*No, I don't recall.*

Mr. TOLLIN:

*Less than five?*

Mr. NELSON:

*Probably more than five.*

Mr. TOLLIN:

*And who were on those telephone conferences?*

Mr. NELSON:

*Generally Mr. Belendiuk and myself.*

TDS/USCC Ex. 2, Tab I at 16. In context, Mr. Nelson did not mean to suggest that there were more than five telephone conferences with members of the Management Committee but rather that he had more than five telephone conferences with Mr. Belendiuk. Mr. Belendiuk called Mr. Nelson on more than five occasions, TDS/USCC Ex. 2, ¶ 22, and while a telephone conversation between two people may not be thought of by everyone as a conference, Mr. Nelson's testimony that the conferences were between only himself and Mr. Belendiuk demonstrates that he was not attempting to mislead the Commission. TDS/USCC Ex. 2, ¶ 63.<sup>48</sup>

47. At his deposition in the *La Star* proceeding, Mr. Nelson also allegedly testified that there was a vote to amend *La Star's* Joint Venture Agreement in June 1990 when no formal vote actually was taken. Mr. Nelson's deposition contains the following passage:

Mr. TOLLIN:

*Okay. When the joint venture agreement was amended, was there a meeting by the management committee to discuss the amendment and a formal vote taken?*

Mr. NELSON:

*Which question do you want me to answer?*

Mr. TOLLIN:

*Was there a meeting?*

Mr. NELSON:

*Where people got together?*

Mr. TOLLIN:

*Yes.*

Mr. NELSON:

*No.*

Mr. TOLLIN:

*Was there any kind of communications by committee members with each other?*

Mr. NELSON:

*Yes.*

Mr. TOLLIN:

*Could you describe what those communications were?*

Mr. NELSON:

*There was communication with Mr. Belendiuk.*

Mr. TOLLIN:

*Okay. Mr. Belendiuk and yourself?*

Mr. NELSON:

*Yes.*

Mr. TOLLIN:

*Okay. And no one else was on that call?*

Mr. NELSON:

*On the call? Not that I recall.*

Mr. TOLLIN:

*Okay. So no formal vote was taken by committee members as to whether to approve the amendment?*

Mr. NELSON:

*I don't know what you mean by "formal," but*

Mr. TOLLIN:

*Was there a vote?*

Mr. NELSON:

*I did tell Mr. Belendiuk that we'd voted for it. The answer is yes. You know, that's what we did in agreeing to the agreement.*

TDS/USCC Ex. 2, Tab I at 29-30. In this passage, Mr. Nelson intended to indicate that by "agreeing" to the amendment, USCC had effectively "voted" in favor of the amendment, not that there was a formal vote taken of the Management Committee members with a quorum in place. TDS/USCC Ex. 2, ¶ 74.

48. Finally, several portions of Mr. Nelson's written testimony in the *La Star* proceeding have been cited as erroneously suggesting that the Management Committee was running the affairs of *La Star* and that Mr. Nelson consulted with the Management Committee several times. Mr. Nelson testified:

*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 [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 interests of the two venturers, a telephone conference was held. The Management Committee discussed the various options and unanimously agreed to follow a settlement plan proposed by Sinclair H. Crenshaw, a member of the Management Committee, appointed by SJI Cellular. At another time, it had been suggested by Mr. Belendiuk that modifications be made to the *La Star* Joint Venture Agreement. Certain supermajority provisions, which I understand had never been invoked by *Star* and which United States Cellular had no interest in invoking were to be deleted, and *Star's* financial obligations to *La Star* were reduced so as to be proportionate to its forty-nine percent joint venture interest. USCC's counsel advised us that it would be in the best interest of USCC to acquiesce in the proposed modifications, and I did so on behalf of *Star*.*

TDS/USCC Ex. 2, Tab R, at 4.5. Mr. Nelson has explained that the point he thought he was making -- and the point on which he was focusing when he reviewed and signed that testimony -- was that direct communication between USCC and SJI on *La Star* matters was quite limited as compared to the more usual communication through *La Star's* attorney, Arthur Belendiuk. TDS/USCC Ex. 2, § 72. In the preceding paragraph of this written testimony, Mr. Nelson had just described his more usual communications with Mr. Belendiuk. *Id.* Tab R, at 4. From that perspective, the testimony was not intended to overstate the functioning of the Management Committee or the extent of Mr. Nelson's communication with the Committee.

49. Mr. Nelson, in hindsight, recognizes that this testimony unintentionally implies that he participated in the conference call concerning settlement<sup>49</sup> and the conference

<sup>49</sup> In mid-1989, a settlement conference between representatives of *La Star* and representatives of NOCGSA was scheduled with the FCC staff. On June 28, 1989, a conference call was held between representatives of SJI and representatives of USCC to agree on *La Star's* settlement position to be advanced at that

meeting. TDS/USCC Ex. 3, ¶ 21; TDS/USCC Ex. 4, ¶ 10. Although he did not actually participate in the conference call, Mr. Nelson was told about the call. TDS/USCC Ex. 2, ¶ 42. Mr. Carlson, Michael G. Hron (corporate counsel for TDS and USCC), John Brady, Pat Brady, Mr. Crenshaw, and possibly Mr.

call concerning the amendment to the Joint Venture Agreement.<sup>50</sup> While each of those conference calls had been described to Mr. Nelson at the time that they occurred, he acknowledges that, with the benefit of hindsight, he should have been more precise because the use of the word "I" in the first sentence of the quoted paragraph could have left the incorrect impression that he personally participated in the telephone conference calls described in that paragraph when other representatives of TDS and USCC participated in the calls. TDS/USCC Ex. 2, ¶ 73. He recognizes that any ambiguity could have been eliminated if he had referred to "representatives of United States Cellular" instead of "I" in the first word of the paragraph and "partners in La Star" rather than "[t]he Management Committee" 42 at the beginning of the fourth sentence.<sup>51</sup> *Id.* Mr. Nelson did not focus on those points because he was focused instead on the more basic point that direct communication between USCC and SJI was quite limited. *Id.*

50. Mr. Nelson's explanation of this paragraph is supported by the record. Prior to executing this written testimony, he had disclosed on the record that he had not participated in the subject conference calls. At his July 1990 deposition, Mr. Nelson had made clear that there were "telephone conferences" regarding the amendment of the Joint Venture Agreement, and that the "one conversation" he had "was with Mr. Belendiuk." TDS/USCC Ex. 2, Tab I, at 19. Mr. Nelson therefore was not attempting to mislead anyone into the belief that he had participated in the conference calls with SJI.

51. Although Mr. Nelson may have been imprecise in certain of his statements about La Star's Management Committee, there remains no genuine issue as to his good faith. The record satisfactorily shows that he did not intentionally misrepresent facts or lack candor concerning the operation of the Management Committee of La Star. In many instances, Mr. Nelson's testimony regarding the operations of the Management Committee, which he explicitly characterized as "informal," was objectively accurate. In some instances where his testimony was not detailed or precise, it is clear that he supplied accurate and complete information in other testimony in the *La Star* proceeding, thus negating any inference that he intended to deceive the Commission. To the extent that some of Mr. Nelson's statements were inaccurate or incomplete, the evidence

Belendiuk participated in that call. Mr. Crenshaw advanced a settlement proposal with which all the parties agreed. TDS/USCC Ex. 3, ¶ 21; TDS/USCC Ex. 4, ¶ 10. It was explained to Mr. Nelson after the conference call that various settlement options were discussed and that SJI and USCC had agreed to adopt as La Star's position the option suggested by Mr. Crenshaw. TDS/USCC Ex. 2, ¶ 42.

<sup>50</sup> After the FCC issued the *La Star HDO*, Mr. Belendiuk recommended adoption of an amendment to the Joint Venture Agreement that would address issues raised in the *La Star HDO*. TDS/USCC Ex. 1, ¶ 22. He called SJI and discussed the provisions that should be amended. *Id.* ¶ 24; TDS/USCC Ex. 4, ¶ 11; TDS/USCC Ex. 3, ¶ 22. He then spoke to Mr. Naftalin and Mr. Nelson about his recommended amendments and sent a draft amendment to Mr. Nelson. TDS/USCC Ex. 1, ¶ 24; TDS/USCC Ex. 2, ¶ 43. On or about June 15, 1990, a conference call was held among Mr. Belendiuk, John Brady, Mr. Crenshaw, Mr. Carlson, and Mr. Naftalin regarding the amendment. TDS/USCC Ex. 1, ¶ 24; TDS/USCC Ex. 11, ¶ 14; TDS/USCC Ex. 3, ¶ 23; TDS/USCC Ex. 4, ¶ 11. When Mr. Belendiuk recommended that the changes be made, Mr. Carlson and

now in the record demonstrates that those statements resulted from honest failures of recollection or an inability to convey completely his perspective on the facts.

### The Petition To Delete Footnote 3

52. After the Commission affirmed the *Initial Decision in La Star I*, USCC filed the Petition To Delete Footnote Three. TDS/USCC Ex. 10, Tab A. The petition was filed because footnote three of the Commission's decision left open the possibility that a candor issue might be designated against USCC in future proceedings in light of allegations by NOCGSA that SJI and USCC had lacked candor. TDS/USCC Ex. 11, ¶ 20. The Petition To Delete Footnote Three was drafted by Koteen & Naftalin. A draft of the petition was distributed by Herbert D. Miller, Jr., of Koteen & Naftalin. TDS/USCC Ex. 10, ¶ 35. LeRoy Carlson and Donald Nelson, among others, reviewed the draft of the petition before it was filed; both approved it. TDS/USCC Ex. 9, ¶ 15; TDS/USCC Ex. 2, ¶ 55.

53. In the Petition to Delete Footnote Three, the following statement was made about La Star's Management Committee:

*Everything Mr. Nelson and USCC did at the request of La Star's counsel, Mr. Belendiuk, was done in the belief that Mr. Belendiuk was guided by the wishes of SJI, whose principals constituted three of the five members of the management committee and therefore, in Mr. Nelson's view, controlled it.*

TDS/USCC Ex. 10, Tab A, at 20. As discussed above, Mr. Nelson knew that Arthur Belendiuk was obtaining approval from SJI for actions and that SJI's three votes controlled the Management Committee. *See supra*, ¶¶ 41-44. The Petition To Delete Footnote Three advocated what Mr. Nelson genuinely believed was an accurate description of the process.

### La Star Pleadings and Filings

54. Finally, statements in submissions filed by La Star also addressed the functioning of La Star's Management Committee. Some of the statements concerning the Management Committee were made in an October 1987 Amendment to La Star's application and in a pleading filed

USCC agreed to do so. TDS/USCC Ex. 1, ¶ 22, 24; TDS/USCC Ex. 11, ¶ 14. Although Mr. Nelson did not participate in that conference call, he was informed of the call's substance. TDS/USCC Ex. 2, ¶ 43-44; TDS/USCC Ex. 9, ¶ 8. Mr. Belendiuk sent the amendment to Mr. Nelson for signature. TDS/USCC Ex. 2, ¶ 44. After discussing the amendment with USCC's counsel, Mr. Nelson signed the amendment and returned it to Mr. Belendiuk. TDS/USCC Ex. 2, ¶ 44 & Tab O, at 9-16.

<sup>51</sup> Mr. Carlson, who participated in the calls for TDS and USCC, was not a member of the Management Committee. He generally, however, negotiated settlements involving competing cellular applications and decided whether to settle in particular cases. TDS/USCC Ex. 2, ¶ 7; TDS/USCC Ex. 9, ¶¶ 7, 10. Mr. Carlson and Mr. Nelson occasionally discussed the progress of negotiations, and Mr. Carlson advised Mr. Nelson of the results of his negotiations. TDS/USCC Ex. 2, ¶ 7; TDS/USCC Ex. 9, ¶ 7. Mr. Carlson had full authority to speak and act on behalf of USCC in such matters, and there generally was no need for Mr. Nelson to participate in the meetings in which Mr. Carlson participated because Mr. Carlson and Mr. Nelson spoke with the same voice. TDS/USCC Ex. 2, ¶ 8; TDS/USCC Ex. 9, ¶ 9.

by La Star in March 1988 in response to a NOCGSA petition to deny La Star's application. Those statements include:

*Except as otherwise expressly provided herein, complete and exclusive power to direct and control [La Star] is delegated to a Management Committee.<sup>52</sup>*

*La Star's management team will make and subsequently implement all policy decisions affecting its cellular system.<sup>53</sup>*

*The partnership itself is governed by a five member Management Committee. Section 4.1 [of the La Star Joint Venture Agreement] places the 'exclusive power to direct and control the Company' with the Management Committee. SJI appoints three members to the Management Committee and Star [USCC] appoints two. Most business and policy decisions of La Star are controlled by a simple majority vote of the Management Committee. Since SJI appoints three members to the Management Committee it has de facto control over La Star's day-to-day business activities.<sup>54</sup>*

*Star [USCC] can block certain actions SJI may wish to take, but Star has no power to require SJI to take any action. SJI still retains majority voting interest, elects a majority of the members of the Management Committee and can conduct business on a majority vote.<sup>55</sup>*

*TDS does not have decision-making authority with regard to construction or operation of the system. That power rests with the La Star Management Committee which is controlled by SJI.<sup>56</sup>*

The March 1988 Reply was based in part on an affidavit of Mr. Nelson. TDS/USCC Ex. 1, Tab C, at 23-24. Although Mr. Nelson did not review the 1987 Amendment and the 1988 Reply, he believed that the central point he was supporting — that the Joint Venture Agreement placed SJI in control of La Star — was correct. See *Supra*, ¶¶ 40-41.

55. Many statements concerning the operation of the Management Committee also were made in a pre-hearing Motion for Summary Decision filed by La Star on August 15, 1990. Illustrative of such statements are the following:

*The Management Committee, which is controlled by SJI Cellular, has always and will continue to control La Star.<sup>57</sup>*

*Furthermore, any actions taken by consultants, engineers, attorneys, or Star, USCC and TDS have been taken at the request of the Management Committee.<sup>58</sup>*

*SJI Cellular elects a majority of the members of the Management Committee, which conducts La Star's day-to-day business by a majority vote.<sup>59</sup>*

These statements allegedly attempted to convey the false proposition that La Star's Management Committee controlled La Star through formal actions, requests and approvals. However, disclosures about the operations of the Management Committee during depositions and in the Summary Decision Motion itself negate any inference that the motion intended to imply that the Management Committee functioned formally or frequently, or that members from SJI and USCC participated together in discussions.

56. Approximately one month before the Summary Decision Motion was filed, the principals of La Star all had testified to the informality of La Star's management at their July 1990 depositions. USCC's Donald Nelson had testified that there had been only one actual meeting of the Management Committee, that any other meetings had been over the telephone or through La Star's counsel, and that to his recollection there had never been any formal votes taken by the Committee. TDS/USCC Exhibit 2, Tab I, at 16-18. Kenneth Meyers, USCC's other representative on the Management Committee, had testified that he was not aware of any Management Committee meetings and that he had not been consulted on any decisions that the Management Committee may have made. TDS/USCC Exhibit 12, at 10, 14. SJI's John Brady had testified that there had been no formal meetings of the Management Committee, that members of the Committee had met only once, in Chicago in 1987, and that no formal votes were taken. TDS/USCC Ex. 13, at 4-9. SJI's Sinclair Crenshaw had testified that the Management Committee had never taken an official vote, that La Star's counsel was the one who initiated the meetings or conference calls, and that La Star's counsel was SJI's point of contact and communication with USCC. TDS/USCC Ex. 1, Tab G, at 58-59.<sup>60</sup>

57. Additionally, the Summary Decision Motion explicitly stated that La Star "functioned on an informal basis," TDS/USCC Ex. 1, Tab G, p. 3; "Seldom was there a need for a 'meeting' of the Committee," *id.* The pleading also stated that "La Star's Management Committee has functioned on an informal basis," and, formal "meetings were not necessary for most of the decisions. Agreement with counsel's recommendations was communicated to counsel via telephone from the members of the Management Committee." *Id.* at 11-12. Under these circumstances, there is no basis for finding any intent to mislead the Commission about the functioning of La Star's Management Committee.

<sup>52</sup> TDS/USCC Ex. 14, October 26, 1987 Amendment To La Star Application (1987 Amendment) Joint Venture Agreement, Article 4.1, at 115.

<sup>53</sup> TDS/USCC Ex. 14, 1987 Amendment, Exhibit L-7, at 1, at 241.

<sup>54</sup> TDS/USCC Ex. 1, Tab C, Reply to Petition of NOCGSA to Dismiss and Deny filed by La Star on March 2, 1988 (March 1988 Reply), at 13-14.

<sup>55</sup> TDS/USCC Ex. 1, Tab C, March 1988 Reply, at 14-15.

<sup>56</sup> TDS/USCC Ex. 1, Tab C, March 1988 Reply, at 17.

<sup>57</sup> TDS/USCC Ex. 1, Tab G, Summary Decision Motion, at 15.

<sup>58</sup> TDS/USCC Ex. 1, Tab G, Summary Decision Motion, at 19.

<sup>59</sup> TDS/USCC Ex. 1, Tab G, Summary Decision Motion, at 26.

<sup>60</sup> Moreover, at the depositions, La Star's counsel, Arthur Belendiuk, had stipulated that there had not been formal meetings of the Management Committee, a stipulation that NOCGSA's counsel accepted. TDS/USCC Ex. 13, at 12-13.

#### 4. Description of USCC's Activities.

58. In their testimony in the *La Star* proceeding, USCC principals H. Donald Nelson, Richard W. Goehring and Mark A. Krohse made statements describing their activities with respect to *La Star*. At its core, the issue concerning this testimony is whether Mr. Nelson, Mr. Goehring and Mr. Krohse intended to downplay or conceal the nature and extent of their role, and thus USCC's role in *La Star*. The record in this proceeding demonstrates that their statements were accurate in material respect and were not intended to mislead the Commission.

##### Activities of Donald Nelson

59. H. Donald Nelson testified in the *La Star* proceeding about his role and the role of USCC in *La Star*. Illustrative of such statements are the following:

Mr. TOLLIN:

*Any specific duties you have on the Management Committee?*

Mr. NELSON:

Yes.

Mr. TOLLIN:

*Could you describe those duties?*

Mr. NELSON:

*Receive bills and process payment thereof.*<sup>61</sup>

*Although I am a member of La Star's Management Committee, I have not been actively involved in the day-to-day management of La Star's affairs.*<sup>62</sup>

*All services provided by USCC to or on behalf of La Star were technical in nature and were provided at the specific request of SJI Cellular or the Management Committee, either directly or through La Star's counsel.*<sup>63</sup>

Mr. TOLLIN:

*Now, how limited was that involvement [in the day-to-day affairs of La Star]? What were you involved in?*

Mr. NELSON:

*I was involved with communication with Mr. Belendiuk. I was involved in the questions that came from him that we were to follow through on cell sites, on payment of bills, on -- I guess, that's about it.*<sup>64</sup>

ALJ CHACHKIN:

*What do you mean by that statement, that you haven't been actively involved in the day-to-day management of La Star's affairs, what do you mean by that?*

Mr. NELSON:

*In that statement I mean that I am not involved in the day-to-day management. When I am requested to do something by Mr. Belendiuk or by the management committee I would respond.*<sup>65</sup>

*Aside from asking USCC personnel to respond helpfully to Mr. Belendiuk's requests for assistance, I have had very little personal involvement, and I have taken very little personal interest, in the La Star matter.*<sup>66</sup>

*I have always viewed the La Star matter as a trivial aspect of USCC's business, for which people other than USCC employees have been primarily responsible, and I have devoted only the minimal time necessary to it; I have not sought opportunities to do more.*<sup>67</sup>

In these statements made in the *La Star* proceeding, Mr. Nelson indicated that his primary roles with *La Star* were to assure that bills were paid and to perform any tasks requested by Mr. Belendiuk. He stressed the belief that his involvement and interest in the *La Star* project were minimal. The evidence confirms the truth of these statements from Mr. Nelson's perspective; any omissions or misstatements by him were not material or intentional.

60. First, when Mr. Nelson testified at his *La Star* deposition that his specific duty on the Management Committee was to receive "the bills and process the payment thereof," he responded accurately.<sup>68</sup> He understood that the specific duty he had as a member of the Management Committee was to pay the bills for *La Star* pursuant to the Joint Venture Agreement. TDS/USCC Ex. 2, ¶ 64.<sup>69</sup> While he also responded to Mr. Belendiuk's requests for information

<sup>61</sup> TDS/USCC Ex. 2, Tab I, deposition testimony of H. Donald Nelson, July 18, 1990, at 7. This testimony was repeated in Mr. Nelson's written testimony. TDS/USCC Ex. 2, Tab T, 7.

<sup>62</sup> TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 3.

<sup>63</sup> TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 5.

<sup>64</sup> TDS/USCC Ex. 2, Tab J, Testimony of H. Donald Nelson, at 6-7.

<sup>65</sup> TDS/USCC Ex. 2, Tab J, Testimony of H. Donald Nelson, at 22-23.

<sup>66</sup> TDS/USCC Ex. 2, Tab U, USCC Exhibit 1 (statement of H. Donald Nelson), at 16.

<sup>67</sup> TDS/USCC Ex. 2, Tab U, USCC Exhibit 1 (statement of H. Donald Nelson), at 16.

<sup>68</sup> Until June 1990, Star was responsible under the Joint Venture Agreement for paying the expenses associated with prosecuting *La Star's* application. TDS/USCC Ex. 14, at 127. USCC assumed that obligation when it acquired Star in August 1987.

<sup>69</sup> During the hearing in the *La Star* proceeding, Mr. Nelson was reluctant to state unequivocally that he personally saw and processed payments for all of *La Star's* expenses. Although this reluctance was alleged by NOCGSA to be evasiveness on Mr. Nelson's part, the record now establishes that he was instead trying to make clear that he processed every request for payment that he received, but that there might have been other requests processed by USCC of which he was unaware. TDS/USCC Ex. 2, ¶ 77. Mr. Nelson was appropriately cautious in this regard because he did not process all *La Star* expense payments handled by USCC. TDS/USCC Ex. 2, Tab Y (USCC check request forms and support documents without Nelson's initials or handwriting). Mr. Nelson did not see these payment requests, and others at USCC processed those payments. TDS/USCC Ex. 2, ¶ 77. Mr. Nelson's testimony was not evasive, but rather was candid and accurate.

or assistance, he did not understand the question about his "specific duties on the Management Committee" to call for him to detail everything he had done regarding La Star. TDS/USCC Ex. 2, ¶ 65. Mr. Nelson did disclose his other activities with respect to La Star elsewhere in his deposition. At other points in his testimony, Mr. Nelson spoke of his discussions with Mr. Belendiuk. TDS/USCC Ex. 2, Tab T at 5; his involvement in the renewal of La Star's cell site options, TDS/USCC Ex. 2, Tab I, at 31-34; his discussions with La Star consultant Dr. Andy Anderson, *id.* at 36-37; the provision of some information for the interim operating authority application, *id.* at 51-52; and USCC's work on preparing La Star's budget, *id.* at 45-46, 63-66.<sup>70</sup>

61. Second, Mr. Nelson's testimony that he was not actively involved in the day-to-day management of La Star's affairs has been alleged to make it appear as though he played only a minor role in La Star's affairs and that there was little activity for La Star other than legal matters. Mr. Nelson did not consider the occasional calls he received from La Star's counsel Mr. Belendiuk or the processing of La Star's bills to constitute "day-to-day management" of La Star's affairs. TDS/USCC Ex. 2, ¶ 66. All of La Star's activities were related to La Star's litigation for a construction permit. *Id.* In Mr. Nelson's experience in overseeing the day-to-day management of numerous cellular systems at USCC, day-to-day management involved hiring personnel, selecting and maintaining equipment, creating marketing plans, building and constructing cellular systems, reviewing financial performance, and other business matters related to construction, operation and development of cellular systems. *Id.* He did not perform these tasks for La Star. *Id.*

62. To the extent that Mr. Nelson's testimony left any ambiguity about his view of his role in the day-to-day management of La Star, that ambiguity was eliminated by the Presiding Judge during questioning at the hearing in that proceeding. Judge Chachkin asked Mr. Nelson "as far as you're concerned, you have been involved, but you wouldn't describe it as day-to-day management, is that your testimony?" and Mr. Nelson responded, "Right." TDS/USCC Ex. 2, Tab J at 24.<sup>71</sup>

63. Third, Mr. Nelson's statement that he devoted only minimal time to La Star was true and accurate from his perspective because the time he devoted to La Star was minimal in comparison with the time he spent on his duties and responsibilities at USCC. TDS/USCC Ex. 2, ¶ 68. The period 1987 through 1990 was exceptionally busy for USCC and for Mr. Nelson personally. The company put 43 new cellular systems into operation over that period, effectively doubling in size each year. Mr. Nelson was personally working 70 to 80 hours per week and was

frequently traveling, in many periods at least half the time. *Id.* ¶ 5. Further, because Mr. Nelson's work concentrates on cellular operations, his principal focus is on markets that USCC owns and operates and he devotes less time to markets where USCC has only a minority interest. *Id.* ¶ 9.

64. Fourth, Mr. Nelson had a reasonable basis for his written testimony that all services provided by USCC to or on behalf of La Star were technical in nature. TDS/USCC Ex. 2, Tab T at 6, 7. The renewal of cell sites, budgeting, and tax return preparation work that USCC provided for La Star involved processing payments, inputting variables into a computer model, and filling in zeros on a tax return. These were ministerial tasks compared to other tasks performed by USCC in its design, construction and operation of 43 cellular systems during this period. TDS/USCC Ex. 8, ¶¶ 6, 8-9, 11, 12. Notwithstanding the Commission's legal conclusion concerning the effect of these activities on who controlled La Star, the record establishes that Mr. Nelson did not recognize these activities as anything other than technical in nature.<sup>72</sup>

#### Statements and Activities of Richard W. Goehring

65. Richard W. Goehring, USCC's Vice-President of Engineering and Network Operations, who was deposed in the *La Star* proceeding in July 1990, TDS/USCC Ex. 7, Tab C, submitted a declaration in August 1990 supporting the Summary Decision Motion, TDS/USCC Ex. 7, Tab D, and testified at the *La Star* hearing in January 1991. TDS/USCC Ex. 7, Tabs E & F. His testimony concerning his activities and the activities of his engineering staff with respect to La Star raise three general issues:

- (1) whether Mr. Goehring candidly described his involvement in the preparation of the engineering portions of La Star's filings;
- (2) whether Mr. Goehring candidly described his involvement with Richard L. Biby and his firm on the La Star project; and
- (3) whether Mr. Goehring candidly described the involvement of other USCC employees in La Star matters.

The record in this proceeding demonstrates that although Mr. Goehring's testimony was overly terse in certain respects, it was candid concerning these matters and was given without any intent to deceive the Commission.

<sup>70</sup> Mr. Nelson did not mention in his testimony in the *La Star* proceeding that in late 1987 and early 1988 he had made introductory telephone calls on behalf of La Star to the Creekmores, business partners of USCC in another market. He explains that the reason he did not mention those conversations is simply that he had forgotten them. TDS/USCC Ex. 2, ¶ 69 and Tab X. In that regard, he notes that he typically participated in 20 to 30 telephone calls a day involving USCC's business partners in various markets. This explanation is credible and uncontradicted by anything in the record. In any event, Mr. Nelson was not asked at either his 1990 deposition or at the hearing in the *La Star* proceeding about any communications that he had with the Creekmores or any of USCC's partners other than SJI.

<sup>71</sup> The Bill of Particulars questions whether Mr. Nelson was

candid in stating that he did not receive a periodic accounting of La Star's expenses. *B/P*, pp. 9-10. Mr. Nelson could not have been receiving such periodic accountings because La Star had no prepared financial statements. Mr. Nelson did see La Star financial information in the form of the La Star bills that crossed his desk, which he acknowledged. TDS/USCC Ex. 2, ¶ 21.

<sup>72</sup> Finally, as he testified in the *La Star* proceeding, Mr. Nelson did view La Star as a "trivial aspect" of USCC's business for which other people were primarily responsible. Mr. Nelson's activities with respect to La Star were minimal compared to the tasks he generally performs at USCC. *See supra* ¶ 63. Moreover, although there were costs of litigation, these costs were small compared with USCC's costs of conducting its business. *See supra* ¶ 27.

### Richard Goehring's Involvement In Preparing La Star's Filings

66. In his testimony in the *La Star* proceeding, Richard Goehring disclaimed any involvement in the preparation of the engineering portions of La Star's 1987 Amendment and its 1988 Application for Interim Operating Authority (1988 IOA Application). Mr. Goehring, for example, testified that (1) he did no "work" on the 1987 Amendment or the 1988 IOA Application, (2) he was not involved in preparing the engineering portions of La Star's filings, (3) he "played no role in the engineering or design" of La Star's 1987 Amendment or 1988 IOA Application, (4) no engineer from USCC or TDS did any work or provided any engineering services on behalf of La Star, and (5) he played no role in the selection of equipment for La Star's interim or permanent systems.<sup>73</sup> While the brevity and simplicity of his statements made them subject to misunderstanding, Mr. Goehring did not intentionally understate USCC's involvement in La Star.

67. Richard L. Biby and his consulting engineering firm, Communications Engineering Services (the Biby firm) did La Star's engineering work. Arthur Belendiuk retained the Biby firm for that purpose in early to mid 1987, before USCC acquired its interest in La Star. TDS/USCC Ex. 5, ¶ 1-3; TDS/USCC Ex. 1, ¶ 8. The Biby firm's work on the La Star project was handled principally by Mark Peabody, who prepared initial drafts and made telephone calls associated with that process. TDS/USCC Ex. 5, ¶ 4; TDS/USCC Ex. 6, ¶ ¶ 1, 7.

68. The Biby firm and La Star's counsel prepared the engineering portions of La Star's 1987 Amendment, 1988 IOA Application and 1990 written direct case without substantive input from Richard Goehring. Mr. Biby and Mr. Peabody reviewed La Star's original application filed in 1983, evaluated its original system design, and worked on updating the application. TDS/USCC Ex. 5, ¶ ¶ 2, 8; TDS/USCC Ex. 1, ¶ ¶ 7-8. Mr. Belendiuk, Mr. Biby and Mr. Peabody collectively decided that La Star's proposed service area should not be expanded beyond what La Star originally had proposed in 1983. TDS/USCC Ex. 6, ¶ 8. Mr. Peabody worked with a real estate agent in the New Orleans area both to renew cell site option agreements that had lapsed and to locate new cell site locations because some of the sites proposed in La Star's 1983 application were no longer available. TDS/USCC Ex. 6, ¶ 9. Mr. Peabody forwarded site maps to the real estate agent and selected appropriate replacement sites to use in the 1987 Amendment. TDS/USCC Ex. 6 ¶ 9. The Biby firm also reviewed the engineering portions of NOCGSA's submissions to the FCC and prepared a critique of those submissions for use in La Star's petition to deny NOCGSA's application. TDS/USCC Ex. 6, ¶ 6; TDS/USCC Ex. 5, ¶ 4.

69. In addition, the Biby firm designed the cellular system proposed in La Star's 1988 IOA Application and prepared all of the related engineering portions of the 1988 IOA Application. TDS/USCC Ex. 5, ¶ ¶ 4, 8; TDS/USCC

Ex. 6, ¶ 6. The equipment categories and types proposed in that application were specified by the Biby firm. TDS/USCC Ex. 6, ¶ 13.

70. Mr. Goehring did not perform any of these tasks. The Biby firm did La Star's engineering work. TDS/USCC Ex. 5, ¶ 11; see TDS/USCC Ex. 6, ¶ ¶ 6, 16. All of the engineering work performed by the Biby firm was directed, approved and supervised by Mr. Belendiuk. TDS/USCC Ex. 5, ¶ 5; TDS/USCC Ex. 1, ¶ 8. Both Mr. Biby and Mr. Peabody have confirmed that no one at USCC, including Mr. Goehring, directed or instructed the Biby firm in its work on the La Star project. TDS/USCC Ex. 5, ¶ ¶ 8, 12; TDS/USCC Ex. 6, ¶ 16. Although Mr. Goehring was sent copies of documents and draft engineering materials being prepared by the Biby firm for La Star, he spent very little time reviewing them. TDS/USCC Ex. 7, ¶ 11; see *infra* ¶ 79.

71. Mr. Goehring's responsibility with regard to La Star's engineering was "to be helpful and answer any questions from Mr. Belendiuk or Mr. Biby's firm, if necessary." TDS/USCC Ex. 7, ¶ 8. Mr. Belendiuk told the Biby firm that Mr. Goehring would serve as its principal point of technical contact at USCC. TDS/USCC Ex. 6, ¶ 9. Mr. Goehring, like Mr. Crenshaw or Mr. Brady of SJI, was so designated in order to serve as a resource whenever the Biby firm thought he could be helpful. TDS/USCC Ex. 5, ¶ 6. As part of USCC's responsibility under the Joint Venture Agreement, Mr. Goehring also authorized payment by USCC of the Biby firm's invoices for work on behalf of La Star, although he did not believe he had the authority to direct or approve that work. TDS/USCC Ex. 7, ¶ 9.

72. Given his responsibility to serve as a resource, Mr. Goehring talked with Mark Peabody about the La Star project on a few occasions. TDS/USCC Ex. 6, ¶ 15; TDS/USCC Ex. 7, ¶ 15. These conversations were typically very short and generally involved requests for assistance in processing cell site acquisitions or renewals. TDS/USCC Ex. 7, ¶ ¶ 15-16; TDS/USCC Ex. 6, ¶ 15. Mr. Goehring's activities in response to Mr. Peabody's requests were primarily clerical in nature and consisted of approving invoices for cell site option renewal payments, signing cell site option renewals and approving payment for the real estate agent. TDS/USCC Ex. 7, ¶ 15. On at least one occasion, Mr. Peabody also raised technical questions with Mr. Goehring about matters on which the Biby firm had insufficient experience. TDS/USCC Ex. 7, ¶ 16; TDS/USCC Ex. 6, ¶ 15. Responding to Mr. Peabody's requests took an insignificant amount of Mr. Goehring's time. TDS/USCC Ex. 7, ¶ 15.<sup>74</sup>

73. From Mr. Goehring's perspective, there was a significant difference between the comprehensive engineering, planning, and design work that he ordinarily did when developing and building USCC's cellular systems and the type of help that he was asked to provide on the La Star project. TDS/USCC Ex. 7, ¶ 21. For USCC's systems, Mr. Goehring determined or approved all of the significant technical parameters. TDS/USCC Ex. 7, ¶ 4. For USCC, he was integrally involved in determining the number and

<sup>73</sup> TDS/USCC Ex. 7 Tab C at 31; Tab C at 10, Tab F at 34-35; Tab D at 1, Tab E at 1; Tab D at 2, Tab E at 4; Tab C at 20, Tab D at 1, Tab E at 3.

<sup>74</sup> Although Mr. Goehring was the Biby firm's designated principal contact at USCC, most of Mark Peabody's contact with USCC was not with Mr. Goehring, but with Mark Krohse

or Tom Gilliland, an assistant to Mr. Goehring. TDS/USCC Ex. 6, ¶ 14. As Mr. Peabody explained, Mr. Goehring often was out of the office when he called. TDS/USCC Ex. 6 ¶ 14. In those circumstances, Mr. Peabody would sometimes try to find someone else at USCC with whom he could speak. TDS/USCC Ex. 6, ¶ 14.

location of cell sites and W-mobile telephone switching offices; the size and type of towers; what cell site buildings to use and their design; how many channels to equip in each site; and the type and vendor of equipment to purchase for the system. *Id.*<sup>75</sup> When Mr. Goehring testified that he did no "work" on behalf of La Star, he meant engineering work of the kind he ordinarily performed for USCC. He did not think the limited tasks he performed on the La Star project were engineering work. *Id.* ¶ 22. Thus, Mr. Goehring believed that his declarations truthfully stated that he was not responsible for the engineering decisions or system design proposed by La Star. *Id.* ¶ 21.<sup>76</sup>

74. Mr. Goehring's written statements were tendered in a categorical manner and did not individually address each of his actions. His declarations, however, did disclose that he had approved invoices for the extension of cell site option agreements and that he had signed those agreements. TDS/USCC Ex. 7, Tab D, ¶ 3, Tab E, ¶ 2. Moreover, shortly before signing the declarations, Mr. Goehring testified at deposition that he had (1) signed cell site option renewals, (2) approved payments for option renewals, (3) talked with Mark Peabody about La Star, and (4) received correspondence from the Biby firm that he had turned over to counsel. TDS/USCC Ex. 7, Tab C at 8, 12, 14-15, 18-19. Finally, the only La Star matter in which Mr. Goehring was substantively involved — his defense of the sufficiency of La Star's estimated costs — was disclosed at his deposition and in his declarations, and were part of the pleadings filed in the *La Star* proceeding served on opposing counsel. TDS/USCC Ex. 7, Tab C, at 22-23, 31-33, Tab D, at 2, Tab E, at 2.<sup>77</sup>

75. Mr. Goehring's *La Star* declarations were designed to compare the type of work he typically performed for USCC with the assistance he provided to La Star. The declarations began by identifying his typical activities on behalf of USCC. TDS/USCC Ex. 7, Tab D, ¶ 2, Tab E, ¶ 1. These activities included configuring the system, determining the location of cell sites and tower heights, and negotiating interconnection agreements — tasks he did not perform for La Star. *Id.*; see *supra* ¶¶ 68-73. The declarations continued by indicating that he played no role in the selection of La Star's engineer, in contrast to his role at USCC, where as director of engineering, he selected its outside engineer. TDS/USCC Ex. 7, Tab D, ¶ 3, Tab E, ¶ 3.<sup>78</sup> The declarations next indicated that he played no "role" in the engineering or design of La Star's cellular system, its 1987 Amendment or its 1988 IOA Application.

<sup>75</sup> The years 1987 and 1988, when La Star filed its amendment and then application for interim authority, were a busy period for USCC and Mr. Goehring. USCC put seven cellular systems on the air in 1987 and another eighteen cellular systems on the air in 1988. Ex. 7, ¶ 5. Mr. Goehring had direct responsibility for the design and construction of those systems, as well as for the engineering portions of any related submissions to the FCC. *Id.* During this period, Mr. Goehring had only one other engineer on staff to assist him with these responsibilities. *Id.*

<sup>76</sup> The fact that Mr. Goehring was not responsible for the engineering decisions or system design proposed by La Star has been corroborated by La Star's outside consulting engineers, Richard Biby and Mark Peabody. TDS/USCC Ex. 5, ¶ 8; TDS/USCC Ex. 6 ¶ 16; see *supra* ¶¶ 67-70.

<sup>77</sup> In February 1988, in connection with a petition to deny La Star's application filed by NCCGSA, Mr. Goehring was asked by Mr. Belendiuk or Mr. Nelson to review the sufficiency of the construction and operating cost estimates in the 1987 Amendment. TDS/USCC Ex. 7, ¶ 12. He signed an affidavit attesting to

in contrast to his typical activities for USCC, where he was responsible for all engineering and design work. TDS/USCC Ex. 7, Tab D, ¶ 4, Tab E, ¶ 4.

76. In concluding his declarations, Mr. Goehring indicated that no engineer at USCC or TDS, "did any work or provided any engineering services" on behalf of La Star. TDS/USCC Ex. 7, Tab D, at 2, Tab E, at 4. Because the declarations on their face identified tasks that he performed on behalf of La Star, it is clear that Mr. Goehring meant to use the word "work" to connote his typical engineering work for USCC. TDS/USCC Ex. 7, ¶ 22. Mr. Goehring has acknowledged he could have been more qualified with respect to the word "work." *Id.* Nevertheless, his testimony regarding his substantive involvement in the preparation of the engineering portions of La Star's filings was accurate and he did not attempt to conceal his actions in the *La Star* proceeding.

#### Richard Goehring's Contacts With The Biby Firm

77. In his testimony in the *La Star* proceeding, Richard Goehring stated that he "did not work with Richard L. Biby on the La Star project." TDS/USCC Ex. 7, Tab D at 1, Tab E at 3. He also testified that although he received correspondence from the Biby firm relating to La Star in his capacity as the person responsible for approving payment of the Biby firm, his involvement was limited to ensuring that the charges were reasonable. The record in this proceeding demonstrates that this testimony was accurate.

78. Mr. Goehring does not recall ever talking with Richard Biby about La Star, much less working with him on the project. TDS/USCC Ex. 7, ¶¶ 26-27. Mr. Biby similarly does not recall talking personally with Mr. Goehring about the La Star project. TDS/USCC Ex. 5, ¶ 11. Mr. Goehring did speak with Mr. Peabody of the Biby firm several times, and he did receive correspondence related to La Star from that firm. Bureau Ex. 30, 31, 32, 33, 534, 35, 36, 37, 38, and 39.<sup>79</sup> But in stating that he "did not work with Richard L. Biby on the La Star project," he could not have intended to make it appear that he had no contact or interaction with the Biby firm, because he already had disclosed those facts in his deposition in the *La Star* proceeding days earlier. TDS/USCC Ex. 7, Tab C, at 8, 12. Moreover, he had participated in the pre-deposition document produc-

the sufficiency of La Star's estimated costs on February 29, 1988; this affidavit was filed in the *La Star* proceeding. *Id.* Mr. Goehring also prepared a reply declaration regarding the sufficiency of La Star's costs that was filed with the Commission. TDS/USCC Ex. 7, ¶ 14. The time he spent drafting and reviewing his affidavit and declaration represented the great majority of the time he spent on the La Star project before testifying at the *La Star* hearing in 1991. *Id.*

<sup>78</sup> Mr. Goehring's brief conversations with Mr. Peabody relating to La Star in 1987 and 1988 contrast with the almost daily contact Mr. Goehring had with USCC's outside engineering consultants during this same period. TDS/USCC Ex. 7, ¶ 5.

<sup>79</sup> Mr. Goehring and Mr. Peabody have testified that their conversations about La Star involved Mr. Goehring merely responding to Peabody's requests for information or assistance. TDS/USCC Ex. 7, ¶¶ 15-16; TDS/USCC Ex. 6, ¶¶ 14-15. Additionally, Mr. Goehring spent very little time looking at the La Star-related materials he received from the Biby firm and did not review them substantively. TDS/USCC Ex. 7, ¶ 11.

tion by turning over documents that reflected correspondence between him and the Biby firm. *Id.*; TDS/USCC Ex. 1, ¶ 25 and Tab E, at 1-3, 5-8, & 22-23.

79. Mr. Goehring did not ask that La Star material be sent to him by the Biby firm. TDS/USCC Ex. 7, ¶ 10; TDS/USCC Ex. 5, ¶ 9; TDS/USCC Ex. 6, ¶ 14. Instead, Mr. Biby had these materials sent to Mr. Goehring on his own initiative as a professional courtesy because USCC was paying the bills for the Biby firm's services and because Mr. Goehring was the one responsible for authorizing payment. USCC/TDS Ex. 5, ¶ 9.<sup>80</sup> During the period 1987-1988, Mr. Goehring customarily received between four to six inches of mail a day, much of it engineering material that required his detailed review. TDS/USCC Ex. 7 ¶ 11. When he received materials from the Biby firm related to La Star, he would typically read them until he determined that they pertained to La Star, and then would add the documents to a pile of La Star documents he kept on a credenza. *Id.*<sup>81</sup> Mr. Goehring never acted on any of the material he received from the Biby firm by giving directives or orders about the work the Biby firm was doing. Mr. Goehring never asked to be kept informed of what the Biby firm was doing for La Star and never called to make suggestions about the Biby firm's work for La Star. TDS/USCC Ex. 5, ¶ 9; TDS/USCC Ex. 6, ¶ 16.

#### The Involvement of USCC's Tom Gilliland

80. Mr. Goehring testified in the *La Star* proceeding that no engineers at USCC worked on La Star's engineering, and that to "the best of [his] knowledge," no engineer at USCC or TDS "did any work or provided any engineering services to or on behalf of La Star." TDS/USCC Ex. 7, Tab C at 11, Tab D at 2, Tab E at 4. He also testified that while Tom Gilliland, a USCC engineer, had assisted him in the preparation of the affidavit responding to NOCGSA's allegations about La Star's estimated costs, Mr. Gilliland did no work related to La Star's applications. *Id.* Tab C at 32-33. Mr. Goehring has made clear that at the time that he testified in the *La Star* proceeding, he was not aware of every task performed by Mr. Gilliland. Mr. Goehring's testimony, therefore, was candid and, as far as he knew accurate.

81. As described above, *see supra* ¶ 74, in February of 1988, Mr. Goehring was asked to review the cost estimates in La Star's 1987 Amendment in order to respond to NOCGSA's petition to deny La Star's application. TDS/USCC Ex. 7, ¶ 12. Mr. Goehring asked Tom Gilliland, the<sup>2</sup> only other engineer on his staff at USCC, to price out La Star's proposed system based on USCC's actual experience in constructing cellular systems.<sup>82</sup> *Id.* Mr. Goehring reviewed the information generated by Mr. Gilliland, concluded that La Star's cost estimates were reasonable and signed an affidavit to that effect on February 29, 1988. *Id.*

<sup>80</sup> Mr. Belendiuk also asked the Biby firm to send copies of some materials to Mr. Goehring. TDS/USCC Ex. 5, ¶ 9.

<sup>81</sup> At the request of Mr. Belendiuk, Mr. Goehring did ask Mr. Peabody to forward a copy of La Star's 1987 cost estimates. TDS/USCC Ex. 7, ¶ 12. Mr. Goehring needed this information for his affidavit responding to NOCGSA's allegation that La Star did not have sufficient funds to build its proposed system. *Id.*

<sup>82</sup> Mr. Goehring had not participated originally in the preparation of La Star's cost estimates.

82. Before appearing in Washington to testify at the *La Star* hearing, Mr. Goehring did not know that Tom Gilliland had done anything else with respect to La Star. TDS/USCC Ex. 7, ¶ 24. During his cross-examination at the hearing, Mr. Goehring learned for the first time that Mr. Gilliland might have performed some other tasks on the La Star matter; he subsequently learned that Mr. Gilliland apparently assisted Mr. Peabody directly with some cell site option renewals and La Star's budget for the 1988 IOA Application. *Id.*<sup>83</sup> Mr. Goehring had not assigned these additional tasks to Mr. Gilliland and at the time he testified at the *La Star* hearing in January 1991, was unaware of Mr. Gilliland's involvement in those tasks. *Id.*

83. The record shows, in sum, that Richard Goehring was candid in his testimony in the *La Star* proceeding. As he openly acknowledged at the *La Star* hearing and here, he could have been more careful to make his meaning clear in all respects. TDS/USCC Ex. 7, Tab F, at 21-22. Although his categorical brevity may have raised a question about his candor, he made no effort to conceal or withhold facts or documents and was substantially correct on material matters.

#### Statements and Activities of Mark A. Krohse

84. Mark Krohse, an Accounting Manager at USCC, submitted a declaration in the *La Star* proceeding and later testified at the<sup>3</sup> hearing. TDS/USCC Ex. 8, ¶ ¶ 1-2 & Tab N, Tab O, Tab R. The issue with respect to Mr. Krohse is whether he fully and accurately described the extent of his involvement in La Star. TDS/USCC Ex. 8, Tab L at 8, 61, Tab N at 1, Tab O at 3, Tab R at 8.

85. At his deposition in the *La Star* proceeding in July of 1990, Mr. Krohse disclosed that his work on behalf of La Star consisted of preparing La Star's proposed budget, TDS/USCC Ex. 8, Tab L, at 8, 10, 18-19, 21, 28-30, 33, 44-51, 67; processing cell site option renewals, *id.* at 8-9, 11-12, 14-17, 21, 23, 31, 33; and the preparation and filing of La Star's 1988 and 1989 federal tax returns, *id.* at 60-61, 70-71. He also testified at that deposition that he was responsible for processing USCC's payment of legal, engineering, and other expenses incurred by La Star. TDS/USCC Ex. 8, Tab L, at 23, 35-36, 43, 59. Prior to the deposition, at least 27 documents reflecting Mr. Krohse's activity in La Star matters had been turned over to opposing counsel in response to discovery requests. TDS/USCC Ex. 1, ¶ 25 and Tab F.

86. Mr. Krohse's declaration submitted in the *La Star* proceeding in August 1990 stated in its entirety:

*I am Accounting Manager for United States Cellular Corporation. I am not a member of the La Star Cellular Telephone Company ('La Star') Management Committee. All duties that I have performed for La*

<sup>83</sup> Mr. Gilliland provided the Biby firm with assistance in preparing the budget for the IOA Application. TDS/USCC Ex. 6, ¶ 13. Mr. Peabody gave Mr. Gilliland a list of the equipment categories and general types of equipment to be included in each category and asked Mr. Gilliland to estimate the costs based on USCC's experience in constructing systems. *Id.* Mr. Peabody was referred to Mr. Gilliland by Mark Krohse of USCC. *Id.*

*Star have been done at the request of and under the direction of La Star's attorney, Arthur V. Belendiuk. In this capacity, I was involved in processing payments for renewals of La Star's cell site options. Also at the request of Mr. Belendiuk, I prepared a model budget for La Star, based on information provided by Mr. Belendiuk and La Star's consultants. I also forwarded a request from SJI Cellular, Inc. to Telephone and Data Systems, Inc. to prepare tax returns for La Star. Any work I performed was approved by La Star's attorney or SJI Cellular, Inc.*

TDS/USCC Ex. 8, Tab N, Tab O. At the hearing in the *La Star* proceeding, Mr. Krohse answered "yes" to the question whether he had included in his testimony "the sum total of things you've done for La Star." TDS/USCC Ex. 8, Tab R at 10.

87. Although Mr. Krohse's declaration did not include all the details of each of his activities for La Star, he believed that he had identified all of the material tasks he had performed. TDS/USCC Ex. 8, ¶¶ 16-18. He would have included more information in the declaration if he thought it was necessary. *Id.* ¶ 18.<sup>84</sup> He had no intent to withhold facts from the Commission and did not think he had any reason to withhold any facts. TDS/USCC Ex. 8, ¶ 18.

88. The only activity undertaken by Mr. Krohse that was not mentioned in his declaration was his processing of all of La Star's bills. This activity was already a matter of record in the proceeding based on his deposition testimony, TDS/USCC Ex. 8, Tab L, at 23, 35-38, 43, 59, and Mr. Krohse therefore could not have intended to conceal that matter from the Commission.

##### 5. References to SJI's Activities.

89. In the *La Star* proceeding, Donald Nelson and Mark Krohse also made certain assertions about actions allegedly taken by SJI. The issue is whether this testimony intentionally overstated the nature and extent of SJI's role in the joint venture.

##### Donald Nelson About SJI

90. Donald Nelson made the following statements about the role of SJI in La Star's operation and governance:

JUDGE CHACHKIN:

Has anyone else been involved in day-to-day management managing the affairs of La Star?

Mr. NELSON:

The Brady's. I'm sure, and the SJI people have.

JUDGE CHACHKIN:

What do you mean by day-to-day management? What have the Brady's done as far as day-to-day management is concerned, when the next sentence says that you -- what you've been involved in up to now is litigious in nature. So, what day-to-day management have the Brady's been involved in?

Mr. NELSON:

I don't know.<sup>85</sup>

*The Management Committee discussed the various options and unanimously agreed to follow a settlement plan proposed by Sinclair H. Crenshaw, a member of the Management Committee, appointed by SJI Cellular.*<sup>86</sup>

*All services provided by USCC to or on behalf of La Star were technical in nature and were provided at the specific request of SJI Cellular or the Management Committee, either directly or through La Star's counsel.*<sup>87</sup>

*It is now my understanding that Mr. John Brady, Jr. has been proposed as La Star's General Manager since 1983, having been so designated in its original 1983 application and again in its 1987 amendment.*<sup>88</sup>

In making these statements, Mr. Nelson did not intend to mislead the Commission.<sup>89</sup>

91. Mr. Nelson has acknowledged that he inaccurately assumed that the Bradys were at the time of the *La Star* proceeding involved in the day-to-day management of La Star. La Star's activities were all related to litigation, and there was no need for any party to be involved on a "day-to-day" management basis. Mr. Nelson explains that because he knew that he was not involved in the day-to-day management of La Star, he assumed, without having personal knowledge, that the Bradys must have been involved in such "day-to-day" management. TDS/USCC Ex. 2, ¶ 67<sup>90</sup> Although that assumption may have been mistaken, the mistake was an honest assumption on Mr. Nelson's part. This is confirmed by the use of the phrase "The Brady's. I'm sure. . . ." followed immediately by his candid indication that he did not know what they had done.

92. Mr. Nelson did correctly testify that Mr. Crenshaw of SJI proposed the plan that the La Star principals adopted as their position on settlement. TDS/USCC Ex. 3, ¶ 21; TDS/USCC Ex. 4, ¶10. Moreover, in referring to requests for assistance made to USCC directly by SJI, Mr. Nelson had in mind and accurately identified SJI's request that

<sup>84</sup> Neither La Star's counsel, with whom Mr. Krohse had worked in providing the declaration, nor USCC's counsel, advised him that his declaration needed to be as detailed as his deposition testimony had been, or that the declaration was deficient or misleading in any respect. TDS/USCC Ex. 8, ¶¶ 17-18.

<sup>85</sup> TDS/USCC Ex. 2, Tab J, at 22-23.

<sup>86</sup> TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 4-5.

<sup>87</sup> TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H.

Donald Nelson, at 5.

<sup>88</sup> TDS/USCC Ex. 2, Tab R, August 1990 Declaration of H. Donald Nelson, at 6.

<sup>89</sup> As found above, Mr. Nelson honestly believed that SJI, not USCC, controlled La Star. See *supra* ¶¶ 34-35, 40-44. With that belief, Mr. Nelson did not have a reason to seek in his testimony to mislead the Commission by exaggerating SJI's involvement. Because he saw nothing incriminating about the facts, he lacked any motive to mislead.

<sup>90</sup> Mr. Nelson was aware that the Bradys received correspondence and telephone calls from La Star's counsel, Arthur Belendiuk. See *supra*, ¶¶ 41-44.

USCC complete La Star's income tax forms made directly to Mr. Nelson by Mr. Crenshaw. TDS/USCC Ex. 2, ¶ 75; TDS/USCC Ex. 2, Tab K. Mr. Nelson thus provided an example of what he also testified candidly was a limited type of occurrence.

93. Finally, Mr. Nelson's hearing testimony, wherein he indicated that he was unaware of the identity of La Star's proposed general manager, TDS/USCC Ex. 2, Tab I, at 108, must be compared to his later written testimony that "[i]t is now my understanding that Mr. John Brady, Jr. has been proposed as La Star's General Manager since 1983, having been so designated in its original 1983 application and again in its 1987 amendment." TDS/USCC Ex. 2, Tab T at 6. Mr. Brady was proposed as La Star's general manager. TDS/USCC Ex. 14, at 247. Mr. Nelson was not aware of this proposal when he first testified at his deposition. TDS/USCC Ex. 2, ¶ 79. His written and oral testimony in the *La Star* proceeding made clear that the basis for his understanding that Mr. Brady had been proposed as the general manager was his communication with counsel. *Id.* Indeed, his written testimony specifies that he is "now" aware of that fact. Because USCC was not a partner in La Star until 1987, Mr. Nelson had to be told of Mr. Brady's appointment in 1983, and was not told of this event until after his July 1990 deposition.

#### Mark Krohse about SJI

94. Mark Krohse made the following statements about SJI:

*The request [for the 1988 and 1989 Federal] tax return[s] was sent to me by someone from Lafourche Telephone Company [SJI]. The TDS tax department completed the return and it was sent in.<sup>91</sup>*

*I also forwarded a request from SJI Cellular, Inc. to Telephone and Data Systems, Inc. to prepare tax returns for La Star.<sup>92</sup>*

*Any work I performed was approved by La Star's attorney or SJI Cellular, Inc.<sup>93</sup>*

The record is clear that Mr. Krohse did not intend to mislead the Commission in making these statements concerning the role of SJI.

95. In 1989, Mr. Krohse was asked to complete federal tax returns for La Star. TDS/USCC Ex. 8, ¶ 12. He received one request from Arthur Belendiuk, La Star's attorney. *Id.* Later, USCC's Donald Nelson forwarded to him a similar request from SJI's Kit Crenshaw. *Id.* & Tab I. Mr. Krohse in turn forwarded the IRS materials to TDS's tax department with the request that they complete and file the

return. *Id.* In December 1989, he received from Allison Compeaux at SJI, whom he understood to be Mr. Crenshaw's secretary, a fax cover sheet and IRS delinquency notice relating to the 1988 return. *Id.* & Tab J. He forwarded these documents to TDS's tax department as well. *Id.* He spoke with Allison Compeaux at SJI about the tax matter at least twice. *Id.*

96. Mr. Krohse's testimony about the request from SJI was a reference to Mr. Crenshaw's request to Mr. Nelson and Mr. Krohse's own communications with Mr. Crenshaw's secretary, Ms. Compeaux. *Id.* ¶ 16. Documentary evidence shows that Mr. Crenshaw sent a request to Mr. Nelson and that Mr. Krohse communicated with Mr. Crenshaw's secretary on the matter. TDS/USCC Ex. 8, Tabs I and J.<sup>94</sup> Mr. Krohse's reference to approval of his work by La Star's attorney or SJI similarly was a reference to the tax preparation work which SJI had asked USCC to handle. He meant simply that SJI had approved USCC's handling that work, which he thought was self-evident from the fact that SJI had made the request. TDS/USCC Ex. 8, ¶ 17. Mr. Krohse's references to the involvement of SJI in his statements in the *La Star* proceeding were, therefore, in all material respects accurate and candid.

#### 6. La Star's "Cost-Based" Rates.

97. Mark Krohse also provided a statement supporting La Star's description of its proposed rates and charges as "cost-based." The statement was made first in La Star's original application, filed in 1983, and then reiterated in the 1987 Amendment:

*These goals [of La Star's proposed rate structure] are served by a cost-based tariff that will encourage full utilization of the wide range of the cellular system's capabilities.<sup>95</sup>*

The same statement was set forth in La Star's direct written case under the declaration of Mr. Krohse in September 1990.<sup>96</sup>

98. In 1987, Mr. Krohse was asked to assist La Star's attorney Arthur Belendiuk in updating the budget and schedule of charges originally submitted in 1983. TDS/USCC Ex. 8, ¶ 7. In reviewing the budget, he relied in part on a computer budget model that USCC used to create budgets for its own cellular systems. *Id.* ¶ 8. The computer budget model was a LOTUS program, into which several variables were input to create a budget for a specific market. *Id.* The drivers for the model included the projected number of system customers and projected churn rate, projected minutes of usage per month, the costs associated with the system, the rates charged to customers, and the number of system employees. *Id.*

<sup>91</sup> TDS/USCC Ex. 8, Tab L, July 1990 deposition testimony of Mark Krohse, at 61.

<sup>92</sup> TDS/USCC Ex. 8, Tab N, August 1990 Declaration of Mark Krohse, at 1.

<sup>93</sup> TDS/USCC Ex. 8, Tab N, August 1990 Declaration of Mark Krohse, at 1.

<sup>94</sup> Mr. Krohse's July 1990 deposition testimony was inaccurate in indicating that the TDS tax department had signed both the 1988 and the 1989 returns. While the TDS tax department had signed the 1988 return, Mr. Krohse signed the 1989 return. Mr.

Krohse explains that either he understood the question to refer to the 1988 return or he had forgotten that he had signed the 1989 return. TDS/USCC Ex. 8, ¶ 14. Furthermore, he lacked any motive to mislead anyone into thinking that TDS rather than he had signed a return.

<sup>95</sup> TDS/USCC Ex. 14, 1987 Amendment, at 203.

<sup>96</sup> TDS/USCC Ex. 8, Tab Q, at 2.

99. The proposed subscriber charges set forth in the updated budget were developed by utilizing the projected costs of the system and determining, based on those costs, what rates would yield a reasonable return over time. *Id.* ¶ 9 & Tab D. Mr. Krohse then compared the rates used in the budget model with rates that were being currently listed for the New Orleans market in a cellular price and marketing letter. *Id.* He conducted that comparison to make sure that the rates input in the budget model were not out of line with what cellular operators were then actually charging in the New Orleans MSA. *Id.* Thus, the proposed rates in the La Star budget were a combination of the budget model projections and information from the pricing guide. *Id.*

100. In August 1990, Mr. Krohse was asked by La Star's counsel to sponsor a hearing exhibit showing La Star's schedule of proposed charges. TDS/USCC Ex. 8, ¶ 20 & Tab P. The exhibit was drafted by counsel and contained the proposed subscriber rates specified in the budget that Mr. Krohse had helped develop in 1987. *Id.* After reviewing the draft exhibit, Mr. Krohse discussed it with Mr. Belendiuk. *Id.* ¶ 20. Among other things, they discussed the statement in the draft that the proposed rates were "cost-based." *Id.* Mr. Krohse wanted to make certain that "cost-based" was the proper term. *Id.* After discussing it with Mr. Belendiuk, he was satisfied that this was appropriate terminology to describe the proposed rates. *Id.* The "Schedule of Proposed Charges" and Mr. Krohse's accompanying declaration were submitted in the hearing as La Star Exhibit 10. *Id.* & Tab Q. Mr. Krohse did not know at the time, and still does not know today, whether there was a reason for La Star to point out that its proposed rates were cost-based. *Id.* ¶ 20.

101. Mr. Krohse's description of La Star's proposed rates as "cost-based" had a reasonable basis and was made in good faith. In developing the budget and rate schedule, Mr. Krohse did factor in the estimated costs of the system. Before he formally certified the schedule of charges to the Commission, he assured himself, by consulting with La Star's counsel, that "cost-based" was the proper terminology for him to use. In any event, he had no motive to mislead the Commission because he knew of no reason why it would be advantageous for La Star to claim that its rates were cost-based.

#### CONCLUSIONS OF LAW

102. Summary decision resolving a misrepresentation or candor issue is appropriate under Section 1.251 of the FCC's Rules where there is no genuine issue as to any material fact for determination at the hearing. 47 C.F.R. § 1.251. Because deceptive intent is the *sine qua non* of misrepresentation or lack of candor, *see supra* ¶¶ 15-17, no genuine issue of material fact remains if there is no evidence of deceptive intent. The absence of deceptive intent may be established by uncontradicted affidavits and sworn

testimony of the principals whose candor is in question. *Ramon Rodriguez*, 4 FCC Rcd. 6817, 6817-18 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd. 4041 (1990), *aff'd sub nom. David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1258 (D.C. Cir. 1990). *See also Richard Bou II*, 9 FCC Rcd. 514 (ALJ 1994) (resolving candor issue in applicant's favor by summary decision); *WXBM-FM, Inc.*, 6 FCC Rcd. 7356 (ALJ 1991) (same); *Charles B. Shafer*, 5 FCC Rcd. 3029 (ALJ 1990) (same); *Mexican-American Communications Entertainment Broadcasting Group*, 5 FCC Rcd. 3859 (ALJ 1990) (same).

103. The record here is fully adequate to permit the determination that USCC and its principals were candid in the *La Star* proceeding, a determination that the Commission was unable to make on the basis of the incomplete record in that proceeding. In response to the Bureau's comprehensive Bill of Particulars and the *HDO*, TDS and USCC have submitted sworn testimony from eleven individuals, specifically including their witnesses in the *La Star* proceeding, H. Donald Nelson, Richard W. Goehring, and Mark A. Krohse. The uncontradicted sworn testimony of those persons has been independently corroborated by the testimony of consultants and other principals and by contemporaneous documents now in the record.<sup>97</sup> TDS and USCC have, therefore, established that USCC's witnesses were candid, and that the evidence they presented at the time was true to the best of their knowledge. The record further demonstrates that none of USCC's principals had any intent or motive to misrepresent facts or mislead the Commission in statements they made in the *La Star* proceeding.<sup>98</sup>

104. In a few instances, the statements made by the principals in the *La Star* proceeding were inaccurate or should have been qualified or supplemented with additional information to make their meaning clear. These instances were inadvertent and do not amount to a lack of candor. The witnesses believed they were testifying truthfully and were unaware that in some instances, their testimony was subject to being understood in a manner that was different from what they intended. For the most part, inaccuracies or variance in interpretation arose from answers being given on cross-examination that arguably undercut written testimony. Because the answers given on cross-examination were consistent with the information provided by these witnesses during discovery several weeks before the provision of the written testimony, it is evident that any variances arose from different perspectives on the facts and testimony and not from any attempt to mislead the Commission.

105. Because the record demonstrates beyond any reasonable dispute that the statements made by USCC's principals were true and that there was no deceptive intent underlying any misstatements, it warrants a finding that USCC did not make misrepresentations to or lack candor with this Commission. The Presiding Judge finds, therefore, that USCC has not violated Section 1.17 of the FCC's

<sup>97</sup> In the present case, the decision is summary in nature only because the witnesses have not been presented for oral direct and cross-examination. Extensive written direct cases have been presented by TDS, USCC and the Bureau and are part of the record. *See Tr.* at 65-374.

<sup>98</sup> The fact that USCC maintained throughout the *La Star* proceeding that it did not control La Star when the Commission has held otherwise does not provide any basis for finding

that USCC misrepresented facts or lacked candor. USCC in good faith believed it did not control La Star. *See supra* ¶¶ 30-36. The unsuccessful pursuit of that good faith claim by La Star and USCC before the Commission is not a basis for a finding of misrepresentation or lack of candor.

Rules, and that the record reflects no facts which would support a finding that TDS and USCC are not qualified to be Commission licensees.

106. No genuine issue of material fact remains to be tried concerning the candor of TDS and USCC in the *La Star* proceeding. Accordingly, the issuance of a decision is warranted (a) resolving Issue 1 in favor of USCC, (b) finding under Issue 2 that TDS and USCC are fully qualified to hold the cellular authorization for the RSA, (c) determining 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.

#### RULINGS

107. IT IS ORDERED that the issues designated against Telephone Data Systems, Inc., and the United States Cellular Corporation in the *Hearing Designation Order*, released on February 1, 1994, (9 F.C.C. Rcd. 938 (1994)) are resolved in their favor; that unless an appeal from this *Decision* is taken by a party, or the Commission reviews this *Decision* on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. § 1.276, the application of Telephone and Data Systems, Inc., as amended to reflect Wisconsin RSA No. 8 Limited Partnership as the applicant (File No. 10209-CL-P-715-B-88) (see *Memorandum Opinion and Order*, FCC 95M-189) for a construction permit for facilities in the Domestic Public Cellular Telecommunications Radio Service in Market 715, Block B, the Wisconsin 8 - Vernon Rural Service Area, IS GRANTED.

#### FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez  
Administrative Law Judge