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July 1992

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-136

In re Application of DOCKET FILE COPY ORIGINAL

ELLIS THOMPSON CORPORATION

File No. 14261-CL-P-134-A-86

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

Appearances

Stuart F. Feldstein, Richard Rubin, N. Robert Stoll, David Lokting, Steve Larson, and *Christopher G. Wood,* on behalf of Ellis Thompson Corporation; *Louis Gurman, William D. Freedman, Doane Kiechel, Jacob Farber* and *Andrea S. Miano,* on behalf of American Cellular Network Corp., d/b/a Comcast Cellular; *Alan Y. Naftalin, Herbert D. Miller, Jr., Alan N. Salpeter, Michele Odorizzi, Howard J. Roin,* and *Demetrious G. Metropoulos,* on behalf of Telephone and Data System, Inc.; and *Joseph Weber* and *Terrence Reideler,* on behalf of the Wireless Telecommunications Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: November 6, 1995; Released: November 14, 1995

Preliminary Statement

1. This case was designated for hearing on November 28, 1994[1] to resolve the following issue:

> [W]hether American Cellular Network Corporation is a real-party-in-interest in the application of Ellis Thompson Corporation for a cellular radio system on frequency Block A in Atlantic City, New Jersey, and, if so, the effect thereof on Ellis Thompson's qualifications to be a Commission licensee.

2. Ellis Thompson Corporation (ETC) is the successor in interest to Ellis Thompson who won the Commission's lottery for the Atlantic City MSA in 1986. Following the grant of Thompson's construction authorization in 1988, he received Commission consent to the *pro forma* transfer of his authorization to ETC, a corporation in which he holds 100% of the stock, and is the sole director. ETC completed construction of the system in 1989 and has been operating the system, with Amcell as manager for the past six years. The system currently operates with eleven cells, serving well over 10,000 customers.

3. The Commission's *Hearing Designation Order* followed a remand of this case from the United States Court of Appeals for the District of Columbia Circuit reversing the Commission's prior order in this case, which had affirmed the grant of the Atlantic City authorization to Thompson and ETC. In the first of two earlier orders, the then Mobile Services Division granted the authorization, conditioned on the removal of a certain provision in an option agreement Thompson had entered into with Telephone and Data Systems, Inc. (TDS). In the second, the Common Carrier Bureau, in response to the Petition for Clarification or Partial Reconsideration filed by TDS asserting that Thompson had relinquished control of the system to Amcell, affirmed the Mobile Services Division's grant of the authorization. The Court reversed and remanded the Commission's order because it believed the Commission's finding that Thompson had not relinquished control was inconsistent with the Commission's decisions in *La Star Cellular Telephone Company*[2] and *Brian O'Neill.*[3]

4. In designating this case for hearing following remand, the Commission expressed the concern that the totality of circumstances in the Thompson/Amcell relationship raises substantial and material questions as to whether Thompson has allowed Amcell to assume too great a degree of control over his system.

5. On January 27, 1995, a prehearing conference was held wherein discovery dates were established and, at the parties' request,[4] the hearing date was extended from February 28, 1995 to June 19, 1995.[5] Amcell, TDS, and Thompson advised the Presiding Judge that they had reached a settlement in principle of protracted civil litigation among them in a number of different forums involving the Atlantic City system.[6] The parties further advised the Presiding Judge that, conditioned upon the outcome of the instant proceeding, the parties' civil settlement paves the way for grant of a pending application[7] for Commission consent to transfer control of ETC to a subsidiary of

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[1] *Ellis Thompson Corporation,* 9 FCC Rcd 7138 (1994) (*Hearing Designation Order* or *HDO).*

[2] 9 FCC Rcd 7108 (1994).

[3] 6 FCC Rcd 2572 (1991).

[4] On February 6, 1995, Ameritel, a fifth-ranked selectee in the Atlantic City non-wireline lottery, petitioned to intervene. Ameritel, *Petition to Intervene,* filed February 6, 1995. By an order released March 7, 1995, the Presiding Judge denied intervention, *Memorandum Opinion and Order,* FCC 95M-68, released March 7, 1995, and, in an order released March 24, 1995, dismissed as untimely a subsequent Response and the accompanying Motion for Leave to File Response filed by Ameritel. *Order,* FCC 95M-84, released March 24, 1995. Ameritel filed for review of the Presiding Judge's rulings with the Review Board. Ameritel, *Appeal,* filed March 27, 1995. By order released July 7, 1995, the Review Board denied Ameritel's appeal. *Memorandum Opinion and Order,* FCC 95R-13, released July 7, 1995. Ameritel filed an Application For Review of the Board's denial, which was denied (FCC 95-424, released October 17, 1995).

[5] *Prehearing conference Tr. 37.*

[6] *Id.* at 6.

[7] File No. 08715-CL-TC-01-92.

Amcell, which TDS had previously petitioned to deny.[8] Accordingly, the parties requested the postponement of discovery and hearing dates to facilitate finalization of their settlement.[9] By letter dated March 28, 1995, the parties informed the Presiding Judge that they had reached a final settlement.[10]

6. In a Joint Motion filed May 17, 1995,[11] the parties, including the WTB, requested a second continuance of procedural dates to allow them until June 30, 1995 to file a joint motion for summary decision. The Presiding Judge granted the Joint Motion by an order released May 22, 1995.[12] On June 29, 1995, the parties filed a Request For Establishment of Procedural Date For Filing of Joint Motion For Summary Decision, requesting until July 14, 1995 to submit the joint motion for summary decision. The Presiding Judge granted the Request by order released July 5, 1995.[13]

7. On July 14, 1995, ETC, Amcell and the Wireless Telecommunications Bureau (WTB) filed a "Joint Motion For Summary Decision" requesting summary decision in favor of ETC on the sole issue designated for hearing in this proceeding. On the same date, TDS filed comments in support of the joint motion. As the Joint Motion notes, ETC, Amcell and TDS cooperated with the WTB in undertaking extensive discovery. A total of 68 boxes of documents were produced by Amcell and Thompson. Amcell alone produced 108,535 pages of documents, including over 10,000 checks written for the Atlantic City system. Ellis, Thompson and ETC together produced over 18,000 pages of documents. Additionally, TDS produced over 1,200 pages of documents. Thirteen individuals were deposed, including Thompson, David Lokting (Thompson's attorney and business advisor), ten current or former Amcell employees, and Michael Riley,[14] a consultant to the cellular industry with experience in managing cellular systems. Based on such discovery, Thompson, Amcell, and the WTB urge that there remains no issue of fact to be resolved at hearing and that summary decision in favor of ETC is appropriate.

Findings of Fact

8. As noted above, the sole issue to be resolved under the *HDO* is whether Amcell is a "real-party-in-interest" to ETC's application. However, the designation of a real-party-in-interest issue in this case, particularly in light of the concerns expressed in the *HDO*, appears to be inaccurate. Traditionally, "[a] real party in interest inquiry is relevant only to an undisclosed interest in an application, not a license."[15] It is clear from a reading of the *HDO* that, in this case, the Commission's concerns arise principally from the period *following* the grant of Thompson's application, during which Thompson constructed and began operating his system as a licensee.[16] There never has been any issue as to the real owner of Thompson's application during its prosecution. The record shows that -- except for certain non-controlling minority ownership claims in the application (in the aggregate 49.99%), arising from a reported pre-lottery settlement[17] -- Thompson was the sole owner of his application and was solely responsible for its prosecution, paying $10,000 in preparation and filing fees out of his own funds.[18] While Amcell and TDS have both purchased interests in the application from minority interest holders under the settlement agreement, Thompson has always retained his 50.01% controlling share.[19] Moreover, in their previous filings with the Commission, Thompson, ETC, and Amcell have each disclosed to the Commission that Amcell and TDS were purchasing the minority ownership claims.[20] The *HDO* expresses no concern about these reported interests.

9. Instead of applicant ownership, the *HDO* focuses on whether during the post-application period, Thompson transferred *de facto* control of his system to Amcell. In making determinations regarding the control of common carrier facilities, the Commission uses the criteria set forth in *Intermountain Microwave*.[21] The six *Intermountain* factors are:

(1) Does the licensee have unfettered use of all facilities?

(2) Who controls daily operations?

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[8] *Prehearing conference Tr. 24.*

[9] *Id.* at 29.

[10] Letter from Louis Gurman et al. to Administrative Law Judge Chachkin of March 28, 1995.

[11] Amcell, TDS and WTB, *Joint Motion for Extension of Time to File Motion for Summary Decision and For Continuance of Procedural Dates,* filed May 17, 1995 (Joint Motion).

[12] *Memorandum Opinion and Order,* FCC 95M-129, released May 22, 1995.

[13] *Memorandum Opinion and Order,* FCC 95M-156, released July 5, 1995.

[14] Michael Riley was retained by ETC as an expert witness in this proceeding. He began his career in the telecommunications industry at Motorola, where for over eight and a half years he held various positions in finance, service and sales capacities. He has held various positions in non-wireline cellular licensees, including director of marketing and vice-president of operations at Metro-Mobile, previously one of the larger non-wireline carriers in the nation. In those capacities, he has had extensive experience in the management of cellular systems pursuant to turnkey agreements and switch-sharing arrangements. In addition, he has done independent consulting for cellular licensees in the development and implementation of their systems. He is currently employed by Motorola as the director of worldwide operations for their 23 cellular licensees around the world. *Riley Dep. Tr.* page 6, line 2 through page 9, line 18.

[15] *Brian L. O'Neill,* 6 FCC Rcd 2572, 2574 (1991) (*O' Neill*). *See also La Star Cellular Telephone Company,* 9 FCC Rcd 7108, 71009 (1994) (*La Star*).

[16] *HDO* at 7140-7143. Under Part 22 of the Commission's Rules, when a cellular application is granted, the applicant receives a radio station construction authorization which entitles the holder to construct the approved facilities. Upon completion of construction and the filing of a notification Form 489, the authorization ripens into a license. *See* 47 C.F.R. §§22.3, 22.132, and 22.142. However, because TDS filed a petition against the grant of the authorization, Thompson's license never became final.

[17] On June 9, 1986, Thompson amended his application to inform the Commission of his participation in a partial settlement agreement among Atlantic City applicants organized by Cellular Management Services, Inc. *Amendment of Application of Ellis Thompson,* File No. 14261-CL-P-134-A-86, filed June 9, 1986.

[18] *Thompson Dep. Tr.* page 48, lines 19-24.

[19] *HDO* at 7138.

[20] *See, e.g.,* Amcell, *Petition for Conditional Grant,* filed January 11, 1988, page 3 n.4; Ellis Thompson, *Response to Petition for Conditional Grant,* filed January 25, 1988, page 3 n.5; ETC, *Application for Modification,* Exhibit 2, filed Jan. 18, 1989.

[21] 24 Rad. Reg. (P & F) 983 984 (1963) (Intermountain).

(3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?

(4) Who is in charge of employment, supervision, and dismissal of personnel?

(5) Who is in charge of the payment of financing obligations, including expenses arising out of operation?

(6) Who receives monies and profits from the operation of the facilities?

Use of the Facilities

10. The Commission, in its analysis of the first *Intermountain* factor, "unfettered use," questions whether the "technical compatibility and capacity to integrate the Atlantic City system and Amcell's own cellular operations [has] a potential impact on Thompson's unfettered use of the facilities." The Commission's concern stems from language in an attachment to the Thompson/Amcell Construction and Switching Agreement which provided that Amcell would ensure that the system was designed to be "automatically" part of the "wide area Delaware valley non-wireline cellular system":

> The description indicates that technology used by the Amcell-related systems enables the Atlantic City system to be fully integrated with the other operations without additional hardware, software, or communications links. This circumstance might reflect valid technical and financial advantages for Thompson and be consistent with Thompson's retention of unfettered use. It is also possible, however, depending on the totality of the circumstances, that the arrangement might reflect an intent for Amcell to exercise control over an integrated operation contrary to Thompson's unfettered use of the facilities.[22]

11. Initially, it should be noted that the *HDO* erroneously suggests that Amcell owned the adjacent Philadelphia system in December of 1987 when the Construction and Switching Agreement was signed. In fact, Amcell did not acquire the Philadelphia system until 1992. It is clear from the record that Thompson in no way intended the language in the Construction and Switching Agreement regarding the technical integration of his system through the use of common switching facilities to lessen his actual control over use of the Atlantic City system. Nor did it do so. Thompson entered into the agreement for two primary reasons. First, the Atlantic City system was a start-up operation. He was concerned about the significant expense of constructing a new system. By purchasing switching services from Amcell, Thompson was able to avoid the substantial capital expenditures and operating costs associated with owning a switch during the start-up years when he would be developing a customer base. Second, Thompson wanted to ensure the compatibility of his system with the other non-wireline cellular systems in the region, which were Motorola-based. The goal was to allow for automatic hand-off between systems in order to compete effectively with the wireline system operated by Bell Atlantic whose geographic footprint extended beyond Atlantic City. By renting capacity from Amcell's Wilmington switch, Thompson was able to ensure his customers access to a seamless regional network of compatible systems. Otherwise, their calls would drop off at the market boundary.

12. When Thompson and Amcell negotiated the Construction and Switching Agreement, Thompson wanted to ensure that the Atlantic City system achieved compatibility as part of the maximum construction cost guarantee offered by Amcell.[23] Accordingly, the "Outline System Configuration" attached as schedule A to the Construction and Switching Agreement specified that the system would be "automatically" part of the "wide area Delaware Valley non-wireless cellular system." In fact, no Delaware Valley regional system formally existed or exists. That phrase was simply a shorthand description of the competitive advantage sought by construction of an independent, yet compatible system. The Motorola "DMX" feature permitted inter-system roaming and customer validation among contiguous systems, including the Philadelphia system which was then owned by Metromedia.

13. From a technical perspective, there is no loss of control over the operation of the system resulting from the sharing of a switch. The Atlantic City system has its own cell group manager physically interconnecting the systems's cells to the switch. If it became necessary for any reason, Thompson could order the Atlantic City cell sites shut down without affecting operations of Amcell's Wilmington facility, much as he would have had to order his own personnel to shut down the Atlantic City cells if the system had a stand-alone switch within the market.

14. A cellular system is far more complex and sophisticated than the simple microwave systems which the Commission had in mind when it adopted *Intermountain*. Switches and cell sites are intricate, multi-million dollar facilities, surrounded by security fences and normally accessed only by authorized trained personnel. Accordingly, the *Intermountain* guideline of "unfettered use" adopted 31 years ago in the context of a less sophisticated, "mom-and-pop" owner, stand-alone microwave system must be construed in light of "the current realities of cellular telephony.[24] The Commission has held that the *Intermountain* guidelines are sufficiently elastic to do so.[25] Recently, in the broadband PCS competitive bidding proceeding, the Commission reaffirmed the applicability of the *Intermountain* guidelines to all commercial mobile radio services, including cellular, stating that "[t]he six *Intermountain* factors provide reasonable benchmarks for ensuring retention of control by the licensee while allowing for full consideration of the circumstances in each case.[26] The Commission found that the guidelines were

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[22] *Id.*

[23] *Lokting Dep. Tr.* Exhibit 1 (Construction and Switching Agreement, as amended). Section 1.8 of the Construction and Switching Agreement provides that "Amcell guarantees that the Budget... will not exceed $1,250,000 to complete construction of the System in accordance with the Design." The "Design" is specified as "the final equipment design and configuration and specifications for the System based on the Outline System Configuration." Thus, the Outline System Configuration is tied directly into the guaranteed maximum cost for the system.

[24] *HDO* at 7140 n.4.

[25] *Id.*

[26] *Fifth Memorandum Opinion and Order*, PP Docket 93-253, 10 FCC Rcd 403 (1994), ¶ 85 (Fifth MO&O).

"sufficiently flexible... to ensure that [applicants] participate actively in the day-to-day management of the company while allowing reasonable flexibility to obtain services from outside experts as well.[27]

15. The type of system integration that exists in this case is typical of the cellular industry and does not impinge on Thompson's actual control of his system. At the time such decisions were made by Thompson, and as is the case today, it was not uncommon for smaller cellular systems to share the switch of an existing system in a neighboring market. Indeed, the Commission acknowledges switch-sharing as an appropriate and accepted practice in the cellular industry, and Commission policy affirmatively encourages switch-sharing agreements.[28]

16. Thus, there is simply no evidence of an intent for Amcell to exercise control over an integrated operation contrary to Thompson's unfettered use of the facilities.[29] Thompson entered into the Construction and Switching Agreement of his own free will for prudent financial and competitive reasons. The Commission has consistently found such arrangements to be in the public interest. Although the Atlantic City system is switched out of Amcell's Wilmington system, the record is clear that Thompson has never been, and never will be, denied access to the switch.

17. The record clearly shows Thompson has "unfettered use" of the Atlantic City system, as that term has been construed and applied under outstanding precedents. In its analysis of the "unfettered use" *Intermountain* guideline, the Court of Appeals questioned "whether the Commission believes 'access' and 'use' to be equivalent."[30] The answer is clear: the Commission's cases have consistently held that a licensee's unimpeded access to his facilities satisfies the "use" criterion.[31] Thompson clearly has such access. ETC owns all the cellular transmitting antenna facilities.[32] Furthermore, ETC is the lessee for all of the cell sites and the local retail sales and installation center. Moreover, ETC leases switch capacity from Amcell under terms that allow it to ensure that a minimum grade of service is provided to customers. Thus, Thompson has 365-day access to and use of the facilities and sites. No party can deny him such access, and the right of all other parties -- including Amcell -- to system access is derivative of Thompson's right as owner and lessee.

18. It is irrelevant that Thompson does not permanently reside in Atlantic City. As the Commission stated in *O'Neill,* "[w]hether the [licensee] does or does not have a private office [on-site] and keeps regular hours is immaterial. The controlling factor is that his access is unimpaired."[33] Over the years Thompson has in fact, made regular inspection visits to the cell sites, the retail store just outside of Atlantic City and the Washington switch. His most recent visit to the system and the switch was during the last ETC quarterly meeting in March of this year.

Day-to-Day Operations

19. In the *HDO,* the Commission expresses two concerns relating to Thompson's control of daily operations. The first is that the Thompson/Amcell Management Agreement provides that Amcell will manage the system for 10 years with an option to extend the agreement for up to two additional five-year terms.[34] According to the Commission, this raises the issue that

> while Thompson may have some theoretical right to terminate the agreement for violation of an implied covenant, there is no provision that gives Thompson routine discretion to review or terminate Amcell's management for as long as 20 years. This factor may undermine Thompson's ability to exercise control over day-to-day operations.[35]

20. While the duration of the Management Agreement might, if coupled with other circumstances, lead to a loss of licensee control, the record shows that in this case, it has not. As the Commission has noted, Amcell's performance under the agreement is subject to an implied covenant of good faith and fair dealing, as well as an obligation to perform its duties in a workmanlike manner.[36] Thus, Thompson has the right to terminate the contract should his continued oversight reveal poor performance by Amcell. The fact is, through the budget process, quarterly meetings, monthly and quarterly financial reports, the routine signing and approval of thousands of checks, and frequent telephone calls and correspondence, Thompson and Lokting are intimately involved in setting parameters for Amcell's performance and in reviewing Amcell's achievement of goals set by Thompson. The record is clear that Thompson is very satisfied with Amcell's performance and has never wanted to terminate its services as system manager. It is also noteworthy that over the years Thompson has successfully negotiated significant reductions in the agreements management fee, from 15% to 7.5%. In any event, both parties have acknowledged that Thompson has the right to terminate the agreement at any time for cause.[37]

21. The Commission's second concern under the daily control criterion is with regard to the system's sharing of office facilities and personnel with Amcell's Wilmington system. The Commission characterizes this arrangement as the "complete integration" of the two systems and ques-

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[27] *Id.*

[28] *Contel Cellular of Richmond, Inc.,* 3 FCC Rcd 3001 (Mobile Serv. Div. 1988) (approving an operating arrangement involving the sharing of a switch and consolidation of office facilities). *See generally Corpus Christi Cellular Telephone Co.,* 64 RR 2d 1270, 1273 (Common Car. Bur. 1988) (regional cellular networks superior to "stand-alone" systems); *Bill Welch,* 65 RR 2d 755, 759-760 (1988) (not economically feasible to operate stand-alone systems because they cannot achieve the economies of scale of wide area systems).

[29] *HDO* at 7140.

[30] *Telephone and Data Systems, Inc.* v. *FCC,* 19 F.3d 42, 49 (D.C. Cir. 1994).

[31] d6 8;1 *Brian O'Neill,* 6 FCC Rcd 2572, 2575 (1991) ("[T]he controlling factor [under the first *Intermountain* factor] is that access is unimpaired.").

[32] *Miller Communications, Inc.,* 3 FCC Rcd 6477, 6478 (Mobile Serv. Div. 1988) (licensee's ownership of cellular facilities establishes unfettered use thereof).

[33] *O'Neill* at 2575 ¶28.

[34] *HDO* at 7141.

[35] d6 8;1 *Id.*

[36] *See, e.g., Sutter v. Bingham Construction, Inc.,* 81 Or. App. 16, 724 P.2d 829 (1986); *Board of Education v. Del Bianco and Associates, Inc.,* 57 Ill. App. 3d 302 (lst Dist. 1978).

[37] *Thompson Dep. Tr.* page 12, lines 207; *Lokting Dep. Tr.* page 96, lines 11-15; *Hillman Dep. Tr.* 17-19.

tions whether it affects "Thompson's ability to exercise control of day-to-day operations, since Thompson presumably has no right to control [Amcell's] activities to the extent they relate to the integrated Wilmington system."[38]

22. The record demonstrates, however, that the two systems are far from being "completely integrated." Thompson entered into the amendment to the Management Agreement consolidating the ministerial functions of system operation with Amcell's Wilmington system in order to achieve significant cost savings. Those savings have been estimated at over $300,000 per year. Though certain facilities and personnel are shared, the Atlantic City system and the Wilmington system are operated as two wholly independent businesses. The two systems have separate marketing plans, rate structures, licensing agreements with Cellular One, cell site leases and bank accounts. ETC maintains its own retail sales and installation facility in a suburb of Atlantic City; contracts independently with its customers, vendors, and other cellular systems for roamer service; and owns all of the system's cellular equipment other than the switch.

23. Moreover, the testimony of past and present Amcell employees show convincingly that Amcell's explicit corporate policy is that, as owner and licensee, Thompson is ultimately solely responsible for all decisions affecting the Atlantic City system. While Amcell can, and frequently does, make proposals that it believes will benefit the system, no change to system operations can be put into effect without Amcell first having obtained Thompson's approval. Amcell makes every effort to ensure that its employees understand the unique nature of Amcell's involvement with the Atlantic City system. Similarly, Amcell takes pains to make it clear to third parties with whom the system does business that Thompson is the system's owner and Amcell is merely his managing agent.

24. Thompson is fully in control of the daily operations of the Atlantic City system. While Amcell, as Thompson's management agent, is responsible for the routine administration of the system, the parameters are set by Thompson. He reviews, revises, and ultimately must approve of every annual operating and capital budget. Thompson and his counsel meet with Amcell management on a quarterly basis to access the system's operations and to review policy. In addition, Thompson, by himself and through Lokting, maintains regular contact with the senior members of Amcell's management team through regular telephone calls and correspondence, typically on a monthly basis, and more frequently if necessary.

25. Moreover, numerous procedures are in place to ensure that Thompson's oversight, review and control of daily operations are fully effective. In 1989, for example, Thompson instituted a written policy restricting check-signing authority for the system. Pursuant to that policy, for any non-recurring expense over $5,000, Thompson's signature had to appear on the check. For certain specified categories of regularly recurring expenses, the policy provides that Thompson's signature is only required for checks in excess of $25,000. Those categories included roamer payments to other systems, cell site leases, routine inventory purchases of cellular phones, and tax payments. In 1995, because of the business necessity of making rapid payments to agents, the policy was amended to allow Amcell to issue checks for agent commissions regardless of their amount, without Thompson's signature. However, such checks require a same-day telecopy notice to Thompson and a reference to the specific agent contract provision warranting such payment. All checks are issued within the parameters of the operating and capital budgets which Thompson helps to develop and must ultimately approve. As of the date of Amcell's document production in this hearing, Thompson had signed over 3,000 checks for the system. The policy also provides that, regardless of amount, Thompson is to receive copies of all checks written for the system, along with accompanying invoices. This allows Thompson to review the system's expenditures and to verify their amounts.

26. In addition to checks issued for the system, Thompson reviews and signs all leases, equipment purchases, and contracts entered into by the system. To effect this policy, whenever a document requires Thompson's approval, it is sent, along with a cover letter or routing slip, to Thompson's attorney for Thompson's review and execution. Finally, Thompson also keeps abreast of daily operations through the receipt of reports from Amcell detailing the status of operations, including monthly and quarterly financial statements.

27. Thompson's degree of actual control over his system's operations is demonstrated when his record of diligent oversight is contrasted with other licensee/management arrangements that the Commission has approved in the past. In *O'Neill*, for example, the Commission found that the control of daily operations *Intermountain* criterion was satisfied despite the licensee's admitted lack of hands-on involvement in daily operations. Despite his having "walked away" from day-to-day control of his system, the Commission was satisfied by a provision in the management agreement that expressly stated that O Neill retained control of such functions. *O'Neill* at 2575. In the case of the Atlantic City system, not only did Thompson formally maintain oversight and control authority under the Management Agreement, he maintained actual control over the system's daily operations.

Policy Decisions

28. With regard to the third *Intermountain* criterion, i.e., policy decisions, the Commission was troubled by the possible effect of a provision of the Thompson/Amcell Indemnity Agreement which "requires Thompson to 'cooperate[] fully' with Amcell and gives Amcell 'sole control' over the defense or settlement of any demand or claim subject to indemnification."[39] The Commission expresses the concern that the provision "raises the possibility of Amcell's dominance."[40]

29. The language quoted by the Commission, however, must be viewed in its limited context. The Indemnity Agreement was negotiated to protect Thompson, given the posture of his relations with TDS at the time, from any adverse consequences of entering into the Construction and Switching Agreement with Amcell. To that end, it provides that Amcell will indemnify Thompson and ETC from

[38] *HDO* at 7141.
[39] *HDO* at 7141.
[40] *Id.*

> all claims, liabilities, obligations, suits, causes of action, administrative proceedings, losses, damages, costs and expenses arising from or relating to the execution and delivery of the [Construction and Switching] Agreement by Thompson and [ETC] or the filing by [Amcell] of any petition, request or other pleading or matter with the FCC.[41]

If Thompson chooses to invoke this indemnification protection, then Thompson would have to grant Amcell the right to defend such lawsuits.[42] Thus, Amcell only has a potential voice in litigation if Thompson seeks indemnification under the agreement.[43] Amcell has *no* control over any other litigation affecting the system and is not authorized to initiate a proceeding on its behalf. The narrow category of proceedings contemplated by the Indemnity Agreement in no way affects Thompson's control over policy decisions regarding the system.

30. Moreover, Amcell's control over such proceedings is explicitly limited by the following proviso in the Indemnity Agreement:

> (i) [Amcell] shall keep Thompson ... fully informed as to the status of such matter and shall furnish copies of all pleadings to [Thompson]; (ii) [Amcell] will have [no] power or authority to settle any such matter in a manner which will result in any liability to Thompson or [ETC] or which will infringe upon or impair any contract or other rights of Thompson or [ETC]; and (iii) Thompson's counsel will represent Thompson before the FCC.[44]

Thus, Thompson is able to protect his interests and the interests of the system even in those limited instances where the Indemnity Agreement potentially gives Amcell the authority to control litigation.

31. As a practical matter, Thompson has always made all decisions regarding his role in litigation completely independent of Amcell. He has always been represented by separate FCC counsel in all proceedings before the Commission and has maintained separate representation in all civil litigation. He has also taken different litigation positions from Amcell before the FCC.

32. The factual record in this proceeding demonstrates that Thompson has always had the final say on matters of policy. While Amcell is free to recommend courses of action or policies for the system, all such proposals require Thompson's approval before being put into effect. Part of the expertise of a turnkey manager is in policy making, and Commission precedent makes clear that the adoption by the licensee of a manager's policy recommendations does not affect the licensee's control over his system. In *O'Neill,* the Commission stated approvingly that: "What policy changes that have been made ... were specifically *approved of* and *consented to* by [the licensee]."[45] Here, the Management Agreement specifically provides that accounting, advertising and other functions performed by Amcell are "subject to the Licensee's continuing oversight and review."[46]

33. A recent example of Thompson's ultimate control over policy decisions is provided by the decision to change the Atlantic City system to AT&T switching equipment. After Amcell decided to replace the Motorola equipment in its Wilmington market, it presented Thompson with several options for the Atlantic City system, including the continued use of the Motorola equipment already in place. Only after reviewing the various alternatives and concluding that the AT&T equipment would best serve the system did Thompson authorize its use for Atlantic City.

34. As the *HDO* expressly recognized, Thompson has always rejected Amcell's recommendations when he believes that they are not in the system's best interest.

> We note in particular evidence that Mr. Thompson exercised control in specific matters. He states that he: (1) rejected a proposal by Amcell to sectorize two new cell sites to be constructed for the Atlantic City system; (2) personally, after his contract with Amcell, conducted discussions with TDS and its subsidiary regarding a reseller agreement and the purchase of resale customers; (3) rejected terms of a lease for the Atlantic City systems [sic] retail sales and installation center and negotiated the relevant construction contract; and (4) disapproved a major agency agreement until Amcell provided a cost analysis justifying the agreement. (citations omitted).[47]

35. Another significant way that Thompson exercises his control over policy is through his annual review and approval of the system's operating and capital budgets. He has the authority to object to items on a line-by-line basis. Thus, every capital expenditure for the system receives Thompson's pre-approval. Thompson does not automatically approve every budget proposal that Amcell places before him. In fact, Thompson has overruled the capital budget in every year of the system's operation, frequently demanding reductions of as much as sixty percent.

36. Thompson also exerts his control over the system's policies by his requirement that he review and approve every contract that the system enters into, including roamer and hand-off agreements with other systems, the licensing agreement with Cellular One, cell site leases, vendor contracts, and agency agreements with third-party distributors. For example, Thompson's review and approval was required before ETC joined the Industry Net Settlement Program which coordinates the payment of net roamer revenues. At the time, Amcell's markets had been members for a year and, based on their positive results, the Amcell management team recommended that ETC also join. Thompson reviewed the proposal, gave his approval and subsequently ETC joined the program.

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[41] Thompson/Amcell Indemnity Agreement § 1 (attached hereto as Exhibit 16).
[42] *Lokting Dep. Tr.* page 90, line 5 through page 91, line 12.
[43] *Id.* page 90, lines 16-17.
[44] Thompson/Amcell Indemnity Agreement § 1(c).
[45] *O'Neill* at 2575 ¶ 28 (emphasis added). *See also Hwalin Lee,* 2 FCC Rcd 1561 (Mobile Serv. Div. 1987); *Miller Communications, Inc.,* 2 FCC Rcd 6477 (Mobile Serv. Div. 1988).
[46] *Lokting Dep. Tr.* Exhibit 1 (Construction and Switching Agreement, as amended), ¶ 4A.2.
[47] *HDO* at 7141.

37. Thompson also must approve the rates and activation fees for the cellular services provided by the system. Thompson has actively exercised this authority from time to time to implement different pricing structures for the Atlantic City system.

38. Thompson is responsible for all engineering decisions affecting the system. As part of the capital budgeting process, Thompson has the authority to approve or reject new cell sites proposed by Amcell's engineering department. In addition, any modification to the system, including the sectorization of cell sites, requires Thompson's express approval.

39. Finally, Thompson is responsible for all FCC filings pertaining to the system. As system manager, Amcell forwards proposed or draft filings to ETC's independent FCC counsel (paid by ETC), who reviews and makes changes, requests and obtains Thompson's approval and signature, and files with the Commission.

Personnel Responsibilities

40. The Commission states that the sharing of personnel "between the Atlantic City and Wilmington systems raises questions as to whether personnel actions will be made on Thompson's -- not Amcell's -- behalf."[48] The record is clear that such "integration" no more undermines Thompson's control over personnel actions than it does his control over daily operations. At the time that Thompson made the decision to consolidate the Atlantic City system with Amcell's Wilmington system, it was not unusual for the office operations and personnel of a cellular system to be consolidated with those of a system in an adjacent market.[49] Most of the applicants for cellular licenses during the time in question were either individuals or joint ventures formed for the purpose of applying for cellular licenses. Such applicants rarely had any employees.[50] Upon winning a cellular lottery, those applicants typically hired a management entity and used its employees in an effort to achieve efficiencies and economies of scale.[51]

41. Consistent with industry practice at the time, Thompson elected to operate the Atlantic City system through a management arrangement with Amcell. As is the case with turnkey management contracts generally, Amcell uses its own employees to perform its responsibilities under the Management Agreement. While Thompson could have retained Amcell only in the capacity of management consultant and staffed the system with personnel hired directly by ETC, such an arrangement would have been awkward and difficult to manage.

42. After entering into the Management Agreement, Thompson determined that considerable cost savings could be achieved by consolidating the management of the Atlantic City system into Amcell's existing Wilmington facility. The decision to do so -- affirmatively made by Thompson -- has saved the system an estimated $300,000 per year in operating expenses and has in no way affected Thompson's control over the system. Amcell's responsibility for personnel remains subject to the "oversight and review" requirements of the Management Agreement.

43. Because Thompson hired Amcell to manage the system, ETC has no need for employees other than Thompson. Thompson determines his own salary, which is paid by ETC, not Amcell. Furthermore, ETC does retain directly the services of attorneys and other independent agents, as required. For example, Thompson selected, and pays as independent agents, his own attorney/business advisor and separate FCC counsel. Moreover, Thompson does maintain direct contact with Amcell personnel. Amcell officials Anna Hillman (Senior Vice President for Finance and Administration), Ray Dombroski (current Vice President for Engineering), David Watson (Senior Vice President for Sales and Marketing), John Moerman (General Manager for Atlantic City), and Jeffrey Smith (Vice President and General Counsel) have testified that they are in regular contact with Thompson and Lokting. Dominic Villecco (former Vice President of Engineering), testified to the same effect during the seven years when he was Amcell's technical interface with Thompson.

44. Finally, while Amcell is the system's manager and thus is responsible for hiring, firing, and supervising its personnel on a daily basis, Amcell itself is subject to dismissal for cause by ETC. Accordingly, if any of Amcell's employees do not perform their duties in an acceptable manner, Thompson can, at his option, terminate his relationship with Amcell. Thus, Thompson has actual control over the Atlantic City system's personnel management.

Financial Obligations

45. In the *HDO*, the Commission expresses two concerns regarding the financial obligations criterion of *Intermountain*. The first is that "Amcell may have a degree of financial exposure which undercuts the significance of Thompson's formal responsibility for paying financial obligations."[52] In particular, the Commission was troubled by the $800,000 payment made by Amcell to Thompson to keep open its option to buy the system,[53] and furthermore, the Commission was troubled by the Indemnity Agreement between Thompson and Amcell which calls for Amcell to pay Thompson $1.5 million if Thompson's authority is revoked as a result of his relationship with Amcell.[54]

46. First, the payment by Amcell to Thompson to keep open its option to purchase the Atlantic City system was a lawful and unremarkable occurrence. It was common, and consistent with Commission policy at the time, for managing agents to purchase an option to acquire the systems under their management.[55] Amcell paid valuable consideration for a contingent future right; it was in no sense an investment in the system. Unless the Commission approves a transfer of control, Thompson remains the majority and controlling interest holder in the system and is entitled to receive 50.01% of its profits.

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[48] *HDO* at 7141.

[49] *Riley Dep. Tr.* page 13, line 24 through page 14, line 24, page 27, lines 4 through 15.

[50] *Riley Dep. Tr.* page 17, lines 2-4.

[51] *Riley Dep. Tr.* page 17, lines 5-8.

[52] *HDO* at 7142.

[53] *Id.*

[54] *Id.*

[55] *Riley Dep. Tr.* page 18, lines 1-7. *See Rodney A. McDaniel*, 2 FCC Rcd 5402 (Mobile Serv. Div. 1987) (approving an option agreement between a cellular licensee and his turnkey manager under the *Intermountain* guidelines).

47. Second, it is common in the cellular industry, particularly for non-wireline systems, to completely fund construction and operating expenses with debt rather than equity.[56] ETC is the sole obligor on the Provident Bank loan, which is now approximately $2.9 million. His stock in ETC is pledged as collateral for the loan. Thus, Thompson's stake in the system is every bit as real as if he had made equity contribution of an equivalent amount. Should there be a default and foreclosure on the $2.9 million loan, Thompson's stake in the loss of his stock would be far greater than Amcell's investment in its option. The Indemnity Agreement with Amcell would be of no help to him in his circumstance.[57]

48. Third, the indemnification provision was a prudent business decision on the part of Thompson in light of the dispute with TDS regarding the Atlantic City system. It served to insure Thompson against the risks associated with his entering into the Construction and Switching Agreement. In any case, the payment contemplated by the indemnity provision is contingent on the forfeiture of Thompson's license. Thus, while it is true that Amcell has paid $800,000 to Thompson for a contingent option, and has pledged $1.5 million more should Thompson lose his authorization for reasons related to Amcell's dispute with TDS,[58] Amcell has not advanced Thompson or ETC any funds to pay the system's financial obligations. This stands in stark contrast to the facts in *O'Neill* where the prospective purchaser had invested hundreds of thousands of dollars *in the system*, without any specified terms regarding repayment.[59] As discussed below, the system has been financed entirely by the loan negotiated by Thompson with Provident Bank, and through the reinvestment of the system's profits.

49. The Commission's second concern was whether the bank loan used to finance construction of the system was negotiated independently of Amcell.[60] While Amcell did introduce Thompson to the Provident Bank, this does not undermine Thompson's complete financial autonomy from Amcell. Amcell recommended Provident Bank because it had a good working relationship with the bank at the time and knew that Provident was the major lender to the cellular industry. After introducing Thompson to bank personnel, Amcell did not participate in the negotiation of the loan agreement, ETC is the sole borrower and guarantor under the loan and the only collateral for the loan is the Atlantic City system and Thompson's stock in ETC.

50. The now-deleted loan provision requiring the retention of Amcell as system manager was a requirement imposed by the bank, not Amcell.[61] No bank will loan money to a start-up company without assurances of professional management. That Thompson later renegotiated the loan agreement to remove that provision to assure compliance with the Commission's rules and policies only serves to highlight that the ongoing relationship between Thompson and the bank does not involve Amcell. In fact, the record shows that Amcell no longer uses Provident Bank as its lender.

51. Thompson is solely responsible for costs associated with the construction and operation of the system. Thompson must pre-approve the capital and operating budgets. Pursuant to the check-signing policy, Thompson must personally sign all checks for non-recurring expenses in excess of $5,000.[62] Thompson has established separate bank accounts for ETC in which all revenues from the system's operation are deposited. All expenses attributable to the system are paid out of the ETC accounts. Thompson alone determines who has access to those accounts and has limited such access to a few Amcell employees. Aside from operating revenues, the only other source of funding for the system is the Provident loan facility. Amcell has never advanced any funds to ETC or Thompson for the construction or operation of the system.[63]

Receipt of Monies and Profits

52. In its analysis of the sixth *Intermountain* factor, the receipt of monies and profits, the Commission expressed concern over Thompson's decision to defer distributing profits.[64] The Commission was troubled by the possibility that Thompson's failure to pay out dividends was related to Amcell's expected acquisition of the system.[65]

53. Several factors should be noted in connection with Thompson's decision to defer the distribution of profits, other than for tax purposes.[66] First, the record is clear that the decision was, in fact, Thompson's and not Amcell's. Second, Thompson had no basis on which to calculate when or to whom he would sell the Atlantic City system. The contingent option with Amcell was executed in December of 1987. At the time, FCC litigation between Amcell and TDS was already underway and civil litigation commenced shortly thereafter. In each forum, the validity of the CMS Agreement's two-third approval provision and of each party's right to acquire the system was in issue. Therefore, Thompson had no way of knowing whether or when Amcell would ever be able to exercise its contingent option. Accordingly, the expectation of a sale to Amcell was not a basis for the delay in distributions.

54. A third factor pertinent to the delay in distributions was the uncertainty caused by litigation over the CMS Agreement. A key issue in that litigation was the nature of the entity to be formed to bring the minority interest holders into equity ownership of the Atlantic City system,

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[56] *Riley Dep. Tr.* page 18, lines 8-23.

[57] *See generally* Thompson/Amcell Indemnity Agreement.

[58] Thompson/Amcell Indemnity Agreement § 1(d).

[59] *O'Neill* at 2575 ¶ 28.

[60] *HDO* at 7142.

[61] *Riley Dep. Tr.* page 18, line 24 through page 19, line 10.

[62] As previiously noted, for certain specified categories of regularly recurring expenses, the policy provides that Thompson's signature is only required for checks in excess of $25,000. These categories include roamer payments to other systems, cell site leases, routine inventory purchases of cellular phones, and tax payments. In 1995, the policy was amended to allow Amcell to issue checks for agent commissions -- regardless of their amount -- without Thompson's signature, provided that Thompson is notified immediately of the issuance of such checks. The amendment was necessary to ensure compliance with agency contracts. All checks are issued within the parameters of the operating and capital budgets which Thompson helps to develop and must ultimately approve.

[63] *Thompson Dep. Tr.* page 41, lines 10-15.

[64] *HDO* at 7142.

[65] *Id.*

[66] *Lokting Dep. Tr.* page 88, line 18 through page 89, line 25. There have been distributions of profits of approximately one and one-half to two million dollars to Thompson to allow him to pay the tax liability that accrues as a result of the system's taxable income. *Lokting Dep. Tr.* page 87, line 16 through page 88, line 3.

as required by the CMS Agreement. For quite some time, Thompson had felt that it was not prudent to make distributions in advance of the resolution of that issue.[67]

55. A fourth factor related to the delay in distributing profits involved a provision in the Provident loan agreement which requires the bank's approval of distributions. Such loan covenants are standard in the cellular industry and are designed to assure that satisfactory financial operating ratios are maintained. During the past year, prior to the issuance of the *HDO*, Thompson approached the bank and, in light of the very positive forecasted revenues for the system, he was able to obtain consent for a distribution.[68] He has decided, however, with the issuance of the *HDO* to defer the distribution pending the outcome of the instant proceeding.

56. Finally, the Atlantic City system, like many non-wireline systems built by lottery winners, was completely financed through debt.[69] In order to avoid incurring substantial additional debt, subsequent improvements to the system were funded through the reinvestment of operating revenues. Given the desire of owners to avoid substantial debt and the highly competitive nature of the cellular industry, reinvestment of profits to make capital improvement was common business practice.[70] Thompson's reinvestment of profits has allowed the Atlantic City system to grow from four to eleven cells and to serve well in excess of 10,000 customers.

57. In sum, the record shows that Thompson had sound business reasons for deferring distributions wholly independent of his contractual relationship with Amcell. If anything, Thompson's decision to defer distributions and plow revenues back into the business was another indicium of his control of monies and profits under the *Intermountain* criteria.

58. In addition, the record makes clear that Thompson is solely responsible for the receipt of monies and profits. All funds derived from operation of the system are deposited directly into ETC's account. These accounts are controlled by Thompson. There is no commingling of the system's funds with accounts controlled by Amcell.

59. As majority owner, Thompson is entitled to 50.01% of the system's profits. Thompson's decision to reinvest, rather than distribute, those profits is indicative of his control over the system's revenues.

60. Despite his decision not to disburse profits, Thompson does benefit financially from the system, receiving a monthly salary from ETC, currently around $12,000. Thompson, as the company's President and only shareholder, is solely responsible for setting the amount of that salary; Amcell plays no role in that determination.

61. In May of 1992, following the Oregon court's grant of summary decision invalidating the TDS option, Thompson and Amcell executed an agreement providing for Thompson's exercise of the Thompson/Amcell Contingent Option Agreement. Thompson negotiated for a provision in the Exercise Agreement which factors the system's retained earnings into the calculation of the consideration that Amcell will pay for the system at closing. Accordingly, Thompson has every incentive to ensure that the system's operations are profitable and he is actively committed to its success.

CONCLUSIONS

62. Section 1.251 of the Commission's rules requires that a party seeking summary decision "show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.[71] As developed through Commission precedent, summary decision may only be granted when "the truth is clear, the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts."[72]

63. Such is the case here. None of the facts set out above are disputed by any party and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. As previously noted, discovery in this proceeding has been thorough and extensive. Proceeding with the hearing would add nothing to the record. Moreover, the facts adduced through discovery, when applied to the *Intermountain* criteria, conclusively demonstrate that Thompson has not relinquished control of his system. Therefore, the designated issue is resolve in Thompson's favor.

Accordingly, IT IS ORDERED, That unless an appeal from this Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[73] the "Joint Motion For Summary Decision" filed July 14, 1995 IS GRANTED; the Commission's grant of the application of Ellis Thompson Corporation for facilities in the domestic public cellular radio telecommunications service on frequency block A in market no. 134, Atlantic City, New Jersey IS REINSTATED; and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

[67] *Lokting Dep. Tr.* page 89, lines 6-16.
[68] *Lokting Dep. Tr.* page 88, line 24 through page 89, line 5. *See supra* part III ¶ 100.
[69] *Riley Dep. Tr.* page 18, lines 8-23.
[70] *Riley Dep. Tr.* page 20, lines 9-20.
[71] 47 C.F.R. §1.25(a)(1); *see also Summary Decision Procedures*, 34 FCC 2d 485 (1972).
[72] *Big Country Radio, Inc.*, 50 FCC 2d 967, 968 (Rev. Bd. 1975).
[73] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).