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CC Docket 92-237

Federal Communications Commission
Washington, D.C. 20554

April 1, 1997

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Federal Communications Commission
Office of Secretary

Mr. Thomas Gutierrez
Lukas, McGowan, Nace & Gutierrez
1111 Nineteenth Street, N.W.
Suite 1200
Washington, DC 20036

Dear Mr. Gutierrez:

This letter is in response to your request, on behalf of CMT Partners (CMT) and Bay Area Cellular Telephone Company (BACTC), that a carrier identification code (CIC) assignment be made available to CMT.[1]

Under current conservation measures, each entity may be assigned no more than two CICs.[2] After detailed review of materials you supplied to the Common Carrier Bureau (Bureau), we conclude that, under the definition of "entity" in Section 1.3 of the industry's CIC Assignment Guidelines (INC 95-0127-006), BACTC, Cellular of Kansas (Cellular One), and CMT, for purposes of obtaining a CIC assignment, are not "entities" separate from AT&T Wireless Services, Inc. (AT&T Wireless), or AirTouch Communications (AirTouch).[3]

The CIC Assignment Guidelines define "entity" in Section 1.3:

> CICs are assigned to access customers or industry entities. For purposes of these guidelines, an entity will be defined as follows:
>
> - An entity is defined as a firm or group of firms under common ownership or control.

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[1] See Letters from Thomas Gutierrez to Geraldine Matise, Chief, Network Services Division, Common Carrier Bureau, Federal Communications Commission, dated December 4, 1996, and September 18, 1996, respectively.

[2] See Letters from Kathleen M.H. Wallman, Chief, Common Carrier Bureau, Federal Communications Commission, to Ron Conners, Bell Communications Research (Bellcore), North American Numbering Plan (NANP) Administration, dated March 17, 1995, September 26, 1995, and October 23, 1995.

[3] Cf. Letter from Regina M. Keeney, Chief, Common Carrier Bureau, Federal Communications Commission, to Ron Conners, Bellcore, NANP Administration, dated February 5, 1997 (King Salmon Letter) (concluding that under the definition of "entity," King Salmon Communications Inc., for purposes of obtaining a CIC assignment, is an "entity" separate from GTE Mobilnet, Incorporated). See attached copy of the King Salmon Letter.

Franchise operators are those individuals, groups, or firms granted the right or license to market a company's goods or services in a particular area. As there is commonality of economic interest in marketing conditions normally imposed on a franchise operator by the franchiser, these industry guidelines treat the franchiser as the relevant entity and not each individual franchise operator. The franchiser is eligible for CICs assigned to an entity up to the maximum number as determined by these guidelines. The franchise operators operating under the common franchise may each use the CICs under the guidance of the franchiser. On the assumption that franchise operators are operating in different territories, as may be dictated by the franchiser, no technical limitation on access service exists due to this CIC limit.

The information in your letters indicates the following ownership structure:

AT&T Wireless Services, Inc.----------AirTouch Communications
(has 5 CICs) - (has 1 CIC)
-
-
-

CMT Partners
Delaware General Partnership
(50% owned by AT&T Wireless, 50% owned by AirTouch, both General Partners)
- -
- -
- -

Bay Area Cellular Telephone Company (wholly-owned by CMT)

Cellular One of Kansas (wholly-owned by CMT)

In your letter of September 18, 1996, you state that Cellular One's request for a CIC assignment was denied because Cellular One was viewed, for purposes of CIC assignments, as part of the same entity as AT&T Wireless and AirTouch. You further state: "BACTC has informally requested a CIC code, both through discussions with Bellcore personnel and discussions with Common Carrier Bureau personnel."

You argue that although both Cellular One and BACTC are under common ownership or control of CMT, a joint venture owned 50 percent by AT&T Wireless and 50 percent by AirTouch, neither Cellular One nor BACTC is under the common ownership and control of either AirTouch or AT&T.[4] In your letter of December 4, 1996, you argue that: (1) CMT is under negative, rather than positive, control of AirTouch and AT&T because neither of them owns more than 50 percent of CMT nor votes more than 50 percent of CMT's interest, and negative control is not equivalent to common ownership or control because it does not permit a party to affirmatively dictate policy; (2) a change from negative to positive control

[4] See September 18 Letter at 1.

would require Commission approval; (3) each general partner in a general partnership should be viewed as having only the status equivalent to an officer or director of a corporation, but not control of the entire partnership; and (4) CMT's governing bylaws and voting agreements do not grant either AT&T or AirTouch a right to control CMT.[5] In support of the above arguments in your December 4, 1996 letter, you provide analysis of Commission and court precedent regarding partnerships and control.

We find, however, that the precedent you offer is not controlling. An important goal of the industry's CIC Assignment Guidelines is number conservation, a goal shared by this Commission. For this reason, the definition of "entity" is written broadly to include "common ownership or control."[6] Therefore, either ownership or control by an existing CIC assignee is sufficient to deem a CIC applicant the same entity as the CIC assignee for purposes of obtaining a CIC assignment.

It is the Bureau's conclusion that CMT, BACTC and Cellular One are, for purposes of CIC assignments, the same entity as AT&T Wireless and the same entity as AirTouch. Absent additional and contradictory facts, it appears that AT&T Wireless and AirTouch have legal ownership of CMT, and therefore, over BACTC and Cellular One. General partnership agreements make the entities created by the contract (here CMT, BACTC and Cellular One) subject to ownership of the two contracting parties.[7] CMT is an entity created by a contract between AT&T Wireless and AirTouch, and CMT is thus owned by them (50 percent by each as indicated in your letter of December 4, 1996). It necessarily follows that BACTC and Cellular One, entities wholly owned by CMT, are also owned by AT&T Wireless and AirTouch. Moreover, as general partners of CMT, both AT&T and AirTouch "control" BACTC, because as general partners of CMT, either AT&T or AirTouch have the power to bind CMT in matters with third parties in the ordinary course of partnership business.[8]

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[5] See December 4, 1996 Letter at 2-4.

[6] See CIC Assignment Guidelines at Section 1.3 (emphasis added).

[7] See Unif. Partnership Act 1994 § 104(4) (defining "partnership" as "an association of two or more persons to carry on as co-owners a business for profit . . . "). The Comment to the 1995 Main Volume of the Uniform Partnership Act (1994) states that this definition refers to a general, rather than limited partnership. See also King Salmon Letter at 2-3.

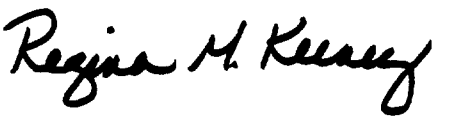
[8] Section 301 of the Uniform Partnership Act 1994 states:

> Subject to the effect of a statement of partnership authority under Section 303:
>
> (1) An act of a partner . . . for apparently carrying on in the ordinary course of the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular

(continued...)

After reviewing the information that you have provided, we find no basis for departing from the analysis appearing in the preceding paragraph. Consequently, we conclude that Bellcore has not been unreasonable in not assigning a CIC to CMT, Cellular One or BACTC.

Sincerely,



Regina M. Keeney
Chief
Common Carrier Bureau

Enclosure

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[8](...continued)
matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

Unif. Partnership Act 1994 § 301(1). See also Moving Phones Partnership, L.P., v. Federal Communications Commission, 998 F.2d 1051, 1055 (D.C. Cir. 1993) (Rehearing and Suggestions for Rehearing En Banc Denied Oct. 5, 1993) (referring to the "well established . . . tenet of partnership law that a general partner has control of partnership affairs as against the outside world").