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MAR 11 1998

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

COMMUNICATIONS DIVISION
WASHINGTON, D.C.

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Facilitate
Future Development of SMR Systems
in the 800 MHz Frequency band

)
)
) PR Docket No. 93-144
) RM-8117, RM-8030
) RM-8029
)

Implementation of Sections 3 (n) and
322 of the Communications Act
Regulatory Treatment of Mobile Services

)
) GN Docket No. 93-252
)

Implementation of Section 309 (j) of the
Communications Act--Competitive
Bidding

)
) PP Docket No. 93-253
)
)

To: Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

Comments

Telecellular, Inc. ("TCI") and nine of the participating licensees ("Licensees") in the TELECELLULAR joint venture for construction of a wide area SMR system in Puerto Rico, through counsel, hereby submit these comments in response to the February 27, 1998 "Reply" filed by North Sight Communications, Inc. ("North Sight") in the above-captioned matter.^{1 2} North Sight's filing offers no new relevant information,

¹The licensees are Caribbean Digital Communications Inc.; Caribbean SMR, Inc.; Caribbean Spectrum, Inc.; Island Communications, Inc.; Island Digital Communications, Inc.; Island SMR, Inc.; Ponce SMR, Inc.; SMR Digital PR; SMR Spectrum (the "Licensees"). In its Reply North Sight questions "Who represents Whom." (North Sight Reply, at 1.) The certifications of the shareholders of the Licensees that were submitted to the Commission as part of the Licensees' November 1997 waiver request demonstrate clearly that these Licensees are working with TCI; these same certifications are reproduced in Exhibit B of North Sight's Reply. Further, the attached affidavits from the directors of the Licensees also address this issue decisively, showing that these Licensees are represented by this law firm.

and includes voluminous attachments comprised almost entirely of documents and/or material already known to the Commission. Having failed adequately to investigate the Puerto Rico market prior to the "upper 800 MHz" auction, North Sight now seeks to avoid its relocation responsibilities under the Commission's policies³ with a belated and unjustified attack on the *bona fides* of the incumbent licensees. North Sight's position has no merit and should be rejected.

I. The Extended Implementation Is Granted To The Participating Licensees, Who have until May 20, 1998 To Construct An 800 MHz Wide-Area Digital System In Puerto Rico.

In its "*Implementation Order*" the Commission gave the participating licensees in "TELECELLULAR" until May 20, 1998 to construct a wide-area digital system in Puerto Rico.⁴ In its attempt to obfuscate the record, North Sight now asks, "Who did the FCC grant an extension to?" (North Sight reply, at 1) It is clear based on the facts of this proceeding, and consistent with the requirements of the Communications Act (See 47 U.S.C. § 301, 47 U.S.C. § 310 (d)), that the extended implementation was granted to the

² North Sight's filing, which was due on February 19, 1998, is late without even an attempted explanation. See "Joint Motion for Extension of Time and to Hold Proceedings in Abeyance", filed January 20, 1998. Moreover, the licensing issues raised by North Sight for the first time in its Reply are untimely. In addition, despite its attack on the prior filings of TCI and the above participating licensees in this proceeding, (North Sight Reply, at 6 (Exhibit 21 therein); North Sight Reply, at 8, (Exhibit 23 therein)) North Sight failed to serve its Reply on these parties. (Exhibit 1) Accordingly, North Sight's Reply should be stricken from the record. At a minimum, in light of the new issues that North Sight attempts to raise, it is respectfully requested that the Commission accept this filing, which provides information refuting and demonstrating the irrelevancy of North Sight's new "issues," and which is offered pursuant to Section 1.41 of the Rules, 47 C.F.R. §1.41 in order to create a complete record.

³*Second Report and Order*, PR Docket No. 93-144, FCC 97-223, released July 10, 1997; *Memorandum Opinion and Order on Reconsideration*, PR Docket No. 93-144, FCC 97-224, released July 10, 1997. The Commission's policies are designed carefully to balance the rights between incumbent licensees and auction winners. North Sight's filings in this proceeding are a blatant attempt to subvert those policies by interjecting untimely, irrelevant and unsupported arguments into the record with an aim of attacking license grants that have long since vested.

⁴DA 97-2373, released November 12, 1997 ("*Extended Implementation Order*").

participating licensees. "Since the *licensees were granted extended implementation*, there is no need for the *licensees* to respond to this letter at this time." (Exhibit 2 Letter dated May 9, 1995 from Terry L. Fishel; Emphasis added).⁵ The grant does not extend to any particular third party that claims a contractual relationship with these Licensees.⁶

North Sight's attempt to raise Real-Party-in-Interest issues, based on its extensive dissertation of the public record, shows no more than that the Licensees had different representatives over the long and protracted history of this proceeding. Despite its regurgitation of hundreds of pages of documents, North Sight does not show a scintilla of evidence of wrongdoing by any Licensee in connection with the license grants. Moreover, North Sight's collateral attack on the qualifications of the Licensees is inappropriate in this proceeding which relates solely to the construction deadline of the Puerto Rico wide-area digital system. Under the Communications Act, issues relating to the initial licensing grants can only be raised in a revocation proceeding, with the Licensees being given their full hearing rights. (47 U.S.C. §312 (a)).

North Sight's insinuations of taint against TCI based on a plea bargain by Pendleton Waugh, a former director and officer of the company are equally misplaced. The matter covered by the plea bargain is unrelated to TCI and is outside the FCC's jurisdiction. Further, the plea bargain has no bearing on the *bona fides* of the participating Licensees. Moreover, Mr. Waugh resigned from the management of TCI

⁵ Also see undated letter from Ronald B. Fuhrman/Terry L. Fishel, "This is in response to your request to toll the one year construction requirement pending consideration of the request for Extended Implementation filed on behalf of the *participating licensees* in TELECELLULAR...." (Emphasis added) (Exhibit 2)

⁶See Letter dated April 3, 1996 from Ronald B. Fuhrman/Terry L. Fishel, "Regardless of who the entity is, that was granted this extended implementation of five years, *it was only granted to the call signs* listed on this Exhibit # 1, *which were the participating licensees* of TELECELLULAR, as stated in the request of May 24, 1994." (Emphasis added) (Exhibit 3).

and has relinquished his legal rights in the company (See attached affidavit of June McNally, Chairperson, Telecellular, Inc.).

As a management company, TCI is not even regulated by the Commission. However, in similar situations involving directors of licensee corporations, the Commission has consistently allowed the entity to continue as a licensee where new management and control is established, as was done within TCI.⁷ Finally, there is no reason to penalize the Licensees in the instant proceeding for unrelated conduct by a former director and officer of a management company with whom the Licensees have a contractual relationship.

The nine participating Licensees represented in this filing are working toward completion of an 800 MHz Island-wide digital system in Puerto Rico. (Annual Certification and Informational filing by TCI and the nine participating licensees, February 27, 1998 "Informational filing"). These licensees have the ability to construct this system in accordance with the requirements of the "Implementation Order."⁸ In short, the *participating Licensees* have valid authorizations from the Commission, they have until May 20, 1999, to construct an Island-wide digital system in Puerto Rico and are currently proceeding on course to meet or exceed that deadline.

⁷ Thus, even when the wrongdoing is by a director of a licensed entity in an FCC-related matter, the Commission has acknowledged that "corporate misconduct can often be cured by replacing management and directors." *Policy Regarding Character Qualifications*, 102 FCC 2d 1179, 1190-1191 (1986); *See Key Broadcasting*, 3 FCC Rcd 6587 (1988); Also see, *A.S.D. Answer Service, Inc.* 1 FCC Rcd. 753 (1986), where the former Chairman of a common carrier who was required to step down as part of a settlement agreement was allowed to retain a 17 % ownership interest in the licensee even though he had been involved in the wrongdoing. *Id.*, at *Para. 6, n. 6, paras. 21, and 26.*

⁸ While the nine participating Licensees would welcome the cooperation of the six additional licensees originally associated with the wide area project, the Commission should be aware that the nine intend to complete construction in full accordance with the Implementation Order with or without the participation of the other six (see February 27, 1998 Annual certification and informational filing).

II. The Extended Implementation Order Should Be Affirmed By The Commission .

The Commission granted extended implementation for the participating licensees to construct a wide-area digital system in Puerto Rico due to the delay caused by on-going third party litigation relating to contractual rights for management of the system. North Sight, however, challenges the Commission's reasoning, contending that there is no "third party" issue. Rather, according to North Sight, "it is a struggle between some portion of the licensees against some other portion of the licensees...." (North Sight Reply, at 7). The record clearly demonstrates that North Sight's reasoning is erroneous and that the Commission should now affirm its Extended Implementation grant to the participating licensees.

As documented above, the *only* parties given any rights by the Commission under the Extended Implementation Order are the *licensees* themselves. Any other rights regarding management of the system are governed by contract law. As the Commission is well aware, there is ongoing litigation in Puerto Rico between Telecellular de Puerto Rico ("TPR") and TCI over those very agreements with the existing licensees. In addition, three of the participating licensees have been sued by TPR in an attempt to enforce a "purchase option agreement" and have the licenses transferred away from the existing owners to TPR.⁹ Therefore, to suggest that third party litigation is not involved and that this is a matter totally within the control of the existing licensees is an absurdity.

⁹Although TPR won an initial lower court decision, the issue is now on appeal. See March 6, 1998 letter to Daniel B. Pythyon, Chief, Wireless Telecommunications Bureau from Albert J. Catalano, FCC File Nos. S0014450, S001451, S001452 (copy filed in this Docket). The lower court decision is fatally flawed because the corporations were not represented by counsel and the shareholders never approved the relevant agreements, all contrary to applicable law.

III. CONCLUSION

In view of the foregoing, the Commission should affirm its Extended Implementation Order giving the participating licensees until May 20, 1998 to construct an 800 MHz Island-wide digital system in Puerto Rico.

Respectfully submitted,

Telecellular, Inc.
Caribbean Digital Communications Inc.
Caribbean SMR, Inc.
Caribbean Spectrum, Inc.
Island Communications, Inc.
Island Digital Communications, Inc.
Island SMR, Inc.
Ponce SMR, Inc.
SMR Digital P.R., Inc.
SMR Spectrum P.R., Inc.

By: 

Albert J. Catalano
Matthew J. Plache

DAY, CATALANO & PLACHE
1000 Connecticut Ave., N.W.
Suite 901
Washington, D.C. 20036
Telephone: (202) 822-9388
Their Counsel

Dated: March 13, 1998

Certificate of Service

I certify that on this 13th day of March, 1998, I sent by first-class mail, postage prepaid, a copy of the foregoing pleading and its attachments and exhibits to the following:

Elizabeth R. Sachs, Esquire
Lukas, Nace, Gutierrez & Sachs
1111 19th Street, NW 12th Floor
Washington, DC 20036

Alan S. Tiles, Esquire
Meyer, Faller, Weisman & Rosenber, PC
4400 Jenifer Street, NW, Suite 380
Washington, DC 20015

A handwritten signature in black ink, appearing to read "Matthew J. Plache". The signature is written in a cursive style with a horizontal line underneath it.

Matthew J. Plache

ATTACHMENTS

**AFFIDAVITS OF JUNE MCNALLY AND
DIRECTORS OF THE LICENSEES**

TELECELLULAR. INC.
 4011 ROSA ROAD
 DALLAS, TEXAS, 75220

Dallas
 (214) 352-2761
 (214) 352-6664 Phone & Fax

Puerto Rico
 (787) 644-1190
 (787) 761-6710 Fax

I, June D. McNally, hereby declare under penalty of perjury the following:

1. I am Chairperson of Telecellular, Inc.
2. Mr. Pendleton C. Waugh has no role in the management of Telecellular, Inc. Although Mr. Waugh was formerly a director and officer of Telecellular, he resigned from these positions as of May 14, 1997. A copy of his letter of resignation is attached. Mr. Waugh is used by Telecellular, Inc. as a consultant on various matters.
3. Mr. Waugh owns no legal interest in Telecellular, Inc. or its voting stock, and he does not have the right to exercise any control over Telecellular, Inc. or its voting stock. Nor, to the best of my knowledge and based on a review of relevant shareholder lists, does Mr. Waugh have any ownership interest in any of the license corporations involved in the Telecellular joint venture.

Dated: March 13, 1998


 June D. McNally

TELECELLULAR, INC.
4011 Rosa Road
Dallas, Texas 75220

Dallas
(214) 352-2761
(214) 352-6664 (Fax)

Puerto Rico
(787) 761-6753
Fax (787) 761-6710

May 14, 1997

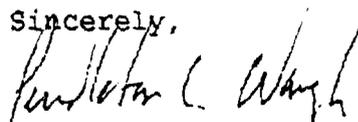
Ms. June D. McNally, Secretary
Telecellular, Inc.
4011 Rosa Road
Dallas, Texas 75220

Re: Resignation

Dear June:

Based upon my recent discussions with Mr. Tom Moore at Capital Alliance Corp., Mr. Ken Dunn and Ms. Audrey Mar, I feel that it is in the best interest of Telecellular, Inc., its shareholders and clients that I tender my resignation as Chairman of the Board of Directors and President. This resignation will become effective immediately.

Sincerely,



Pendleton C. Waugh

SMR DIGITAL P.R., INC.
HC -71 Box 2829
Naranjito, P.R. 00719

I, Hector M. Marrero Marrero, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of SMR Digital P.R., Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 11 day of March, 1998.

By: Hector M. Marrero Marrero

Hector M. Marrero Marrero
Print Name

ISLAND COMMUNICATIONS, INC.

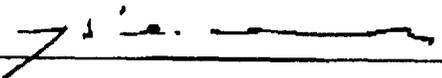
Box 23

Naranjito, P.R. 00719

I, Hector L. Ortega Jr., hereby declare under penalty of perjury, the following:

- 1. I am the duly-elected and sole director of Island Communications, Inc.
- 2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
- 3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 11 day of March, 1998.

By: 

Hector L. Ortega Jr.
Print Name

ISLAND DIGITAL COMMUNICATIONS, INC.

**Box 3189
Bayamon, P.R. 00960**

I, Ramón Rivera Mulero, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of Island Digital Communications, Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 11 day of March, 1998.

By:  _____

Ramón Félix Rivera Mulero
Print Name

ISLAND SMR, INC.
G.P.O. Box 363587
San Juan, P.R. 00936

I, Robert E. Pennock, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of Island SMR, Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 11th day of March, 1998.

By: 

Robert E. Pennock
 Print Name

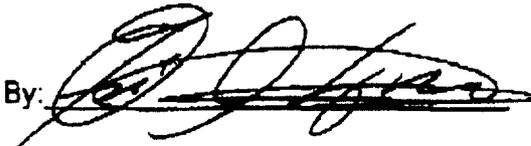
CARIBBEAN SMR, INC.
Topacio St. #31
Villa Blanca
Caguas, P.R. 00725

I, José A. Lozano, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of Caribbean SMR, Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 10 day of March, 1998.

By:



Jose' A Lozano

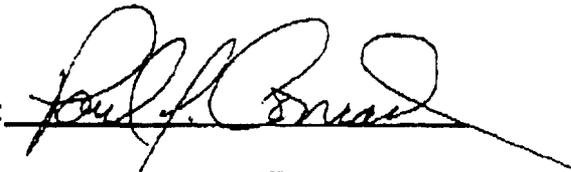
Print Name

CARIBBEAN SPECTRUM, INC.
P.O. Box 8507
San Juan, P.R. 00910

I, Paul J. Conrad, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of Caribbean Spectrum, Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 10 day of March, 1998.

By: 

Paul J. Conrad
 Print Name

PONCE SMR, INC.
182 CALLE VILLA
PONCE, P.R. 00731

I, Pedro J. Rosselló, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of Ponce SMR, Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 10 day of March, 1998.

By: 

PEDRO J. ROSSELLO
Print Name

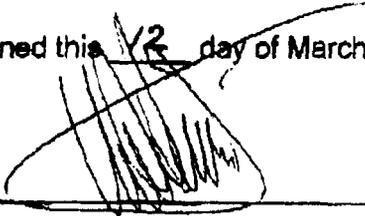
CARIBBEAN DIGITAL COMMUNICATIONS, INC.

Calle Nicaragua F-7
Vista Del Morro
Cataño, P.R. 00962

I, Victor M. De León Perez, hereby declare under penalty of perjury, the following:

1. I am the duly-elected and sole director of Caribbean Digital Communications, Inc.
2. The law firm of Day, Catalano & Plache is authorized to serve as legal counsel on behalf of this corporation on all matters before the Federal Communications Commission (FCC), including the ongoing proceeding in PR Docket 93-144.
3. No other law firm is authorized to represent this corporation before the FCC.

Signed this 12 day of March, 1998.

By: 

Victor De León

Print Name

EXHIBIT 1

Certificate of Service from North Sight's Reply showing that North Sight failed to serve the Reply on Telecellular, Inc., its attorneys or any of the participating Licensees.

CERTIFICATE OF SERVICE

I, Ruth A. Buchanan, a secretary in the law office of Meyer, Faller, Weisman and Rosenberg, P.C. hereby certify that I have on this 27th day of February, 1998 caused to be hand delivered, a copy of the foregoing Reply to the following:

Daniel Phythyon, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Rosalind K. Allen, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

David Furth, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
2100 M Street, N.W., 7th Floor, Room 24
Washington, D.C. 20554

Ramona Melson, Chief,
Policy and Rules Branch
Commercial Wireless Division/WTB
Federal Communications Commission
2100 M Street, N.W., 7th Floor, Room 101A
Washington, D.C. 20554

Terry L. Fishel, Chief*
Land Mobile Branch
Division of Operations
Wireless Telecommunications Bureau
Federal Communications Commission
1270 Fairfield Road
Gettysburg, PA 17325

Elizabeth R. Sachs, Esquire**
Lukas, McGowan, Nace & Gutierrez
1111 19th Street, N.W., Suite 1200
Washington, D.C. 20036

*Via Federal Express
**Via First Class Mail


Ruth A. Buchanan

EXHIBIT 2

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

In Reply Refer To:
7110-163

MAY 09 1995

Richard S. Myers
Law Offices of Richard S. Myers
1030 15th Street, N.W., Suite 908
Washington, D.C. 20005

Dear Mr. Myers:

This is in regard to the 800A letters which were sent to TELECELLULAR granted extended implementation to permit a construction period of five years.

Since the licensees were granted extended implementation, there is no need for the licensees to respond to this letter at this time. Our processing system has generated many of these letters automatically before we were aware of the problem. Due to the time involved in physically changing our system to avoid the generation of this letter, it is probable that more letters will be received by the licensees until our system is updated. At this time we are asking you to disregard the 800A construction letters. We are in the process of updating our database to again send these letters out to the licensees five years from the grant date.

We apologize for the inconvenience that this has caused to you and the licensees. Any questions concerning this matter may be directed to Mr. Al Knerr of our Technical Section at (717) 337-1411 (ext. 163).

Sincerely,



Terry L. Fishel
Chief, Land Mobile Branch

cc: Kathy Garland, FCC

08/01/1994 20:18 9168567848
08/01/1994 15:48 2623711136
08/01/1994 10:20 717 337 1841

SPECTRUM MGMT
RICHARD S. MYERS ESQ
LICENSING PCC

PAGE 01
PAGE 02
001/001
5/10

Federal Communications Commission

1270 Fairfield Road
Ockford, PA 17123-7245

In Reply Refer To:
7110-163

Law Offices of Richard S. Myers
1030 15th Street, N.W., Suite 908
Washington, D.C. 20005

Attn: Richard S. Myers

Dear Mr. Myers:

This is in response to your request to toll the one year construction requirement pending consideration of the request for Extended Implementation filed on behalf of the participating licensees in TELECELLULAR which was dated May 24, 1994.

Due to the delay in responding to your request for Extended Implementation, we are hereby granting your request to toll the one year construction requirement. The construction period will be tolled from May 24, 1994 to the date of which a decision is made on the Extended Implementation Request.

I hope this responds fully to your tolling request. Any further questions concerning this request may be directed to Mr. Al Knerr of our Technical Section, at (717) 337-1411 (ext. 227).

Sincerely,

Ronald B. Fisher
Terry L. Fabel
Chief, Land Mobile Branch

Tolling Grant

Public File No. 7871	Date 8-1-94	Page 1
To: DEAN BEATY	From: AL KNERR	
CAUSE: REQUEST FOR EXTENDED IMPLEMENTATION	Re: PCC	
File # 202-271-1136	File # 717-337-1841	

EXHIBIT 3

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

APR 03 1995

In Reply Refer To:
7110-22

Paul J. Conrad, Director
Calle 44 #699
Fair View
San Juan, P.R. 00926

Dear Mr. Conrad:

This is in response to your recent letter concerning the Extended Implementation Request filed by Telecellular on May 24, 1994. You requested clarification of the 5-year extended implementation period granted by the Commission on February 27, 1995 to TELECELLULAR.

On May 24, 1994, the Law Offices of Richard S. Myers filed on behalf of the participating licensees of TELECELLULAR, a request for extended implementation period. The participating licensees of TELECELLULAR, as outlined by the May 24, 1994 request, were 13 licensees and their respective call signs which are listed on the attached Exhibit #1. Regardless of who the entity is, that was granted this extended implementation of five years, it was only granted to the call signs listed on this Exhibit #1, which were the participating licensees of TELECELLULAR, as stated in the request of May 24, 1994.

I hope that this fully responds to your request. If you have any additional questions concerning this matter, you may contact Al Knerr of our Technical Section at (717) 338-2622.

Sincerely,



for Terry L. Fishel
Chief, Land Mobile Branch

cc: John McNally
Attachment