**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| Amendment of Part 1 of the Commission's | ) | WT Docket No. 97-82 |
| Rules – Competitive Bidding Proceeding | ) | |

**PETITION FOR CLARIFICATION OR RECONSIDERATION**

TeleCorp PCS, Inc., Tritel Communications, Inc., Poplar PCS, LLC, and Summit Wireless, LLC ("Petitioners"), by their attorneys, pursuant to 47 U.S.C. §405 and C.F.R. §1.429, hereby request clarification or reconsideration of four components of the Commission's *Order*[1] in the captioned proceeding.

In its *Order*, the Commission properly determined to extend its "controlling interest" standard for broadband personal communications services ("PCS"). *Order*, at paras 58-67. That action helps to bring PCS regulation into accord with regulation of other wireless services, thus furthering compliance with the Congressional mandate for regulatory parity. *See* 47 U.S.C. §332. In the process of making this change, however, the Commission inadvertently (a) created certain ambiguity regarding the availability of new or existing affiliates of current licensees to continue to utilize control group eligibility provisions; (b) extended the definition of "controlling interests" so that entities not now attributable to licensees could be deemed to be attributable even in the event that the licensees

[1] Amendment of Part 1 of the Commission's Rules – Competitive Bidding, WT Docket No. 97-82, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, 65 Fed. Reg. 52323 (August 29, 2000) ("*Order*").

in question retained their control groups; and (c) rekindled debate over whether, in the case of controlling individuals, their personal revenues and net worth (as opposed to the net worth and revenues of entities that they control) are to be attributed to the applicant or licensee. The Commission also inexplicably changed its rules governing the payment obligations of licensees who default upon their installment payment obligations.

## I. Discussion

### A. The Role of Officers and Directors.

Newly adopted rule Section 1.2110(c)(ii)(F) provides, in unqualified terms, that:

> officers and directors of an entity shall be considered to have a controlling interest in the entity. The officers and directors of any entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant.

It appears as though the language in the rule was intended to apply only in the event that entities sought to establish eligibility for entrepreneurial spectrum by complying with the controlling interest standard. *See Order*, at para. 63, where the Commission explains that "we note too that, under the controlling interest standard, the officers and directors of any applicant will be considered to have a controlling interest in the applicant" (citation omitted).

Unfortunately, a literal reading of the rule could arguably provide that officers and directors are always considered to have a controlling interest, even where control groups have been established. Equally important, in calculating revenues and assets attributable under control group scenarios, the new rule could arguably expand the definition of affiliates so that greater revenues and assets would be attributed on that basis alone. Petitioners urge the Commission to so clarify its rules.

The ambiguity associated with the Commission's new rule can be obviated by adding introductory language to Section 1.2110(c)(ii)(F) providing that the rule applies only where parties seek to establish eligibility through compliance with the Commission's controlling interest standard.

### B. Where Existing Licensees That Utilize Control Group Structures Establish New Licensee Affiliates, Those Affiliates Should Also Be Able to Utilize Control Groups.

The intent of the Commission's new rules limiting the applicability of the controlling interest standard as it applies to PCS appears to be clear: existing licensees who have carefully crafted organizational structures to comply with Commission rules are not required to revise those structures to accommodate the controlling interest standard. *See Order*, at para. 67. Whereas the language in the Commission's *Order* is clear regarding existing licensees, no mention is made of existing or newly established affiliates of those licensees. As such, argument could be made that under the new rules new affiliates do not have the same flexibility to utilize an organizational structure that involves the same control group mechanisms as their licensed affiliates have.

As the Commission is no doubt aware, prudent business considerations often dictate that license entities hold various licenses through separate entities. Among other things, this arrangement often facilitates more efficient financing and security arrangements and can stimulate investment by local entities in certain specific license areas. Moreover, the Commission's rules governing affiliation already recognize the tie between such license entities and their existing parent and affiliate entities. *See e.g.*, 47 C.F.R. §24.720. As such, the public interest considerations that the Commission properly understood to be worth maintaining by creating the opportunity for existing control group licensees to maintain their current structure would be equally well-served by clarifying that such flexibility extends to newly created licensee companies.[2] Petitioners urge the Commission to take such action.

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[2] Although the text of the Commission's *Order* is clear with respect to the grandfathering rights of existing control group entities, the rules are not. Accordingly, in order to avoid potential dispute, Petitioners urge that the text of the rules also be clarified as set forth above.

### C. The Commission Should Clarify That the Revenues and Assets of Entities Controlled by Controlling Parties, Including Officers and Directors, But Not Personal Revenues and Assets, Should be Attributed to the Applicant or Licensee.

In the *Order*, at para. 60, the Commission provides that a "controlling interest" includes individuals or entities, or groups of individuals or entities that have control of an applicant. Newly promulgated Section 1.2110(c)(ii)(F) provides that officers and directors are considered to hold controlling interests. The result of the above is that, were the Commission's words to be construed literally, in assessing eligibility for entrepreneurial blocks, the assets and revenues of individuals, as well as entities controlled by individuals (including affiliates of the applicant or licensee) would have to be considered. This is an abrupt and significant departure from prior practice. It is also one that arguably was made (i.e., if it were intended to be made at all) without in any way explaining the Commission's departure from prior practice of not including the revenues or worth of individuals. Thus, the Commission has provided no reason why its precedent could be "inexplicably ignored", as prohibited by *New Orleans Channel 20, Inc. v. FCC*, 830 F. 2d 361, 364 (D.C. Cir. 1987). Accordingly, the rule should be clarified to eliminate the arguable change that would itself be arbitrary and capricious.

### D. The Commission's "Clarification" Regarding Licensees' Obligations in the Event of a Default on Installment Payment Obligations is Arbitrary and Capricious.

In its *Order*, at paras. 38-39, the Commission speaks of "clarifying" its rules regarding licensee obligations in the event of a default on installment payment obligations. In actuality, the subject paragraphs increase significantly the obligations of defaulting licensees. They also remove the parity that previously existed between obligations of defaulting licensees and entities that default on post-auction, pre-license payment obligations. As such, the rules as "clarified" by the Commission require that defaulters make good on all payment obligations to the FCC, while also taking away from

such parties the licenses upon which their obligations were based. This is akin to a mortgage lender requiring full payment on a mortgage while taking back title to the house upon which the mortgage was created. It is a level of lender protection that exists nowhere else in Western jurisprudence, and most certainly is one that was not bargained for by existing licensees as of the effective date of the Commission's *Order*. Equally important, no explanation for the change in rules was provided. Accordingly, the Commission should reconsider its "clarification" in view of the impermissible retroactivity and basic equitable flaws associated with the change.

## II. Conclusion

For all of the above reasons, Petitioners urge the Commission to (a) clarify that officers and directors are deemed to have controlling positions in entities only where the controlling interest standard applies; (b) clarify that both existing licensees, and their affiliates, may utilize the control group exception rather than the newly adopted controlling interest standard to establish eligibility to hold certain PCS licenses; (c) clarify that there is no need to include the personal revenues and assets of individuals who hold controlling interests; and (d) rescind the new, expansive interpretation of the payment obligations of entities who default on installment payment obligations.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jennifer McCord, a Secretary in the firm of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that a copy of the foregoing "PETITION FOR RECONSIDERATION" was sent by hand delivery this 28th day of September, 2000 to the following:

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