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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY TO COMMENTS ON PETITION FOR RECONSIDERATION

Penasco Valley Telephone Cooperative, Inc. ("PVT"), by its attorneys and pursuant to Section 1.429(g) of the Federal Communications Commission ("FCC" or "Commission") Rules, hereby submits its reply to comments on Petitions for Reconsideration filed by Rural Telecommunications Group ("RTG"), *Petition for Reconsideration* (filed Sept. 28, 2000) ("*RTG Petition*"), Telecorp PCS, Inc., Tritel Communications, Inc., Poplar PCS, LLC, and Summit Wireless, LLC ("Telecorp"), *Petition for Clarification or Reconsideration* (filed Sept. 28, 2000) ("*Telecorp Petition*"), and others seeking reconsideration of the *Fifth Report and Order.* (WT Docket No. 97-82) (rel. Aug. 14, 2000). Comments were filed by the National Telephone Cooperative Association ("NTCA") (filed Oct. 30, 2000) ("NTCA Comments") and Neoworld License Holdings, Inc. ("Neoworld") (filed Oct. 23, 2000) ("Neoworld Comments") (hereinafter "Commenters") The RTG Petition requests that the

> Commission should: (1) clarify that the gross revenues of the outside business interests of a rural cooperative's officers and directors are not attributable to the cooperative unless the cooperative and such outside

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> businesses are closely involved with each other's businesses; and, (2) modify its attribution rules to consider an officer or director of a rural cooperative to have a "controlling interest" in the cooperative only if such individual officer or director has the actual power to control the cooperative. *RTG Petition*, pg. 3.

In particular, RTG, Telecorp, and the Commenters voice concern that a recent amendment to the attribution rules, which deems officers and directors to automatically hold a "controlling interest" in an entity, will force rural telephone companies to attribute the gross revenues of the outside business interests of a cooperative's officers and directors, and thus disqualify legitimate small businesses from small business benefits that they truly deserve.

PVT agrees with RTG, Telecorp, and the Commenters that the Commission should clarify its rules so that rural telephone cooperatives are categorically exempt from the "controlling interest" standard with respect to officers and directors. Otherwise, the Commission should clarify that only those offices or directors that truly control the entity will be attributable (e.g., Chief Executive Officer). Moreover, the Petition for Reconsideration of PVT (*"PVT Petition"*) (filed October 27, 2000), attached hereto, illustrates exactly the type of situation which the Commenters fear will occur in the event that a rural telephone company or its affiliates are forced to attribute the outside revenues of all officers and directors to its gross revenues.

STATEMENT OF INTEREST

PVT is a rural telephone cooperative that provides local exchange telephone and advanced telecommunications services to its member-subscribers in Southeastern New Mexico. PVT holds licenses for PCS, Local Multipoint Distribution Service (LMDS), and 39 GHz spectrum. PVT was adversely affected by a recent ruling attributing the gross

revenues of a director to PVT's gross revenues. PVT sought reconsideration of the Commission's order, *In re PVT Networks, Inc., Request for Waiver of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules*, (DA 00-2198), by which the Public Safety and Private Wireless Division ("Division") found that a family farm owned by an officer and director of PVT and its parent company was an affiliate of PVT and the gross revenues of this personal farm were attributed to PVT for purposes of determining PVT's eligibility for treatment as a very small business.

DISCUSSION

NTCA correctly observes that cooperatives have a unique organizational structure that severely limits the abilities of officers and directors of a rural telephone cooperative to control any aspect of the entity. PVT wholeheartedly agrees with this point. *See NTCA Comments*, pg. 5. PVT provides a good example of how officers or directors of rural telephone cooperatives are frequently not involved in the day-to-day affairs of the cooperative or its affiliates, and individually lack the ability (or incentive) to exercise *de facto* control. Generally, such control is exercised by the cooperative's general manager. In the case of PVT, the Division found that the farming operation of Bob Mayberry, a director and officer of PVT, should be considered an affiliate, apparently based merely on the fact that he was an officer and director. PVT's Petition demonstrates that Mr. Mayberry has minimal involvement in the day-to-day operations of the cooperative and no control over the finances, the hiring, firing, and policies of the company. *See PVT Petition*, pgs. 5-7. These are the principal considerations in determining where actual control resides.[1]

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[1] *See* Tri-Counties Communications, Inc., 31 FCC.2d 83, 88 (1971).

Therefore, PVT agrees with RTG that officers and directors of rural telephone cooperatives and the unrelated personal businesses that these individuals own and control should be categorically exempt from attribution to the cooperative and/or its subsidiaries.[2]

As a less desirable alternative, PVT can support the proposal of Neoworld that the Commission should allow applicants or licensees a way to show that a particular officer or director does not control an entity. *Neoworld Comments*, Pg. 6. Neoworld is correct in pointing out that the Commission's purposes are ill-served by presuming that every director "controls" an applicant, "regardless of the actual rights and responsibilities of the specific director or any legal restrictions on a director's ability to control the entity." *Id.*

PVT also agrees with NTCA's policy argument that attributing gross revenues of the personal businesses of officers and directors could have disastrous consequences for telephone cooperatives and the rural communities they serve because cooperatives will be discouraged from looking to the most qualified individuals in their community for leadership. If such revenues are considered attributable, many rural cooperatives will either be forced out of eligibility for treatment as a small business or very small business under the Commission's rules, or will be forced to lose the benefit of a board made up of talented community leaders. Rural telephone companies do not have an endless supply of qualified board members. *See PVT Petition*, pg. 8.

Furthermore, RTG, Telecorp, and the Commenters each question the legitimacy of the Commission's departure from prior practice of not attributing the revenues or

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[2] PVT likewise supports NTCA's position that the FCC should "abandon the rule as it applies to cooperatives," because, "by law, no single officer or director can exercise control over a cooperative." *NTCA Comments*, pg. 3.

assets of individuals, since the Commission fails to provide any rationale for its decision. The Commission has failed to explain why its precedent has been "inexplicably ignored," in violation of *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 364 (D.C. Cir. 1987), since the Commission has found officers and directors to lack *de facto* control on numerous occasions. *See Telecorp Comments*, pg. 5. The Commission has previously held that individuals having officer/director status as well as significant ownership interests in an applicant, do not necessarily allow an individual to exercise *de facto* control. In particular, the Commission has held that a director who voted the second-largest bloc of stock as a trustee and who was "the key source of corporate funds" was not found to have *de facto* control. *See Arizona Mobile Telephone Co.*, 60 FCC.2d 1021 (1976). The Commission has also found no *de facto* control where a 28% stockholder of a television permittee had an option to acquire the remainder of the stock, had agreed to loan the corporation money, served as one of only three directors, and had authority to countersign checks in excess of $500. *See Atlantic Coast Broadcasting Corp. of Charleston*, 22 R.R. 1045 (1962). In the context of spectrum auctions, the Wireless Bureau has held that an individual did not have *de facto* control of an entrepreneurs' block PCS applicant where he was an officer and director of the applicant's parent company, he held 16.13% of the parent companies voting stock, and was one of only three members of the applicant's control group. *See DCR PCS, Inc.*, 11 FCC Rcd 16849 (1996). The Commission has offered no sound reason for ignoring years of reasoned analysis on this issue.

RTG observes that attribution of the outside business interests of a cooperative's officers and directors "will lead to ridiculous and unintended results." *RTG Comments*,

pg. 7. For example, application of the new attribution rules could result in a company being forced to attribute the gross revenues of any business in which a controlling interest is held by a family member as remote as a step-relative, in-law, or half brother or sister, of every officer and director. *See id.* Indeed, the attribution of Mr. Mayberry's farm to PVT illustrates the problematic nature of the Commission's new controlling interest standard as applied to officers and directors. In the PVT Order, the Division failed to perform a complete *de facto* control analysis and merely cited to Mr. Mayberry's officer status in the cooperative and concluded that this fact established the control necessary to find an attributable interest. *See Order*, para. 7.

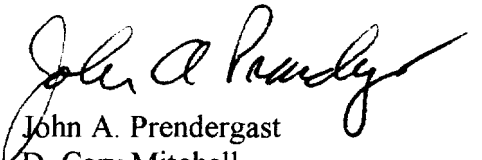
Finally, all of the parties to this proceeding argue that by adopting the contested attribution rules, the Commission will violate its duties under Section 309(j) of the Communications Act of 1934, as amended. In fact, forcing a rural telephone cooperative to attribute the outside business interests of its officers and directors will defeat the very purpose underlying the attribution rules—to prevent larger commercial firms from spinning off a "front" company to compete against legitimate small businesses. RTG has expressed fear that the new attribution rules will "grossly exaggerate the gross revenues of rural cooperatives thereby improperly excluding them from eligibility for bidding credits." *RTG Petition*, pg. 3. Indeed, as shown by PVT in the attached petition, the presumption that the personal business of an officer or director should be considered attributable has resulted in a *bona fide* small business being denied the small business treatment that it rightly deserves. The Commission should therefore act quickly and clarify that rural telephone cooperatives do not need to treat the businesses of officers and directors as affiliates, when the cooperative has no business relationship with such

outside businesses, and has no other means of accessing outside business revenues. Forcing a rural telephone cooperative to attribute such revenues will have a chilling effect on the participation of rural telephone cooperatives in future spectrum auctions.

CONCLUSION

PVT agrees with the Commenters that the Commission should reconsider its "controlling interest" standard with respect to officers and directors of rural telephone cooperatives. Upon review of the comments filed in response to the RTG Petition, no objection was made among the Commenters and not one reason was given why the outside interests of officers and directors should be attributed to a rural telephone company. In accordance with the underlying purpose of the Commission's Rules and the mandate of Section 309(j), the Commission should adopt RTG's proposals to clarify its attribution rules so that rural telephone cooperatives will not be forced to attribute the outside business revenues of its officers and directors; or modify its attribution rules so that an individual officer and director will only be deemed to have "control" where such an individual has actual control.

Respectfully submitted,



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Attachment

RECEIPT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
PVT NETWORKS, INC.	)	DA 00-2198 FCC File No. 0000137330
Request for Waiver Of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules	)	

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OCT 27 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION OF PVT NETWORKS, INC.

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Dated: October 27, 2000

SUMMARY OF ARGUMENT

In this petition, PVT Networks, Inc. ("PVTN") respectfully seeks reconsideration of an order issued on September 27, 2000, by the Public Safety and Private Wireless Division ("Division") in which the Division found that a family farm owned by an officer and director of PVTN and its parent company, the Peñasco Valley Telephone Cooperative ("PVT"), should be considered an affiliate of PVTN and the gross revenues of this personal farm should be attributed to PVTN for purposes of determining its eligibility for treatment as a very small business for purposes of the 39 GHz band auction ("Auction No. 30").

As discussed herein, the Mayberry Farm is not an affiliate of PVTN or the parent cooperative and its gross revenues are properly excluded. In finding otherwise, the Division may have misunderstood the nature of Mr. Mayberry's role with PVTN when it applied the standard for determining whether he exercises *de facto* control over PVTN. Even if a finding of control were appropriate in this instance, PVTN's alternative request for waiver should have been granted based on public interest considerations and precedent in which the Bureau allowed a not-for-profit auction applicant to exclude the gross revenues of an affiliate where the applicant has demonstrated that it had little or no access to the affiliate's funds. Moreover, PVTN demonstrated good cause for grant of the requested waiver. Based on these facts and circumstances, it is respectfully submitted that the Division did not give PVTN's request for waiver the "hard look" required by the Commission's Rules and applicable case law.

Because the underlying purpose of Sections 1.2110 (b) and 101.1209 (b) of the Commission's Rules is not served by the denial of bidding credits to a legitimate very small business and rural telephone company, reconsideration of the *Farm Attribution Order* and reinstatement of PVTN's very small business status in the public interest.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
PVT NETWORKS, INC.	)	DA 00-2198 FCC File No. 0000137330
Request for Waiver Of Sections 1.2110(b) and 101.1209(e) of the Commission's Rules	)	

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION OF PVT NETWORKS, INC.

PVT Networks, Inc. ("PVTN"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, respectfully requests reconsideration of the above captioned *Order* (DA 00-2198) ("*Farm Attribution Order*"), released on September 27, 2000, by the Public Safety and Private Wireless Division of the Wireless Telecommunications Bureau ("Division"). In the *Farm Attribution Order*, the Division found that a family farm owned by an officer and director of PVTN and its parent company, the Peñasco Valley Telephone Cooperative ("PVT"), should be considered an affiliate of PVTN and the gross revenues of this personal farm should be attributed to PVTN for purposes of determining its eligibility for treatment as a very small business for purposes of the 39 GHz band auction ("Auction No. 30"). As discussed below, the Mayberry Farm is <u>not</u> an affiliate of PVTN or the parent cooperative and its gross revenues are properly excluded. In finding otherwise, the Division may have misunderstood the nature of Mr. Mayberry's role with PVTN when it applied the standard for determining whether he exercises *de facto* control over PVTN. Even if a finding of control were appropriate in this instance, PVTN's alternative request for waiver should be granted based on public interest considerations and Wireless Telecommunication Bureau ("Bureau") precedent in which the Bureau allowed a not-for-profit auction applicant to exclude the gross

revenues of an affiliate where the applicant has demonstrated that it had little or no access to the affiliate's funds. PVTN demonstrated good cause for grant of the requested waiver. Based on these facts and circumstances, it is respectfully submitted that the Division did not give PVTN's request for waiver the "hard look" required by the Commission's Rules and applicable case law. Because the underlying purpose of Sections 1.2110 (b) and 101.1209 (b) of the Commission's Rules is not served by the denial of bidding credits to a legitimate very small business and rural telephone company, reconsideration of the *Farm Attribution Order* and reinstatement of PVTN's very small business status in the public interest.

Statement of Facts

PVTN is a wholly owned subsidiary of the Peñasco Valley Telephone Cooperative, Inc. ("PVT"), a rural telephone cooperative that provides local exchange telephone and advanced telecommunications services to its member-subscribers in southeastern New Mexico. In its short-form application for Auction No. 30, PVTN disclosed the revenues of a farming operation run by John Mayberry, a director and officer of PVT and PVTN. The application included an alternative request for waiver, out of an abundance of caution. Under a strict reading of the Commissions affiliation rules the mere happenstance that the farm was organized as a corporation (rather than a sole proprietorship), for purposes of limiting liability could be viewed as turning an entity that has no business relationship with PVT into an affiliate of PVTN. PVTN repeated its waiver request in its long-form application. In late September, months after the close of Auction No. 30, the Division issued the *Farm Attribution Order* which concluded that the Mayberry farm should be considered an affiliate of PVTN, and denied the waiver request. Despite evidence showing that Mr. Mayberry did not have *de facto* control over PVTN, the Division found that his officer/director status created an attributable interest and it stripped PVTN of its very small business status for purposes of Auction No. 30. This loss of very small business status has had an immediate impact on PVTN and its parent

cooperative because PVTN has been forced to pay the Commission an additional $8,760 for its 39 GHz licenses. However, PVTN is most concerned by the *Farm Attribution Order* because it may serve as precedent for denial of small business benefits to PVTN and its affiliates in future FCC auctions. Moreover, it could jeopardize PVTN's future ability to participate in very small business consortia and to otherwise provide advanced telecommunications services in rural and underserved communities.

I. MR. MAYBERRY DOES NOT EXERCISE *DE FACTO* CONTROL OVER PVTN.

In addressing PVTN's application and request for waiver, the Division appears to have found that Mr. Mayberry exercises *de facto* control over PVTN. In reaching this result, the Division may not have understood the relevance of certain facts and circumstances demonstrating Mr. Mayberry's inability to control PVTN's Board of Directors because of the somewhat unusual nature of rural telephone cooperatives *vis-a-vis* other corporate ventures. These factors include Mr. Mayberry's lack of day-to-day involvement in the affairs of the company, his lack of ownership or investment in PVTN or its parent cooperative, and the community service nature of his involvement with PVT. When these facts are properly considered in light of the Commission's *de facto* control precedent, it is clear that Mr. Mayberry does not exercise *de facto* control over PVTN and the gross revenues of his family farm should not be attributed to PVTN.

On January 21, 2000, the Auctions and Industry Analysis Division issued a *Public Notice* announcing the rules and application filing requirements for FCC Auction No. 30.[1] The *Auction Notice* indicated that "[f]or purposes of determining which entities qualify as very small businesses or small businesses, the Commission will consider the gross revenues of the applicant, its controlling

[1] *Public Notice*, DA 00-112, Report No. AUC-99-30-B (*rel.* January 21, 2000) ("*Auction Notice*").

interests, and the affiliates of the applicant and its controlling interests."[2] To clarify how it intended applicants to define "control" in this context, the Auctions Division included the following citation to its familiar six-factor *Intermountain Microwave* test:

> For further guidance on the issue of control, see the Commission's affiliation rule at 47 C.F.R. § 1.2110(b)(4). *See also* Ellis Thompson Corp., 76 Rad. Reg. 2d (P & F) 1125, 1127-28 (1994), in which the Commission identified the following factors used to determine control of a business: (1) use of facilities and equipment; (2) control of day-to-day operations; (3) control of policy decisions; (4) personnel responsibilities; (5) control of financial obligations; and (6) receipt of monies and profits; Intermountain Microwave, 24 Rad. Reg. (P & F) 983 (1963), and Application of Baker Creek Communications, LP, For Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd 18,709 (rel. September 23, 1998).[3]

Therefore, for purposes of Auction No. 30, the Commission stated clearly that a *de facto* control analysis under *Intermountain Microwave* should be used to identify controlling interests.

PVTN relied on the definition of control set forth in the *Auction Notice* in preparing its short-form application for Auction No. 30, and it correctly excluded the gross revenues of the Mayberry farm because PVTN is a legitimate very small business and Mr. Mayberry, who is Secretary-Treasurer of PVTN and one of nine members of PVTN's board of directors[4], does not have *de facto* control over PVTN or its parent cooperative. However, out of an abundance of caution, PVTN explained these facts in a request for waiver and provided the Commission with an alternative showing of eligibility for treatment as a small business. The waiver request explained that Mr. Mayberry is one of a nine members on the board of directors and did not control PVTN; that the farm revenues were his personal income and would clearly be excluded if the farm was organized as a sole proprietorship; that the cooperative controlled PVTN; that neither Mr. Mayberry nor his family has any investment in the cooperative or PVTN; that PVTN has no access to the farm's

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2 *Auction Notice* at page 14.

3 *Id.* at Note 20.

4 The PVT board of directors is identical to the board of directors of the parent telephone cooperative.

revenues; and that Mr. Mayberry's participation in the business affairs of the cooperative is in the nature of community service.[5]

PVTN was an active bidder in Auction No. 30, and following the close of the auction, was high bidder for 10 licenses in two BTAs in southeastern New Mexico and west Texas. PVTN relied upon its eligibility for very small business bidding credits (35% for Auction No. 30) in its pre-auction budgeting and when formulating its bidding strategy during the auction. Because of its very small business status, PVTN was able to reduce its gross high bids for these licenses by $30,660 (*i.e.*, from $87,600 to $56,940).

On September 27, 2000, after bidding in Auction No. 30 had ended and PVTN's payment obligation was fixed, the Division issued its *Farm Attribution Order*. However, instead of performing a complete *de facto* control analysis and considering all of the relevant facts and circumstances described in PVTN's request for waiver, the Division merely cited to Mr. Mayberry's officer and director status in the PVTN and the cooperative and concluded that this fact established the control necessary to find an attributable interest.[6] A footnote in the *Farm Attribution Order* even cites to his member-subscriber status in the cooperative and indicates "<u>that this may also be sufficient basis to establish affiliation</u>."[7] These conclusions are incorrect. Moreover, they represent a fundamental misunderstanding of how a rural telephone cooperative operates and are at odds with *de facto* control precedent.

While holding certain officer or director positions with a company can be a circumstance to consider in evaluating *de facto* control, having officer/director status by itself has not justified a

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[5] *See* PVT Networks, Inc., FCC Form 175, Exhibit C. These facts and further evidence showing Mr. Mayberry's lack of control over PVTN is set forth in the attached Declaration of John C. Metts, who is CEO / General Manager of PVTN and its parent cooperative. *De facto* control over PVT and PVTN is exercised by Mr. Metts.

[6] *Farm Attribution Order* at ¶ 7.

[7] *Id.* at Note 22.

finding of control. To the contrary, the Commission has found that individuals having officer/director status as well as significant ownership interests in an applicant, do not necessarily allow an individual to exercise *de facto* control. In particular, the Commission has held that a director who voted the second-largest bloc of stock as a trustee and who was "the key source of corporate funds" was not found to have *de facto* control. *See* Arizona Mobile Telephone Co., 60 FCC2d 1021 (1976). The Commission also found no *de facto* control where a 28% stockholder of a television permittee had an option to acquire the remainder of the stock, had agreed to loan the corporation money, served as one of only three directors, and had authority to countersign checks in excess of $500. *See* Atlantic Coast Broadcasting Corp. of Charleston, 22 R.R. 1045 (1962). In the context of spectrum auctions, the Wireless Bureau has held that an individual did not have *de facto* control of an entrepreneurs' block PCS applicant where he was an officer and director of the applicant's parent company, he held 16.13% of the parent companies voting stock, and was one of only three members of the applicant's control group. *See* DCR PCS, Inc., 5 CR 474, 11 FCC Rcd 16849, (November 4, 1996).

By contrast, Mr. Mayberry's involvement in PVTN is insignificant. As explained in the attached declaration of John C. Metts, CEO / General Manager of PVTN, Mr. Mayberry was elected by PVT's member-subscribers to serve on the cooperative's board. He attends board meetings that take place once a month, and occasional special meetings that may be required two to three times per year. As Secretary-Treasurer of PVTN, Mr. Mayberry's duties involve little more than signing corporate minutes and voting as one of nine directors. Moreover, he does not receive compensation for serving in this capacity. In this regard, rural telephone cooperatives differ from many other corporations. These cooperatives are formed out of necessity, because no other telephone company perceived adequate profitability to serve the rural community. The cooperative therefore establishes a board, and appoints officers largely from among the leading citizens of the community. These

citizens often serve in a part-time capacity, without compensation. Actual control is generally vested in the chief executive officer and/or general manager, who is paid a full-time salary, and is empowered to do all of the things necessary to operate the cooperative on a day-to-day basis. John Metts serves in this capacity for both PVT and PVTN, as shown by his attached Declaration. Mr. Mayberry does not control the finances, and he does not control the hiring, firing, and policies of either company. These are the principal considerations in determining where actual control resides.[8]

The Division also appears to misunderstand the nature of Mr. Mayberry's "ownership" interest in the cooperative. Mr. Mayberry receives local exchange telephone service from PVT, so he is entitled to a membership interest in PVT that is equal to any other telephone subscriber. Because PVT serves approximately 3,350 subscriber lines, his ownership interest in the cooperative (if one could call it that) amounts to less than one-thirtieth of one percent (*i.e.*, 0.0029). Mr. Mayberry does not have <u>any</u> ownership interest in PVTN. To conclude that this miniscule and indirect interest in a telephone cooperative provides a separate basis for finding affiliation quite simply strains logic. In any event, the precedent cited above reflects that the Commission has countenanced substantial ownership interests by officers and directors without finding *de facto* control.

If the Division had correctly applied its *de facto* control precedent to the facts present in this case, it would have found that Mr. Mayberry does not have the ability to control PVTN.[9] There is no

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[8] *Tri-Counties Communications, Inc.*, 31 FCC 2d 83, 85, 22 RR2d 678, 681 (1971).

[9] In assessing Mr. Mayberry's ability to control PVTN, the Division may have mistakenly applied a stricter "controlling interest" standard that was adopted as part of the August 14, 2000 *Fifth Report and Order* in WT Docket 97-82. It is well settled that the Commission may apply amended processing rules to pending applications. *United States v. Storer Broadcasting Co.* 351 U.S.192, 202 (1956). However, a retroactive application of the new controlling interest standard would have been improper in this instance because it would "impair rights a party possessed when it acted, increase a party's liability for past conduct, and impose new duties with respect to transactions already completed. *See*, *Bowen v. Georgetown University Hospital*, 448 U.S. 204 (1988). In particular, it would impair PVT's right to claim very small business status for purposes of Auction No. 30, it increases PVT's net high bids for Auction No. 30 by $8,760, and it imposes this obligation on an transaction the terms of which were set at the close of bidding in April. PVTN has already incurred irrevocable liability for its bids under the Commission's Rules. Moreover, the new rule did not appear

business relationship between Mr. Mayberry's farm and the applicant. The farm provides personal income to Mr. Mayberry and his family. Mr. Mayberry has no equity interest in the applicant or its parent that PVTN does not have the ability to access or control revenues from Mr. Mayberry's farm, and that Mr. Mayberry has utterly no reason to make his personal income available to the cooperative or PVTN. The only logical conclusion from these facts is that the Mayberry farm should not be considered an affiliate of PVTN.

Finally, as a matter of public policy, application of the affiliation rules in this manner could have disastrous consequences for telephone cooperatives and the rural communities they serve. The officers and directors of rural telephone cooperatives receive little or no compensation for their service, and accordingly, support themselves and their families through businesses outside of and unrelated to the cooperative's telecommunications business. Many of these officers and directors are farmers and ranchers who run family-owned farms and ranches. Others are business people in their rural communities. Often these same individuals serve on other civic boards as well. Requiring a cooperative or its subsidiary to disclose the gross revenues of these entities is a powerful disincentive for individuals who wish to maintain the privacy of their personal affairs to volunteer their services to the cooperative. Moreover, requiring attribution of such revenues will mean that many rural cooperatives will either be forced out of eligibility for treatment as a small business or very small business under the Commission's rules, or will be forced to lose the benefit of a board made up of talented community leaders. This result is contrary to the mandate of Congress expressed in Sections 309(j)(3)(B) and (j)(4)(D) of the Communications Act of 1934, as amended (the "Act"), which require the Commission to disseminate licenses among a wide variety of

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in the Federal Register until August 29, 2000 (65 Fed. Reg. 52323). As a matter of law the new rule was not yet effective and indeed has been challenged on reconsideration. PVTN and its parent cooperative enthusiastically support those challenges and submit that the very same unjust and unduly burdensome application of the Commissions Rules that the rural telephone industry fear has come to pass in the *Farm Attribution Order*.

applicants and to ensure that small businesses and rural telephone companies are given the opportunity to participate in the provision of spectrum-based services.[10] Rural telephone companies do not have an endless supply of qualified board members.

II. THE DIVISION ERRED BY FAILING TO GRANT AN APPROPRIATE WAIVER TO PVTN

Even if it is assumed *arguendo* that there is a basis for finding that Mr. Mayberry exercises *de facto* control, PVTN has shown good cause for the grant of a waiver of Rule Sections 1.2110(b) and 101.1209(e). As discussed below, a strict application of the affiliation rules in this case would frustrate the underlying purpose of the Commission's Rules, would be unduly burdensome on PVTN and the member-subscribers of its parent telephone cooperative, and would fail to serve the public interest.

It is appropriate for the Commission to grant a waiver of its rules in cases where (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.[11] Moreover, the Commission must take a "hard look" at applications for waiver and must consider all relevant factors when determining if good cause exists.[12]

In PVTN's case, a strict application of the Commission's affiliation rules is simply not warranted. The Wireless Bureau has previously found that one of the main purposes underlying the affiliation rules is to prevent larger commercial firms from spinning off a "front" company to

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[10] *See* 47 C.F.R. §§ 309(j)(3)(B) and (j)(4)(D).

[11] *See* 47 C.F.R. § 1.925 (b)(3)(i)-(ii).

[12] Pikes Peak Broadcasting v. FCC, 422 F2d 671, 682 (D.C.Cir 1969); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

compete against legitimate small businesses.[13] In this instance, it is clear that neither PVTN nor its parent company, a not-for-profit rural telephone cooperative, is a large commercial firm. Moreover, PVTN was not created as a "front" company to somehow avoid the attribution of farm revenues. Instead, the cooperative formed PVTN as a vehicle for participating in a variety of non-regulated businesses. These are legitimate and prudent business purposes which have nothing to do with the Commission's affiliation rules.

Any finding that the Mayberry farm is an affiliate of PVTN will have real-world consequences for the cooperative and its member-subscribers. It has already required PVTN to pay the FCC an additional $8,760 for its 39 GHz licenses – which is a significant amount for a not-for-profit telephone cooperative to absorb. Moreover, this unexpected capital expenditure significantly reduces the limited funds that PVTN has available to construct its network and to meet the Commission's mandate of providing advanced telecommunications services to rural customers.

However, and as previously mentioned, PVTN is most concerned by the *Farm Attribution Order* because it may serve as precedent for denial of very small business benefits to PVTN and its affiliates in future FCC auctions. Moreover, it could jeopardize PVTN's future ability to participate in very small business consortia. In this regard, PVTN and its parent have been exploring a variety of partnerships, joint ventures, and other business arrangements with small businesses that would help it to speed advanced telecommunications services to rural and underserved communities and promote the provision of competitive services throughout southeastern New Mexico. These are policies that the Commission has aggressively sought to promote through a number of regulatory initiatives.[14] PVTN applauds the Commission for these and other ongoing efforts to promote access

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[13] *See* Virginia Tech Foundation, Inc., Petition for Reconsideration of Request for Waiver of Section 101.23, *Order*, DA 98-378, 13 FCC Rcd 4535 (1998) at ¶ 5.

[14] Such initiatives include the Commission's proceedings to implement Section 706 of the Act in CC Docket No. 98-146, numerous efforts to promote access to telecommunications on tribal lands, proceedings to broaden access to

to advanced telecommunications services for all Americans. Such efforts are in the public interest and are only thwarted by a denial of very small business status to PVTN.

The Division's denial of PVT's request for waiver is inconsistent with Wireless Bureau precedent involving application of the Commission's auction attribution rules to not-for-profit entities. In particular, the *Farm Attribution Order* does not address a March 4, 1998 *Order* in which the Wireless Bureau permitted a not-for-profit affiliate of Virginia Polytechnic Institute to exclude the gross revenues of the university and thereby qualify as an "entrepreneur" for purposes of the LMDS auction.[15] In the *Foundation Order*, the Wireless Bureau found that grant of the Virginia Tech Foundation's waiver request would serve the public interest "by permitting a not-for-profit entity affiliated with a public educational institution with limited discretionary funds to continue its demonstrated commitment to developing advanced communications technology for the public benefit." The Bureau also cited to the fact that the foundation was "not a large commercial venture."

For similar reasons, the Division should have granted the waiver request filed by PVT. The Peñasco Cooperative is a not-for-profit entity with a demonstrated history of serving its member-subscribers in rural New Mexico. By obtaining 39 GHz licenses, PVT is seeking to deploy advanced communications technology for the public benefit. Moreover, PVT and its parent cooperative likewise have limited discretionary funds. Therefore, it is vitally important that PVT be granted the very small business status to which it is rightfully entitled.

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universal service in CC Docket Nos. 96-45 and 97-160, the Indian Telecom Training Initiative, and efforts in conjunction with Senate Democratic Leader Tom Daschle and others to ensure that rural Americans are not left behind as new telecommunications technologies are developed and deployed.

[15] Virginia Tech Foundation, Inc., Petition for Reconsideration of Request for Waiver of Section 101.23, *Order*, DA 98-378, 13 FCC Rcd 4535 (1998) ("*Foundation Order*").

CONCLUSION

The not-for-profit status of the Peñasco Cooperative, its demonstrated commitment to providing advanced telecommunications services to its rural member-subscribers, and the uncompensated public service nature of Mr. Mayberry's limited involvement with the parent cooperative, compel a finding that PVTN be allowed to exclude from attribution the gross revenues of Mr. Mayberry's personal farm. Moreover, PVTN has demonstrated just cause for a waiver of the Commission's affiliation

Respectfully Submitted,

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Counsel for PVT Networks, Inc.
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John C. Metts
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PVT Networks, Inc.
4011 West Main Stret
Artesia, NM 88210-9566

Dated: October 27, 2000

Attachment A

Declaration of John C. Metts
CEO/General Manager of PVT Networks, Inc.

DECLARATION

I, John C. Metts, hereby declare under penalty of perjury as follows:

1. I am the CEO / General Manager of the Peñasco Valley Telephone Cooperative, Inc. ("PVT"), a New Mexico membership corporation that is in the business of providing local exchange telephone and other telecommunications services to its member-subscribers in rural New Mexico. The main office of the PVT is located at 4011 W. Main in Artesia, New Mexico.

2. I am also CEO / Chief Executive Officer of PVT Networks, Inc. ("PVTN"), a wholly owned subsidiary of PVT that is in the business of providing PCS, fixed wireless, Internet and paging services, as well as direct broadcast satellite ("DBS") equipment sales. PVT's corporate office is also located at 4011 W. Main in Artesia.

3. I was hired by the Board of Directors of PVT to manage the day-to-day operations of the cooperative and its subsidiaries. I am therefore in a position of *de facto* control over all operations of PVT and PVTN.

4. Mr. Mayberry is not in a position of *de facto* or *de jure* control over PVTN. In adopting and implementing policies for the cooperative and its subsidiaries, I do not seek separate approval from Mr. Mayberry. Instead, his input is limited to his single vote out of nine board members.

5. Mr. Mayberry does not maintain an office at the cooperative and he is not involved in the management of the day-to-day operations. Instead, he attends board meetings that take place once a month and occasional special meetings that may be required two to three times per year.

6. As Secretary-Treasurer of PVTN, Mr. Mayberry is responsible for signing the corporate minutes and voting as one of nine directors. In contrast, as CEO, I am responsible for implementing the policies of the board and I am responsible for all company operations. My responsibilities for PVT and PVTN include adopting annual operating budgets; long and short-range planning; day-to-day operations; supervision and hiring/firing of employees; public relations; development of rate structures; oversight of regulatory affairs and all FCC filings; and other executive functions as needed.

7. Mr. Mayberry's participation in the business affairs of PVTN is solely in attending meetings and voting on policies of the Board. I consider Mr. Mayberry and other members of the PVT Board of Directors to be responsible citizens who provide a valuable service to the community at large. The public service nature of Mr. Mayberry's position with PVTN is underscored by the fact that he receives no compensation for his service. In sum, Mr. Mayberry's duties require that he devote only a few hours per month to the affairs of the cooperative and its subsidiaries.

8. Aside from a membership interest arising from being a subscriber to a cooperatively organized telephone company, neither Mr. Mayberry nor any member of his family owns any interest in PVTN.

9. To the best of my knowledge, Mr. Mayberry spends most of his time on duties associated with running his family's farm. The revenues generated by the farm provide personal income to Mr. Mayberry and his family, and the farm has no business relationship with PVT or PVTN.

Executed on this 26th day of October, 2000.

John. C. Metts

SERVICE LIST

I, Cary Mitchell, do hereby certify that on this 27th day of October 2000, I had copies of the foregoing Petition for Reconsideration sent via hand delivery or First Class Mail, postage prepaid, to the following:

Chairman William E. Kennard *
Federal Communications Commission
445 12th St. S.W. Room 8-B201
Washington DC 20554

Commissioner Susan Ness *
Federal Communications Commission
445 12th St. S.W. Room 8-B115
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Commissioner Gloria Tristani *
Federal Communications Commission
445 12th St. S.W. Room 8-C302
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Commissioner Harold Furchgott-Roth *
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Commissioner Michael Powell *
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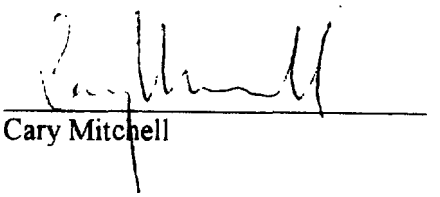

Cary Mitchell

* via hand delivery

CERTIFICATE OF SERVICE

I, Sarah E. Leeper, do hereby certify that a copy of the foregoing Supplement to Petition for Reconsideration was mailed, postage prepaid by first-class mail, to the following this ninth day of November, 2000:

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