

**Attachment C**  
**Contribution Agreement**

**NEWCOMM WIRELESS SERVICES, INC.**

**CONTRIBUTION AGREEMENT**

**BY AND AMONG**

**CLEARCOMM, L.P.**

**TELEFÓNICA LARCA DISTANCIA DE PUERTO RICO, INC.**

**AND**

**NEWCOMM WIRELESS SERVICES, INC.**

**MAY 20, 2002**

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## CONTRIBUTION AGREEMENT

THIS CONTRIBUTION AGREEMENT is entered **into** by and **among** ClearComm, L.P., a limited partnership organized and existing under the laws of the State of Delaware ("ClearComm"), Telefonica Larga Distancia de Puerto Rico, Inc., a corporation **organized** and existing under the laws of the Commonwealth of Puerto Rico ("TLD"), and NewComm Wireless Services, Inc., a corporation organized and existing under the laws of the Commonwealth of Puerto Rico (the "Company"), **as of and effective May 20, 2002** (the "Agreement"). ClearComm, **TLD** and the Company shall hereinafter be collectively referred to **as** the "Parties."

### WITNESSETH

**WHEREAS**, ClearComm, TLD and Syndicated Communications Venture Partners IV ("SynCom") are parties to that certain Joint Venture Agreement dated February 4, 1999, **as** amended (the "Joint Venture Agreement");

**WHEREAS**, ClearComm and SynCom are shareholders of the Company and TLD is a creditor of the Company and holds a Secured Convertible Promissory Note originally issued by NewComm on March 3, 1999, **as** amended and substituted from time to time (the "SCPN") and three other convertible promissory notes, all of which are convertible into shares of NewComm;

**WHEREAS**, ClearComm is **also** the holder of a promissory note issued by NewComm dated August 9, 2001 in the principal amount of **\$3,000,000** and a **promissory** note issued by NewComm dated March 11, 2002 in the principal amount of **\$5,000,000** ("ClearComm's Promissory Notes");

**WHEREAS**, ClearComm desires to contribute **\$9,036,072** to the capital of NewComm, to be paid for in part by the cancellation of ClearComm's Promissory Notes and in part in cash; and

**WHEREAS**, TLD desires to lend NewComm \$9,000,000 in cash in exchange for a convertible promissory note.

**NOW, THEREFORE**, in consideration **of** the foregoing, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto agree **as** follows:

ARTICLE I  
CONTRIBUTION

**Section 01 Purchase and Issuance of Shares.** Subject to the terms and conditions of this Agreement, pursuant to Section 1.05(a) of the Joint Venture Agreement and in reliance on the representations, warranties and agreements contained herein:

a. ClearComm agrees to contribute ClearComm's Promissory Notes to the capital of NewComm as soon **as** practicable, but in no event later than July 15, 2002 (the "Contribution Date"), and from the date hereof ClearComm forever renounces all right to payment of principal **and** interest and any other right thereunder. ClearComm's Notes will cease to accrue interest **as** of the date hereof.

b. ClearComm hereby contributes the **sum** of \$819,614.27 in readily available funds to NewComm (the "Cash Amount") in exchange for a non-interest bearing promissory note which shall be contributed to the capital of NewComm on the Contribution Date (the "New Note"). The sum of the Cash Amount plus the accrued interest on ClearComm's Promissory Notes **as** of the effective date of this Agreement totals \$1,036,072.

c. On the Contribution Date, and upon delivery by ClearComm of ClearComm's Promissory Notes and the New Note to NewComm for cancellation, NewComm agrees to issue to ClearComm that number of shares of its Class **A** Common Stock reasonably **determined** by ClearComm.

d. **TLD** hereby lends the sum of **\$9,000,000** to NewComm, in consideration for which NewComm hereby issues to **TLD** the Fourth Convertible Promissory Note in substantially the form of Exhibit A attached hereto.

Section **1.02** ClearComm's Deliveries. Simultaneously with the execution of this Agreement, ClearComm shall deliver to NewComm the following:

- a. A certified check in the amount of \$819,614.27.

Section **1.03** TLD's Deliveries. Simultaneously with the execution of this Agreement, TLD shall deliver to NewComm the following:

- a. Nine Million Dollars (\$9,000,000) by wire transfer in immediately available funds.
- b. The SCPN, for its cancellation and substitution with a new SCPN in substantially the form of Exhibit B hereto.

Section **1.04** NewComm's Deliveries. Simultaneously with the execution of this Agreement, NewComm shall deliver to TLD the Fourth Convertible Promissory Note and the new SCPN

## ARTICLE II REPRESENTATIONS AND WARRANTIES OF CLEARCOMM

ClearComm represents and warrants to NewComm that:

Section **2.01** Organization. ClearComm is a limited partnership duly organized and validly existing under the laws of the State of Delaware.

Section **2.02** Authority. ClearComm has the full right, power, and authority (including full partnership power and authority) to execute and deliver this Agreement, to perform its obligations hereunder, and to carry out the transactions contemplated in this Agreement, except as may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally. Without limiting the generality of the foregoing, ClearComm's general partner has taken all corporate action necessary to authorize, and has duly authorized the execution, delivery, and performance of this Agreement by ClearComm. This Agreement constitutes a valid and legally binding obligation of ClearComm, enforceable in accordance with its terms and conditions.

Section **2.03 No Conflicts**. Neither the execution and delivery of **this** Agreement, nor the consummation of the transactions contemplated hereby, will violate any constitution, statute, regulation, rule, injunction, judgement, order, decree, ruling, charge, or other restriction of any government, governmental agency or instrumentality, or court to which ClearComm is subject or any provision of the limited partnership agreement of ClearComm.

Section **2.04 Legal Proceedings**. To ClearComm's knowledge, there is no action, suit, arbitration, unsatisfied order or judgment, governmental investigation or proceeding pending against ClearComm, which could in any material way interfere with the consummation by ClearComm of the transactions contemplated by this Agreement

### ARTICLE III REPRESENTATIONS AND WARRANTIES OF TLD

TLD represents and warrants to NewComm that:

Section **3.01 Organization**. TLD is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Puerto Rico.

Section **3.02 Authority**. TLD has the full right, power, and authority (including full corporate power and authority) to execute and deliver this Agreement, to perform its obligations hereunder, and to carry out the transactions contemplated in this Agreement, except as may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally. Without limiting the generality of the foregoing, the Board of Directors of TLD and TLD's shareholders have taken all corporate action necessary to authorize, and have duly authorized the execution, delivery, and performance of this Agreement by TLD. **This** Agreement constitutes a valid and legally binding obligation of TLD, enforceable in accordance with its terms and conditions.

Section **3.03 No Conflicts**. Neither the execution and delivery of **this** Agreement, nor the consummation of the transactions contemplated hereby, will violate any constitution, statute, regulation, rule, injunction, judgement, order, decree, ruling, charge, or other restriction of any government, governmental agency or instrumentality, or court to which TLD is subject or any provision of the Articles of Incorporation or By-Laws of TLD.

Section **3.04 Legal Proceedings**. To TLD's knowledge, there is no action, **suit**, arbitration, unsatisfied order or judgment, governmental investigation or proceeding pending *against* TLD, which could in any material way interfere with **the** consummation by TLD of the transactions contemplated by this Agreement.

ARTICLE IV  
**REPRESENTATIONS AND WARRANTIES OF NEWCOMM**

NewComm represents and warrants to ClearComm and TLD that:

Section **4.01 Organization**. NewComm is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Puerto Rico.

Section **4.02 Authority**. NewComm ~~has~~ the full right, power, and authority (including full corporate power and authority) to execute and deliver this Agreement, to perform its obligations hereunder, and to carry out the transactions contemplated in this Agreement, except **as may be** limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws affecting creditors' rights generally. Without limiting the generality of the foregoing, the Board of Directors of NewComm and NewComm's shareholders have taken all corporate action necessary to authorize, and have duly authorized the execution, delivery, and performance of this Agreement by NewComm. **This** Agreement constitutes a valid and legally binding obligation of NewComm, enforceable in accordance with its terms and conditions.

Section **4.03 No Conflicts**. Neither the execution and delivery of **this** Agreement, nor the consummation of the transactions contemplated hereby, will violate any constitution, statute, regulation, rule, injunction, judgement, order, decree, ruling, charge, or other restriction of any government, governmental agency or instrumentality, or court to which NewComm is subject or any provision of the Articles of Incorporation or By-Laws of NewComm. In furtherance, and not in limitation, of the foregoing, the consummation of the transactions contemplated herein will not violate the provisions of Section **14.12** of the Joint Venture Agreement.

Section **4.04 Legal Proceedings**. To NewComm's knowledge, there is no action, suit, arbitration, unsatisfied order or judgment, governmental investigation or proceeding pending against NewComm, which could in any material way interfere with the consummation by NewComm of the transactions contemplated by **this** Agreement.

**ARTICLE V**  
**SURVIVAL**

**Section 5.01 Survival** Subject to any limitations expressly set forth in ~~this~~ Agreement, any provision of ~~this~~ Agreement which contemplates the performance or existence of obligations ~~after~~ the date hereof, and any and all representations and warranties set forth in this Agreement ~~shall~~ expressly survive and shall be binding upon the Party or Parties obligated thereby, in accordance with the terms of this Agreement.

**ARTICLE VI**  
**INDEMNITY**

**Section 6.01 Indemnity**.

a. ClearComm shall indemnify NewComm and its officers, directors, employees, agents, and affiliates in respect of, and hold each of the aforementioned harmless from and against, any and all losses suffered or sustained by any of them or to which any of them becomes subject, resulting from, arising out of, or relating to any misrepresentation, breach of warranty, or nonfulfillment of or failure to perform any covenant or agreement on the part of ClearComm contained in ~~this~~ Agreement.

b. TLD shall indemnify NewComm and its officers, directors, employees, agents, and affiliates in respect of, and hold each of the aforementioned harmless from and against, any and all losses suffered or sustained by any of them or to which any of them becomes subject, resulting from, arising out of, or relating to any misrepresentation, breach of warranty, or nonfulfillment of or failure to perform any covenant or agreement on the part of TLD contained in this agreement.

c. NewComm shall indemnify each of ClearComm, TLD and its officers, directors, employees, agents, and affiliates in respect of, and hold each of the aforementioned harmless from and against, any and all losses suffered or sustained by any of them or to which any of them becomes subject, resulting from, arising out of, or relating to any misrepresentation, breach of warranty, or nonfulfillment of or failure to perform any covenant or agreement on the part of NewComm contained in this agreement.

ARTICLE VII  
MISCELLANEOUS

Section **7.01** Anti-Dilution. If, after the conversion by **TLD** of the SCPN and ~~as~~ a result of the transactions contemplated herein, **SynCom** successfully demands that NewComm adjust the number of **shares** held by SynCom pursuant to Section **FOURTH(f)** of the Second Amended and Restated Certificate of Incorporation of NewComm, then the number of **shares** held by TLD shall be simultaneously adjusted on a pro rata basis to preserve its percentage ownership of NewComm ~~at~~ such point in time.

Section **7.02** Expenses. Each **Party** shall pay any and all costs incurred by such **Party** incident to the preparation and execution of this Agreement and performance of its respective obligations hereunder, including, without limitation, the fees and disbursements of legal counsel, accountants and consultants employed by the respective Party in connection with the transactions contemplated by this Agreement.

Section **7.03** Assignability. No Party may **assign** or transfer **its** rights and obligations under this Agreement without the prior written approval of the other Parties. **This** Agreement shall inure only **to** the benefit of and be binding upon the Parties hereto and their respective successors, representatives, and permitted assigns.

Section **7.04** Applicable Law. This Agreement shall be construed, interpreted, enforced in accordance with, and governed by, the laws **of** the Commonwealth of Puerto Rico.

Section **7.05** Counterparts. **This** Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

Section **7.06** Entire Agreement. This Agreement and the agreements, instruments, exhibits, and other writings referred to in **this** Agreement contain the entire understanding of the parties with respect to the subject matter of this Agreement. There are no restrictions, agreements, promises, warranties, covenants or undertakings other than those expressly set forth herein or therein. **This** Agreement supersedes all prior agreements and understandings between the parties with respect to its subject matter.

Section **7.07** Amendments. **This** Agreement may not be amended, changed or terminated orally, and no attempted change, termination or waiver of any of the provisions hereof shall be binding unless in writing and signed by the Party **against** whom the amendment, change, termination or waiver is sought to be enforced.

Section **7.08** Exhibits. Each exhibit hereto shall be attached hereto and shall be considered a part hereof **as** if set forth in the body hereof in full.

Section **7.09** Negotiated Transactions. The provisions of **this** Agreement were negotiated by the Parties hereto and said agreement shall be deemed to have been drafted by all of the Parties hereto.

Section **7.10** Notices. All notices, claims, certificates, **requests**, demands, and other communications under this Agreement shall be in writing and notices will be deemed to have been duly given if delivered or mailed, registered or certified mail, postage prepaid, return receipt requested, or for overnight delivery by a nationally recognized overnight mail service, **as** follows:

If to ClearComm, L.P., to:

ClearComm, L.P.  
268 Muñoz Rivera Avenue  
Suite 2206  
San Juan, P.R. 00918-1929  
Attention: Javier **O.**Lamoso  
Fax: (787) 620-0144

If to TLD, to:

Telefónica Larga Distancia de Puerto Rico, Inc.  
P.O. Box 70325  
San Juan, P.R. 00936-8325  
Attention: María Dolores Pizarro  
Fax: (787) 749-5880

If to NewComm Wireless Services, Inc., to:

NewComm Wireless Services, Inc.  
**City** View Plaza, Suite 700  
Car. 165 #48  
Guaynabo, P.R. 00968  
Attention: Javier **O.**Lamoso  
Fax: (787) 774-5058

with a copy to:

Adsuar **Muñiz** Goyco & Besosa, P.S.C.  
268 Muñoz Rivera Avenue  
Suite 1400  
Hato Rey, Puerto Rico 00918  
Attention: Fernando Goyco-Covas, Esq.  
Facsimile No.: (787) 756-9010

or to such other address **as** the Party to whom notice is to be given previously may have furnished to the other Party in writing in the manner set forth in this Section.

Section **7.11 Severability**. If any term, condition or provision of this Agreement **shall** be declared invalid or unenforceable, the remainder of the Agreement, other than such term, condition or provision, shall not be affected thereby and shall remain in full force and effect and shall **be** valid and enforceable to the fullest extent **permitted** by law.

Section **7.12 Jurisdiction**. Each of ClearComm, TLD and NewComm hereby submits to the jurisdiction of the courts of the Commonwealth of Puerto Rico in any action or proceeding arising out of or relating to **this** Agreement and agrees that all claims in respect of the action or proceeding may be heard and determined in any such court. Each of ClearComm, TLD and NewComm agree not to bring any action or proceeding arising out of or relating to **this** Agreement in any other court. Each of ClearComm, TLD and NewComm hereby waives any defense of inconvenient forum to the maintenance of any action or proceeding so brought and waives any bond, **surety**, or other security that might be required of any other Party with respect thereto.

Section **7.13 Other**. **Unless** the context otherwise indicates, words importing the **singular** number shall include the plural number and vice versa. The terms "hereby," "hereof," "hereto," "herein," "hereunder," and any similar terms, **as** used in this Agreement, refer to this Agreement **as** a whole.

IN WITNESS WHEREOF, the Parties hereby have **caved** this Agreement to be duly executed **as** of the day and year first above written.

**CLEARCOMM, L.P.**  
BY ITS GENERAL PARTNER  
**SUPERTEL COMMUNICATION CORP.**

  
By: \_\_\_\_\_  
Name: Javier O. Lamoso  
Title: President

**TELEFÓNICA LARGA DISTANCIA DE  
PUERTO RICO, INC.**

By: \_\_\_\_\_  
Name: Victoria Medina  
Title: General Manager

**NEWCOMM WIRELESS SERVICES, INC.**

  
By: \_\_\_\_\_  
Name: Javier O. Lamoso  
Title: President

IN WITNESS WHEREOF, the Parties hereby have caused this Agreement to be duly executed as of the day and year first above written.

CLEARCOMM, L.P.  
BY ITS GENERAL PARTNER  
SUPERTEL COMMUNICATION CORP.

TELEFÓNICA LARGA DISTANCIA DE  
PUERTO RICO, INC.

By:   
Name: Javier O. Lamoso  
Title: President

By:   
Name: Victoria Medina  
Title: General Manager

NEWCOMM WIRELESS SERVICES, INC.

By:   
Name: Javier O. Lamoso  
Title: President

May-23-2002 08:52am From-ADSWAR MUNIZ BOYCO BESOSA

+7877569092

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IN WITNESS WHEREOF, the Parties hereby have caused this Agreement to be duly executed as of the day and year first above written.

CLEARCOMM, L.P.  
BY ITS GENERAL PARTNER  
SUPERTEL COMMUNICATION CORP.

TELEFÓNICA LARGA DISTANCIA DE  
PUERTO RICO, INC.

By:   
Name: Javier O. Lamaso  
Title: President

By:   
Name: Victoria Medina  
Title: General Manager

NEWCOMM WIRELESS SERVICES, INC.

By:   
Name: Javier O. Lamaso  
Title: President

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**Attachment D**

**Declaration of Javier Lamosa**

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
TFM Puerto Rico, Inc. )  
 )  
Petition for Declaratory Ruling Pursuant to )  
Section 310(b)(4) of the Communications )  
Act of 1934 )

DECLARATION OF JAVIER LAMOSO

Javier Lamoso does hereby attest **and** affirm as follows:

1. I am the President of ClearComm, L.P.
2. A survey of the ownership of ClearComm, L.P. based on the mailing address supplied to the limited partner of record in the partnership records, discloses no more than 4 percent non-U.S. ownership.
3. Given a number of ClearComm, L.P. limited partners who are known to be U.S. citizens living abroad, I believe that 4 percent non-U.S. ownership overstates actual non-U.S. ownership of ClearComm, L.P.

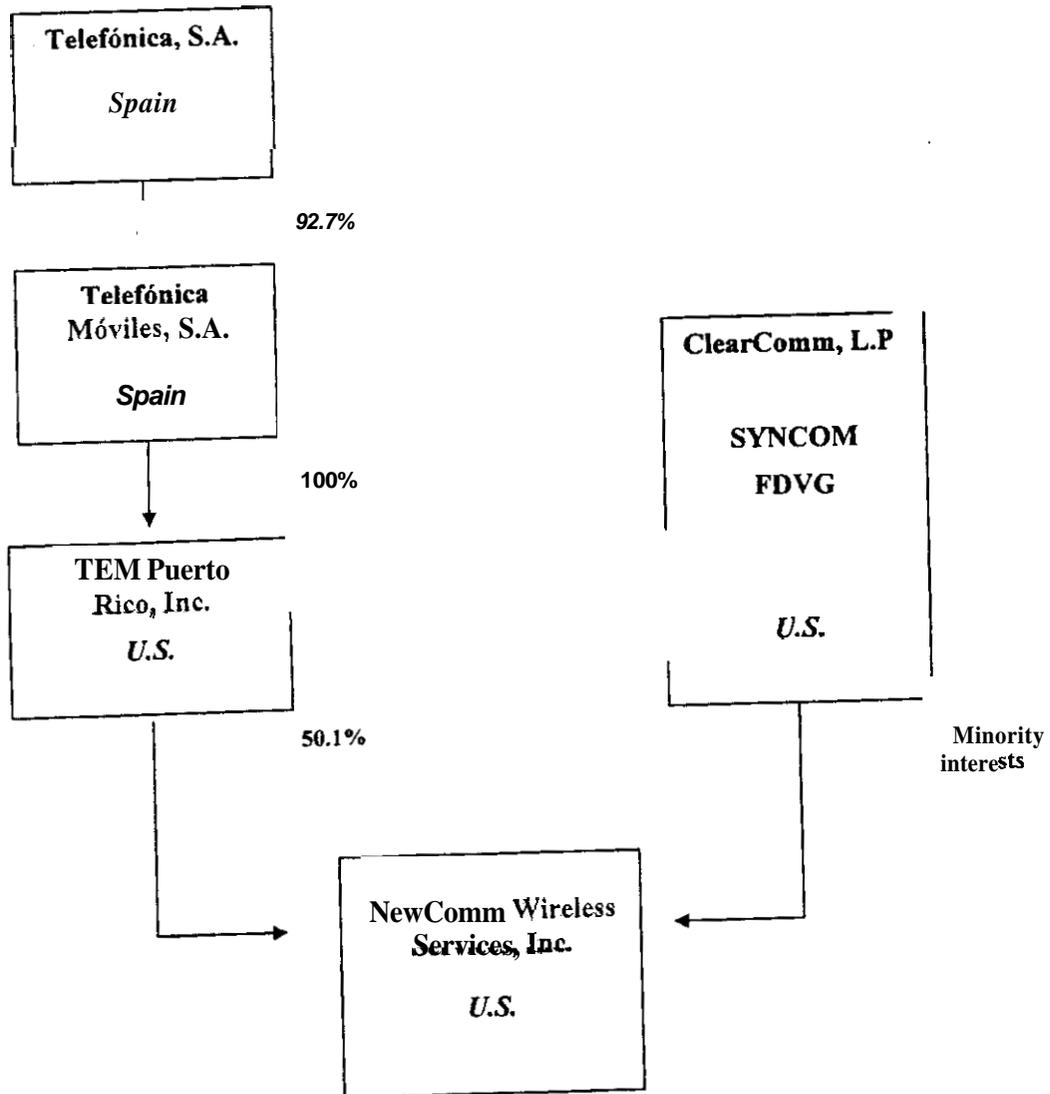
Further declarant sayeth not.

  
\_\_\_\_\_  
Javier Lamoso, President  
ClearComm, L.P.

Dated: October 2, 2002

Attachment E

Proposed Ownership Structure of NewComm Wireless Services, Inc.



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**Attachment F**

**Petition for Declaratory Ruling**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of**

**TEM Puerto Rico, Inc.**

**Petition for Declaratory Ruling Pursuant to  
Section 310(b)(4) of the Communications  
Act of 1934**

**To: International Bureau**

**PETITION FOR DECLARATORY RULING**

**I. INTRODUCTION**

TEM Puerto Rico, Inc. (“TEM PR”) hereby petitions the International Bureau (“Bureau”) of the Federal Communications Commission (“Commission”) pursuant to Section 310(b)(4) of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. §310(b)(4) (2002) and Section 1.2 of the Commission’s rules, 47 C.F.R. § 1.2(2002), for a declaratory ruling that it is in the public interest for TEM PR, a U.S. corporation that is an indirect subsidiary of Telefonica S.A. (“Telefonica”), a publicly-traded corporation organized under the laws of Spain, to hold a greater than **25%** interest in NewComm Wireless Services, Inc. (“NewComm”), a corporation organized under the laws of the Commonwealth of Puerto Rico, that is a broadband personal communications **service** (“PCS”) and common **carrier** point-to-point microwave licensee. Specifically, TEM **PR** seeks a declaratory ruling from the Bureau that it is in the public interest for NewComm to have ultimate foreign ownership by a Spanish corporation of 50.1% and non-

controlling, indirect ownership by citizens of foreign countries other *than* Spain of no more **than** two percent resulting in combined non-U.S. ownership of approximately 51.61%.<sup>1</sup>

## II. BACKGROUND AND DEAL STRUCTURE

The Parties. NewComm holds two broadband PCS licenses, **131 common** carrier point-to-point microwave licenses, and an authorization to provide global resale and facilities-based telecommunications services pursuant to Section 214 of the Act, **47 U.S.C. §214 (2002)**. The current organizational structure of NewComm is set forth in Exhibit B to **this** Petition for Declaratory Ruling (“Petition”). NewComm is majority owned by ClearComm, a limited partnership organized under the laws of the state of Delaware, composed of one general partner, SuperTel Communications Corp. (“SuperTel”), a corporation organized under the laws of the Commonwealth of Puerto Rico, and approximately 1600 individual limited partners. Syndicated Communications Venture Partners IV, L.P. (“SYNCOM”) and Fleet Development Ventures Group (“FDVG”) also hold minority interests in NewComm of **8.02%** and **4.08%**, respectively.

TEM PR is a corporation organized under the laws of the Commonwealth of Puerto Rico and is wholly-owned by Telefónica Móviles, S.A. (“Móviles”), a publicly-traded Spanish corporation, which is controlled by Telefónica, S.A. (“Telefónica”), also a publicly-traded

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<sup>1</sup> In addition to Telefonica’s foreign ownership, ClearComm, which will retain a substantial minority interest in NewComm following consummation of the proposed transaction, has **non-U.S.** investment of no more than **four percent (4%)**. See Declaration of Javier Lamoso, attached hereto as Exhibit A. Under Section 1.2112(a)(5), four percent ownership of ClearComm is equal to 1.51% ownership of NewComm. Considering Telefonica’s proposed 50.1% ownership of NewComm and ClearComm’s foreign ownership of up to four percent **(4%)**, under Section **310(b)(4)**, a public interest determination is required before the proposed transaction may be consummated.

Spanish corporation.<sup>2</sup> Under certain circumstances, certain company resolutions of Telefónica and Móviles which significantly impact Telefónica or Móviles property in Spain are subject to **rules** requiring advance administrative authorization (“Authorization Rules”) **from** the government of Spain.<sup>3</sup> The Authorization Rules will remain **in** force until February 18, 2007, unless they are amended or invalidated before then. Exhibit C-1 is a certified English translation of the documents that provide for the application of the Authorization Rules to Telefónica and Móviles. Exhibit C-2 is the original Spanish version of the documents.

The Authorization **Rules** do not apply to the proposed transaction. As indicated in Exhibits C-1 and C-2, the Authorization Rules do not deprive Telefónica or Móviles of legitimate business autonomy in the management of Telefonica or Móviles. Rather, they are merely **rules** of administrative authorization which apply in limited circumstances, which do not

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<sup>2</sup> Telefónica owns 92.7 % of Móviles’ issued and outstanding shares, leaving just **over** seven percent (7%) of Móviles’ shares to be traded on the Spanish continuous market and the Madrid, Barcelona, Bilbao and Valencia stock exchanges, as well as the New York Stock Exchange, under **the** symbol TEM. Móviles was included in the Spanish stock exchange’s Ibx-35 index on January 2, 2001. Telefónica’s stock is traded on the continuous market on the Spanish Stock Exchanges and the Madrid, Barcelona, Bilbao and Valencia stock exchanges and on those exchanges in London, **Paris**, Frankfurt, Tokyo, New York (under the symbol TEF), Lima, **Buenos Aires**, **São Paulo** and SEAQ International Exchange in London. Telefonica’s two largest shareholders **are** Chase Manhattan Bank, N.A., which holds 8.131 % of Telefónica’s issued and outstanding stock, and Banco Bilbao Vizcaya Argentina, **S.A.**, which currently **holds 5.19%** and has rights to acquire up to 10% of Telefonica’s issued and outstanding stock. No other single shareholder holds five percent (**5%**) or greater of Telefónica’s issued and outstanding stock. **Due to the** nature of these publicly traded companies, it is not possible to ascertain the countries and **amounts** of non-Spanish foreign ownership in Telefónica of **less than** five percent (**5%**).

<sup>3</sup> The resolutions that are subject to the Authorization Rules (“Covered Resolutions”) **are** those resolutions that involve the following major transactions by Telefonica or Móviles: (i) voluntary dissolution, spin-off, or merger; (ii) substitution of company purpose; (iii) sale or encumbrance, in any form and on any basis, of the covered communications assets; and (iv) sale or encumbrance, in any **form** and on any basis, of shares or certificates representing capital that **are** owned by Telefonica in Telefonica or Moviles.

include the proposed transaction. The Authorization Rules are the least intrusive means of preserving the general interest of the Spanish government in the continued health of its telecommunications service providers.

Background. In March 1999, ClearComm entered into a Joint **Venture** Agreement (“JVA”) with Telefónica Larga Distancia de Puerto Rico, Inc. (“TLD”), an indirect Telefónica subsidiary, which formed NewComm.<sup>4</sup> NewComm commenced commercial wireless service in Puerto Rico in September 1999. Under the terms of the JVA, and pursuant to Commission consent, ClearComm assigned its licenses to NewComm and TLD loaned working capital to NewComm.<sup>5</sup> That loan was evidenced by promissory notes in favor of TLD (“Notes”) secured by a TLD right to convert the Notes, **as well as** certain subsequent non-dilution notes, into approximately 49.9% of the equity and 25% of the voting **rights** of NewComm.<sup>6</sup>

**On** March 12, 2002, TLD and ClearComm executed a Stock Purchase Agreement (“Stock Purchase Agreement”) which, together with modified rights under the Notes, would give TLD a controlling 50.1% voting ownership interest in NewComm.<sup>7</sup> A copy of the Stock Purchase Agreement is attached to this Petition **as** Exhibit D.

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<sup>4</sup> TLD is indirectly controlled by Telefónica through its wholly owned subsidiary, Telefónica Internacional, S.A. (“**TISA**”), a company incorporated in Spain, and directly controlled by Telefonica International Holding, B.V. (“TIH”), a company incorporated in the Netherlands and a wholly-owned subsidiary of TISA.

<sup>5</sup> *See* Application of ClearComm, L.P. for Consent to Pro Forma Assignment to NewComm Wireless Services, Inc., of C Block Broadband PCS Licenses for BTAs B488 and B489, *Memorandum Opinion and Order*, 16 FCC Rcd 18627, 18630 (2001) (“**Order**”).

<sup>6</sup> *Id.*

<sup>7</sup> TLD currently manages the Puerto Rico system pursuant to a Management Agreement. *Order*, 16 FCC Rcd 18631. *See supra* note 8.

Subject Transaction. **Subject** to Commission consent, TEM PR intends **to** exercise its rights under the Notes and under the Stock Purchase Agreement to acquire a controlling 50.1% majority voting ownership interest in NewComm from ClearComm.<sup>8</sup> TEM PR proposes to do **so as** follows:

First, during the pendency of this Petition and the related applications discussed below, TLD shall assign the promissory notes, with their attendant conversion rights, and the Stock Purchase Agreement to TEM PR in exchange for 100% of the voting interests in TEM PR. TLD also shall assign to TEM PR an agreement between TLD and ClearComm **that** currently provides for TLD to exercise its conversion rights and acquire additional shares in order to obtain a 50.1% interest in NewComm.<sup>9</sup>

Second, also during the pendency of **this** Petition, control of TEM PR will be transferred from TLD to Móviles. Because Moviles, through its subsidiaries and affiliates, holds **and/or** manages the wireless components of Telefonica's telecommunications business worldwide, **this** transfer will allow for the eventual consolidation of control and operation **of** NewComm's licenses and authorizations in the **arm** of Telefonica that possesses the most experience and expertise in providing commercial wireless services.

Finally, after Commission consent to the transfer of control of NewComm is obtained, TEM PR will exercise the conversion and acquisition rights obtained from TLD, in accordance

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<sup>8</sup> TLD ~~also~~ will assign its rights under the Management Agreement to TEM PR pursuant to which TEM PR will undertake day-to-day management of the Puerto Rico stations, subject to ClearComm's ultimate control and supervision, as set forth in the Management Agreement.

<sup>9</sup> Due to non-dilution provisions associated with the SYNCOM and FDVG investments, their interests will **remain** consistent following the conversion of TLD's rights under the promissory notes and the consummation of the Stock Purchase Agreement. Upon consummation of the proposed **transaction**, TEM PR will own 50.1% of NewComm's issued and outstanding stock; ClearComm will own **37.8%**; SYNCOM will **own 8.02%** and FDVG will own **4.08%**.

with the agreements entered into between TLD and ClearComm. Upon exercise of these rights TEM PR will acquire a 50.1% interest in NewComm. Following consummation of this transfer of control of NewComm to TEM PR, NewComm will be directly controlled by TEM PR, which will be controlled by Móviles, which is, in turn, controlled by Telefonica. The proposed ownership structure of NewComm, after consummation, is set forth in Exhibit E to this Petition.

The Commission has held that under the current ownership structure of NewComm, ClearComm holds both *de jure* and *de facto* control of NewComm.<sup>10</sup> Until such time as Commission consent to this transaction is obtained and the underlying transaction is consummated, both *de jure* and *de facto* control of NewComm will remain with ClearComm.

Applications. Concurrently with this Petition, the Parties also are filing applications (“Applications”) for Commission consent to the transfer of control from ClearComm to TEM PR of NewComm in its capacity as holder of the following authorizations: (a) two broadband PCS licenses; (b) 131 common carrier point-to-point microwave licenses; and (c) a certificate, issued pursuant to Section 214 of the Act, authorizing NewComm to provide global facilities-based and resale telecommunications services.<sup>12</sup> The Parties also will file voluntarily with the U.S. Department of Treasury Committee on Foreign Investment in the United States (“CFIUS”) a notification regarding the proposed transaction and are working with the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”) (collectively, DOJ and FBI shall be referred to as the “Executive Agencies”) to reach agreement on a Network Security Agreement.

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<sup>10</sup> See Order, 16 FCC Rcd 18633

<sup>11</sup> See Call Signs KNLF736 and KNLF746.

<sup>12</sup> See FCC File No. ITC-214-19990615-00426.

**III. CONSUMMATION OF THE PROPOSED TRANSACTION WILL NOT VIOLATE THE ACT OR THE COMMISSIONS RULES, REGULATIONS OR POLICIES AND WILL NOT BE DETRIMENTAL TO THE PUBLIC INTEREST.**

**A. Grant of This Petition is in the Public Interest.**

In considering the proposed transaction under Section 310(b) of the Act, the Commission must determine whether consent to the Applications and grant of this Petition serves the public interest. Traditionally, the Commission considers the benefits of grant as compared to the possible detrimental effect on the public interest. The Commission's consideration of the proposed foreign ownership of a Commission licensee in excess of 25% will be informed by Section 310(b)(4) of the Act and the Commission's decisions implementing it.

In the *Foreign Participation Order*,<sup>13</sup> the Commission adopted an open entry standard, including a presumption that indirect foreign ownership above the 25% level specified in Section 310(b)(4) serves the public interest when the investing company is from a World Trade Organization ("WTO") member country.<sup>14</sup> Specifically, the Commission stated:

Because additional foreign investment can promote competition in the U.S. market, we conclude that the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees.<sup>15</sup>

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<sup>13</sup> See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order, 12 FCC Rcd. 23891 (1997) ("Foreign Participation Order").

<sup>14</sup> Id, 12 FCC Rcd 23913,23940.

<sup>15</sup> Id, 12 FCC Rcd 23940

In the instant case, TEM PR is owned directly by Móviles and is **owned indirectly** by Telefónica, both of which are corporations organized under the laws of Spain. Spain is a member of the WTO.<sup>16</sup> The Commission’s public interest presumption fully applies.”

The prompt grant of *this* Petition will serve the public interest, as it would promote competition in the U.S. market by encouraging additional investment and competition **in** the Puerto Rico wireless service market.

Specifically, the proposed transaction will mark the entry of **Telefónica** into the **U.S.** commercial mobile radio services marketplace, more particularly, in Puerto Rico.” **Telefónica** and its subsidiaries, including TEM PR, are the leading telecommunications operators in the Spanish and Portuguese-speaking world. Beginning in 1924, Telefonica provided every kind of telecommunications service, first as a public company and then beginning in 1980, **as an** increasingly privately-held, publicly-traded company. The Telefonica **group** of companies has over 75 years of experience providing a wide variety of quality telecommunications service to government, commercial and individual customers throughout Spain, the rest of Europe and Latin America. **As** an indirect subsidiary of Telefónica, TEM PR will bring substantial economic resources and technical expertise to enhance the competitiveness of NewComm’s **PCS**

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<sup>16</sup> See [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (indicating that Spain became a member of the WTO on January 1, 1995).

<sup>17</sup> The Commission specifically notes that the presumption applies to “petitions for declaratory rulings by existing or prospective licensees that the public interest would be **served** by allowing them to exceed **25** percent indirect foreign ownership.” Foreign Participation Order, at 23940.

<sup>18</sup> The Commission previously has found Telefonica qualified to control a U.S. fixed wireless license. Specifically, Telefonica Data Licensing, Inc., an indirect subsidiary of Telefonica, participated in Auction Number 30, completed May 9, 2000, and was issued a 39 GHz license for a geographic area encompassing Puerto Rico and the U.S. Virgin Islands. See FCC File No. ISP-PDR-20000313-00001.

operations **through** price, product and quality of service competition. **Through** the collective experience of the Telefonica family of companies, **TEM PR** is well positioned to focus on the provision of quality and innovative services to customers in Puerto Rico.

**Through** the proposed transaction, TEM PR will move into a vibrantly competitive market. AT&T Wireless, Sprint PCS, Cingular Wireless, Centennial and Verizon Wireless are among the active service providers. None of those competitors will be eliminated or otherwise adversely impacted by consummation of the proposed transaction. In the *DT Order*,<sup>19</sup> the Commission concluded that VoiceStream likely would be unable to engage in successful price predation because there were at least six other mobile wireless companies with more subscribers and more revenues in the market than VoiceStream.<sup>20</sup> **Through** NewComm, TEM PR will be unable to engage in successful price predation because (1) there are at least four PCS or cellular carriers with more subscribers and more revenues than NewComm in the Puerto Rico market and (2) **as** a widely-held publicly traded carrier that is not owned by a foreign government, Telefónica has no ability to underprice **through** subsidies routed from government **supported** monopoly operations. Additionally, in the *DT Order*, the Commission allowed foreign government ownership of a national PCS service provider. NewComm provides service exclusively on the island of Puerto Rico.

More importantly, grant of consent to the proposed transaction and the instant Petition are consistent with the Commission's rules and policies **as** set forth in the *Foreign Participation*

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<sup>19</sup> See In re Applications of Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 16FCC Rcd 9779 (2001) ("*DT Order*").

<sup>20</sup> Importantly, unlike TEM PR, at the time of the *DT Order*, Voicestream **was** majority-owned by a foreign government. Id. at 9784.

**Order.** In complying with the WTO Basic Telecom Agreement, the Commission adopted a rebuttable presumption that competitive concerns are not raised by foreign ownership of FCC-licensed entities if the foreign owners are from WTO member countries, like Spain.

Accordingly, TEM PR submits that grant of the Applications and this Petition is in the public interest because it will enhance competition and grant is consistent with the Commission's commitments under the WTO Basic Telecom Agreement.

**B. The Authorization Rules Do Not Preclude Grant of This Petition**

There is no basis to conclude that the proposed transaction would **harm** the public interest. Rather, the proposed transaction will ensure the viability of a competitive wireless carrier on the island of Puerto Rico.

Telefonica and Moviles, TEM PR's indirect owners, are subject to the Authorization Rules. The Authorization Rules are the only relationship between each of Telefónica and Moviles and the government of Spain.' As explained *supra*, the Authorization Rules concern only those types of major corporate decisions for which minority shareholder protection is traditionally accorded?' Even if the Authorization Rules gave the government of Spain some level of influence over TEM PR, the Commission has stated that Section 310(b)(4) of the Act

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<sup>21</sup> The government of Spain holds no equity interest in Telefonica. The government of Spain has no economic interest to protect through granting Telefonica access to capital at an artificially low cost. There is no economic reason that the government of Spain would tolerate subsidization of Telefonica's U.S. operations through operations in its home market. There is no economic incentive for the government of Spain to give preferential regulatory treatment to Telefonica. In short, there is no concern that the Spanish government will take any action to promote Telefónica in the face of contrary market forces to the detriment of competition in the U.S. The Spanish government merely retains authority to protect the provision of telecommunications services in Spain through the Authorization Rules.

<sup>22</sup> See, e.g., *DT Order*, 16 FCC Rcd 9797.

gives no indication that foreign governments are to be treated any differently than aliens or foreign corporations.<sup>23</sup>

Telefónica is subject to competition even in its home market.<sup>24</sup> At least five other carriers provide services competitive with Telefonica in Spain.” Additionally, Telefonica has no incentive to cross-subsidize its U.S. operations through its Spanish operations.<sup>26</sup> If Telefónica attempted to subsidize its U.S. operations through rate increases in its home market, it would lose market share in its core business. Sixty-five percent (65%) of Telefonica’s earnings before interest, tax, depreciation and amortization (“EBITDA”) is earned in Spain, while less than 2% of its EBITDA is earned in the U.S.<sup>27</sup>

As indicated below, Telefónica is working with CFIUS and the Executive Agencies to resolve concerns about national security, law enforcement and public safety arising from

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<sup>23</sup> The Commission has considered veto rights like the Authorization Rules and found that the veto rights did not give “control” over the licensee to the shareholders granted the veto rights. The Commission found that when considering the veto rights alone, the protected shareholder had no “attributable ownership” in the licensee. *DT Order, 16 FCC Rcd 9806.*

<sup>24</sup> In addition, in 1992, the Commission considered the potential for Telefónica to abuse its market power in Spain to the detriment of unaffiliated U.S. international carriers. *Telefónica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106,111-113 (1992). In 1992, competitive entry was not allowed in Spain. Even so, the Commission found no reason to deny Telefonica’s application to enter the long distance market in Puerto Rico. In the ten years since, Spain has opened its telecommunications markets to competition and Telefonica experiences Vigorous competition in its home market.

<sup>25</sup> See Company Profile, Telefonica, S.A., available at, <http://www.hoovers.com/co/capsule/6/0.2163,41846,00.html>

<sup>26</sup> Telefónica is subject to the imposition of price cap regulation under the General Law on Telecommunications.

<sup>27</sup> See Telefónica, S.A., Selected Financial Data, available at, <http://www.telefonica.com/quienes/ing/06/textos/02.html>.

Telefónica's proposed ownership interest in NewComm. Considering the general concerns discussed in the *DT Order*, there is no public interest barrier to grant of the Commission's consent to the proposed transaction and *this* Petition

#### IV. EXECUTIVE BRANCH REVIEW

The *Foreign Participation Order* provides that, in evaluating proposed foreign ownership under Section 310(b), the Commission must accord deference to the Executive Branch with respect to any national security or law enforcement concerns identified by Executive Agencies in connection with a proposed transaction.<sup>28</sup> TEM PR has held preliminary discussions with the Executive Agencies, and understands that there are law enforcement, national security, and public safety issues that the Executive Agencies want to review in connection with the transaction proposed herein. TEM PR anticipates that any issues raised by the Executive Agencies can be fully addressed through an agreement with the Executive Agencies.

Based on the discussions with the Executive Agencies, and with the concurrence of the Executive Agencies, TEM PR requests that the Commission commence its review and processing of *this* Petition. TEM PR asks that the Commission place the Petition on public notice for public comment, but defer substantive action concerning the Applications and this Petition pending notification to the Commission that all issues identified by the Executive Agencies have been resolved. If the issues identified by the Executive Agencies can be resolved through an agreement between NewComm and the Executive Agencies, TEM PR anticipates that the agreement with the Executive Agencies will be filed with the Commission along with a

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<sup>28</sup> See Foreign Participation Order, at 23918,23920-23921; see also 47 U.S.C. § 310(b)(4).

request that the Commission condition the grant of ~~this~~ Petition and any consent to the proposed transaction on compliance with the agreement with the Executive Agencies.

**IV. CONCLUSION**

For the foregoing reasons, TEM PR requests that the Commission declare that indirect foreign ownership of NewComm by ~~TEM~~ PR beyond the **25%** threshold, ~~more~~ specifically, 51.61%, is in the public interest.

[Signatures Follow]

Respectfully submitted,

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