

**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%.¹

11. 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 Telefonica Moviles, S.A. (“Moviles”), a publicly-traded Spanish corporation, which is controlled by Telefonica, S.A. (“Telefonica”), also a publicly-traded

¹ 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.² Under certain circumstances, certain company resolutions of Telefónica and Moviles which significantly impact Telefonica or Moviles property in Spain are subject to rules requiring advance administrative authorization (“Authorization Rules”) from the government of Spain.³ 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 Telefonica and Moviles. 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 Telefonica or Moviles of legitimate business autonomy in the management of Telefonica or Moviles. Rather, they are merely rules of administrative authorization which apply in limited circumstances, which do not

² Telefonica owns 92.7 % of Moviles’ 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 Ibex-35 index on January 2, 2001. Telefonica’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 Telefónica’s issued and outstanding stock. No other single shareholder holds five percent (5%) or greater of Telefonica’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 Telefonica of less than five percent (5%).

³ The resolutions that are subject to the Authorization Rules (“Covered Resolutions”) are those resolutions that involve the following major transactions by Telefonica or Moviles: (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 Telefonica Larga Distancia de Puerto Rico, Inc. (“TLD”), an indirect Telefonica subsidiary, which formed NewComm.⁴ 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.⁵ 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.⁶

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.⁷ A copy of the Stock Purchase Agreement **is** attached to this Petition as Exhibit D.

⁴ TLD is indirectly controlled by Telefonica through its wholly owned subsidiary, Telefonica 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.

⁵ 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 8488 and B489, *Memorandum Opinion and Order*, 16 FCC Rcd 18627, 18630 (2001) (“*Order*”).

⁶ *Id*

⁷ 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.⁸ 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.⁹

Second, also during the pendency of this Petition, control of TEM PR **will** be transferred &om TLD to Moviles. Because Moviles, through its subsidiaries and affiliates, holds and/or manages the wireless components of Telefónica'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

⁸ 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.

⁹ 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.¹⁰ 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.” 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.

¹⁰ See *Order*, 16 FCC Rcd 18633.

¹¹ See Call Signs KNLF736 and KNLF746.

¹² 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*,¹³ 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**.¹⁴ 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.¹⁵

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

¹⁴ *Id.*, 12 FCC Rcd 23913,23940.

¹⁵ *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.¹⁶ 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." Telefonica 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 Telefonica, TEM PR will bring substantial economic resources and technical expertise to enhance the competitiveness of NewComm's PCS

¹⁶ See 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).

¹⁷ 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.

¹⁸ 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 Telefónica 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*,¹⁹ 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.²⁰ 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, Telefonica 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*

¹⁹ 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*, 16 FCC Red 9779 (2001) ("*DT Order*").

²⁰ 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 concern 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 Telefonica 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

²¹ 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 Telefonica 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.

²² 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.²³

Telefonica is subject to competition even in its home market.²⁴ At least five other carriers provide services competitive with Telefónica in Spain.²⁵ Additionally, Telefonica has no incentive to cross-subsidize its U.S. operations through its Spanish operations.²⁶ If Telefonica 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.²⁷

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

²³ 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.

²⁴ 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.

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

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

²⁷ See Telefonica, S.A., Selected Financial Data, available at, <http://www.telefonica.comi/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.²⁸ 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

²⁸ 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,

TEM Puerto Rico, Inc.

A handwritten signature in black ink that reads "Richard Rubin". The signature is written in a cursive style and is positioned above a horizontal line.

Richard Rubin
Marjorie Conner

Akin Gump Strauss Hauer & Feld L.L.P.
1676 International Drive, Penthouse
McLean, VA 22102
(703) 891-7500

October 2, 2002

Counselor TEM Puerto Rico, Inc.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

TEM Puerto Rico, Inc.

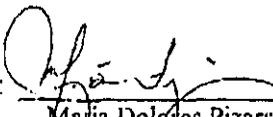
**Petition for Declaratory Ruling Pursuant to
Section 310(b)(4) of the Communications
Act of 1934**

Declaration

I am the Director of the Corporate Legal Office for **TEM Puerto Rico, Inc. ("TEMPR")**, petitioner in the attached Petition for Declaratory Ruling ("Petition"). I have reviewed the Petition. All of the facts set forth in the Petition which relate to **TEMPR**, and its parent corporation, **Telefónica Móviles, S.A. ("Móviles")**, a publicly-traded Spanish corporation and its parent, **Telefónica, S.A. ("Telefónica")**, also a publicly-traded Spanish corporation, are true and correct to the best of my personal knowledge, information and belief.

Pursuant to Sections 1.2001 through 1.2003 of the Commission's rules, I also certify that no party related to **TEMPR**, **Móviles** or **Telefónica** has been denied federal benefits pursuant to Section 5301 of the **Anti-Drug Abuse Act** of 1988.

TEM Puerto Rico, Inc.

By: 

Myria Dolores Pizarro
Director of the Corporate Legal Office

October 3, 2002

EXHIBIT A

Declaration of Javier Lamoso

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)

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 by 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

EXHIBIT B

Current Ownership Structure of NewComm Wireless Services, Inc.

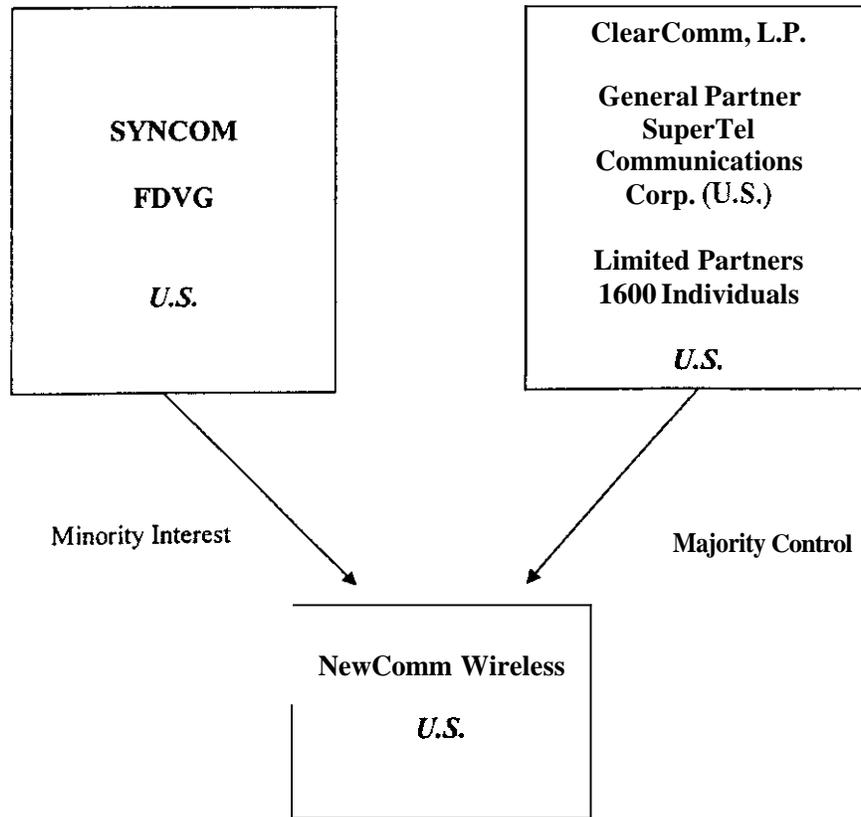


EXHIBIT C-1

Authorization Rules (English)



GEOTEXT
Translations, Inc.

STATE OF NEW YORK)
)
) SS
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Spanish into English of Royal Decree 611997 of January 10, concerning Telefonica Espatia, along with two exhibits and a draft of an amendment to the Royal Decree 811997.

Randon Bums, Vice Resident
Geotext Translations, Inc.

Sworn to and subscribed before me
this 12th day of September, 2002.

MARISOL FLORES
Notary Public, State of New York
No. 01FL6077223
Qualified in New York County
Commission Expires July 08, 2006

Royal Decree 8/1997 of January 10, concerning the application of the rules governing advance administrative authorization to Telefonica de España, Sociedad Anónima, and another company of its group.

Contents:

- Article 1. Subjective scope of application
- Article 2. Resolutions and acts subject to the rules governing administrative authorization
- Article 3. Concept of acquisition
- Article 4. Authorization procedure
- Article 5. Term of effectiveness of authorization rules
- Article 6. Compatibility of authorization rules
- SOLE FINAL PROVISION. Start of effectiveness

Telefónica de España, Sociedad Anónima falls under the scope of application of Law 5/1995 of March 23, concerning the Legal Rules Governing the Sale of Public Interests in Specific Companies, because the government's stake in its capital was greater than 25% at the time that law took effect, it is controlled by the State in accordance with the criteria established in article 4 of Law 24/1988 of July 28, concerning the Securities Market, and *Telefónica de España, Sociedad Anónima* and its group of companies are engaged in activities that fit the circumstances described in section 1 of article 1 of the aforementioned Law. Specifically, *Telefónica de España, Sociedad Anónima* is the licensee of essential communication services that are state-owned and reserved to the public sector, whose rates and service rules are regulated by the Government. In accordance with article 2.2 of the aforementioned Law 5/1995, the rules governing advance administrative authorization that said law regulates will apply when the government's stake is reduced to a percentage less than 15% of the capital stock, as a result of any legal act or transaction, or when a percentage equal to or greater than 10% of the capital stock is sold, if the State's interest is less than 50%. Furthermore, article 4 of said Law requires that the Royal Decree establishing the rules governing advance administrative authorization be effective

prior to realization of the eventualities indicated in article 2 of that law.

Such is the purpose of **this** Royal Decree: to establish, in accordance with Law 5/1995 of March 23, the requirement of advance administrative authorization for the adoption—by the entities that fall under its scope of application—of specific resolutions that are especially relevant when the government's stake in the entities included in exhibit I to **this** Royal Decree is less than 15% of the capital, or is zero.

The State's interest in Telefónica de España is administered by the Ministry of Economy and Treasury, which does so through the General Division of State Property. However, insofar as the powers for telecommunications are held by the Ministry of Promotion, which, moreover, currently performs duties of authorization of specific decisions of Telefónica de España, it seems logical—while following the procedure stipulated in article 3 of Royal Decree 1525/1995 of September 15, by means of which said law is implemented—for this decree to grant the authorization responsibilities to the Ministry of Promotion, although with issuance of a report by the Ministry of Economy and Treasury, given that we must not forget the importance, in strictly economic terms, of this company for the national economy.

The establishment of the rules governing administrative authorization fulfills the need to assure the continuity of the activity of the Telefónica group, in light of the strategic nature of its business and the challenges that it faces in the makeup of the future telecommunications market, as it is a necessary instrument for securing the national interest.

The authorization rules will not entail any loss of legitimate business autonomy in the management of the companies to which **this** Royal Decree refers. They are rules of administrative authorization that conform to the idea of the least public intervention compatible with assuring that general interest. All of this is without prejudice to the unquestionable legal guarantee that commercial entities have for defending their rights.

Therefore, in response to a proposal from the Ministry of Economy and ~~Treasury~~ and the Ministry of Promotion, with the approval of the ~~Ministry~~ of Public Administrations, in accordance with the Council of State, and after deliberation of the Council of Ministers at their meeting on January 10, 1997, I decree:

Article 1. Subjective scope of application

The companies that are listed in exhibit I to this Royal Decree shall be subject to the rules governing advance administrative authorization that are established in Law 5/1995 of March 23, for Sale of Government Interests in Specific Companies.

Article 2. Resolutions and acts subject to the rules governing administrative authorization

1. The company resolutions that are subject to the rules governing advance administrative authorization shall be as follows:

- A. Voluntary dissolution, spin-off, or merger
- B. Substitution of company purpose
- C. Sale or encumbrance, in any form and on any basis, of the assets, undivided interests, or shares thereof that are included in exhibit II to this Royal Decree that are owned by any of the entities included in exhibit I
- D. Sale or encumbrance, in any form and on any basis, of shares or certificates representing capital that are owned by *Telefónica de España, Sociedad Andnima*, in the entity included in exhibit I of this Royal Decree

For the purposes of the provisions of the preceding paragraph, other securities that might give the right, directly or indirectly, to subscribe for or acquire shares have been likened to shares.

2. Also subject to the rules governing advance administrative authorization, pursuant to and with the consequences stipulated in Law 5/1995 of March 23 and in Royal Decree 1525/1995 of September 15, shall be the direct or indirect acquisition, including through interposed or fiduciary third parties, of shares of *Telefónica de España, Sociedad Andnima*, or of the entity included in exhibit I of this Royal Decree or other securities that might give the right, directly or indirectly, to subscribe for or acquire them, when

the consequence thereof is the disposal of at least 10% of the corresponding capital stock.

Article 3. Concept of acquisition

For the purposes of section **2** of the preceding article, acquisition shall be understood to mean acquisition that occurs by purchase and acquisition that is made on any other basis, regardless of how it is formalized.

To determine the possession percentage of the corresponding capital stock, all the shares that are possessed with voting right, even if it be as beneficial owner or creditor in possession, shall be counted.

Article 4. Authorization procedure

1. The authorization that is referred to in article 2.1 above shall be requested **through** the resolution adopted by the proper company body, which shall be documented by certification. Said resolution must contain the items referred to in article 70 of Law 30/1992 of November 26. concerning the **Legal Rules Governing Public Administrations and Common Administrative Proceeding**.

2. In the eventuality stipulated in article 2.2 of this Royal Decree, the authorization shall be requested by the individuals and legal entities **seeking** to conduct the acts referred to in that article.

3. The request shall be addressed to the General Secretariat **of** Communications, which shall be the proper body for ruling on the request, after a report from the Ministry of Economy and Treasury. The investigating body shall be the General Division of Telecommunications. The resolution shall put an end to the administrative recourse.

4. The proceeding may end with the signing of an agreement between the Administration and the interested party or parties about the features of the resolution or act that is subject to authorization.

To that end, the interested parties or the proper administrative body for investigating the proceeding may, at any time prior to the proposed resolution, formulate the corresponding proposed agreement.

If the proposal is approved by the investigating body and the interested parties, it shall be submitted, with all the proceedings, to the proper body for resolving. which shall resolve with freedom of judgment and, if appropriate, shall submit the proposed agreement to the proper body for its formalization.

Once the agreement has been formalized, it shall have the same effects as the resolution of the proceeding.

5. The advance authorization in *this* Royal Decree shall be processed in accordance with the provisions of article 5 of Law 5/1995 of March 23. concerning the Legal Rules for the Sale of Government Interests in Specific Companies, in *this* Royal Decree **and**, in matters not provided for in that law or decree, by Law 30/1992 of November 26. concerning the Legal Rules Governing Public Administrations and Common Administrative Proceeding, and by Royal Decree 1778/1994 of August 5, by which the rules regulating the procedures for the granting, modification and termination of authorizations are conformed thereto.

Article 5. Term of effectiveness of authorization rules

The rules governing advance administrative authorization that are established in *this* Royal Decree shall be effective from the date on which the government's stake in the entities included in exhibit I of *this* decree is reduced to a percentage less than 15% of its capital stock.

The rules governing administrative authorization shall be effective for ten years, **as** of the ~~date~~ on which they take effect, **as** stipulated in the preceding paragraph.

Article 6. Compatibility of authorization rules.

The **rules** governing advance administrative authorization that are established in *this* Royal Decree shall not affect the specific rules of authorization that are regulated in clauses seven, twelve, thirteen, and fourteen of the Contract of the State with *Telefónica de España, Sociedad Anónima*, approved by Resolution of the Council of Ministers on November 29, 1991, without prejudice to transitional provision five of Law 3/1987 of December 18. concerning Governance of Telecommunications, which is included in said **Law** by section 9 of article 2 of Royal Decree-law 6/1996 of June 7. for deregulation of telecommunications.

SOLE FINAL PROVISION. Start of effectiveness

This Royal Decree shall take effect on the day after the day of its publication in the *Boletín Oficial del Estado*.

Issued in Madrid on January 10, 1997.

- Juan Carlos R -

The First Vice-president of the Government and Minister of the Presidency, Francisco Alvarez-Cascos Fernández.

EXHIBIT I.

Companies that fall under the scope of application of the Royal Decree:

- a. Telefónica de España, Sociedad **Andnima**.
- b. *Telefónica* Servicios *Móviles*, Sociedad *Andnima*,

EXHIBIT II.

Assets referred to in article 2.1.c.

1. The formal array of communication carriers and equipment and the associated **infrastructure**, provided that they are in the Spanish territory and are in any of the following categories:
 - A. Coaxial cable
 - B. Fiber-optic cable
 - C. Interurban paired cables
 - D. Subscription networks
 - E. Connections among secondary junctions of Madrid and Barcelona
2. Transit exchanges and buildings that house them
3. International exchanges and buildings that house them
4. Underwater cables
5. Interests in companies or consortia that are devoted to the operation of satellites or underwater cables
6. Earth stations of satellites
7. Coastal stations for mooring of underwater cables

**MINISTRY
OF SCIENCE
AND TECHNOLOGY**

**GENERAL DIVISION OF TELECOMMUNICATIONS
AND INFORMATION TECHNOLOGIES**

DRAFT OF ROYAL DECREE AMENDING ROYAL DECREE 8/1997 OF JANUARY 10, CONCERNING THE APPLICATION OF THE RULES GOVERNING ADVANCE ADMINISTRATIVE AUTHORIZATION TO TELEFÓNICA DE ESPAÑA, SOCIEDAD ANONIMA, AND ANOTHER COMPANY OF ITS GROUP

Royal Decree 8/1997 of January 10 establishes, in accordance with Law 5/1995 of March 23, the requirement of advance administrative authorization for the adoption—by the entities that fall under its scope of application—of specific resolutions that are especially important when the government's stake in them drops below 15% of their capital stock or becomes zero.

In application of the provisions of Royal Decree 8/1997, through Agreement dated October 2, 2000, which was executed among the Secretariat of State for Telecommunications and the Information Society, Telefonica, S.A., and Telefonica Móviles, S.A.U.; Telefonica, S.A. was authorized to transfer to Telefonica Moviles, S.A.U. the shares of Telefonica Móviles España, S.A.U. that Telefonica, S.A. owns.

As a consequence of that acquisition and transfer, it is necessary to amend exhibit I of Royal Decree 8/1997, so that the acquirer of the shares of Telefónica Móviles España, S.A.U., which is Telefónica Móviles, S.A.U., will be included under its **scope** of application.

Therefore, upon proposal from the Ministry of Science and Technology and Ministry of Treasury, in accordance with the Council of State, and after deliberation of the Council of Ministers at its meeting on _____, 2001

[See original for address, phone, and fax.]

I DECREE

Sole Article. Amendment to Royal Decree 8/1997 of January 10

1. Section 1.d) of article 2 is amended and a new section 1.e) is added to that article, of Royal Decree 8/1997 of January 10, with the following wording:

“d) Sale or encumbrance, in any form and on any basis, of shares *or* certificates representing capital that are owned by Telefonica, S.A., in the entity included in Exhibit I, when the former’s stake in the latter drops below fifty percent of its capital stock.

e) Sale or encumbrance, in any form and on any basis, of shares or certificates representing capital that are owned by Telefonica, **S.A.**, in Telefonica Moviles España, **S.A.**, when the former’s stake in the latter drops below fifty percent of its capital stock.”

2. Section 3 of article 4 of Royal Decree 8/1997 of January 10, shall be worded **as** follows:

“The request **shall** be addressed to the Secretariat of State for Communications and the Information Society, which shall be the proper body for deciding about the request, **after** a report from the Ministry **of** Economy and Treasury. The investigating body shall be the General Division of **Telecommunications** and Information Technologies. The resolution shall put an end to the administrative recourse.”

3. A new section c) is added to Exhibit I of Royal Decree **8/1997** of January **10**, with the following wording:

“c) **Telefónica** Moviles, S.A.”

First final provision. Amendments to Exhibit **I** of Royal Decree **8/1997** of January **10**

The Minister of Science and Technology is empowered to amend the list of companies that appear in Exhibit I of Royal Decree **8/1997** of January 10.

Second final provision. ~~Start~~ of effectiveness

This Royal Decree shall take effect on the day after the day of its publication in the “Boletín Oficial del Estado.”