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August 8, 2006

REDACTED – FOR PUBLIC INSPECTION

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C., and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc. (WT Docket No. 06-114).

Dear Ms. Dortch:

On behalf of General Communication, Inc. ("GCI"), jointly with Denali PCS, L.L.C. and Alaska DigiTel, L.L.C. (collectively, the "Applicants"), and in accordance with the instructions in the Protective Order in the above-referenced docket, we are filing herewith a redacted version of our " Joint Opposition to MTA Wireless' Supplemental Comments."

Please contact the undersigned, or Thomas Gutierrez at (703) 584-8662, should you have any questions regarding this matter.

Sincerely,

Michael L. Lazarus
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

cc: Thomas Gutierrez
Russell Lukas
Erin McGrath
Susan Singer
Stefan Lopatkiewicz
Carl Northrop

REDACTED- FOR
PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.	)	WC Docket No. 06-114
	)	
	)	

JOINT OPPOSITION TO MTA WIRELESS' SUPPLEMENTAL COMMENTS

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August 8, 2006

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SUMMARY

General Communication, Inc. ("GCI"), Alaska DigiTel LLC ("DigiTel") and Denali PCS LLC (collectively, the "Applicants") are responding to the Supplementary Comments (the "Supplement") filed by MTA Communications, Inc. d/b/a MTA Wireless in this proceeding. The Applicants' response demonstrates that MTA Wireless still has failed to raise any substantive issue meriting denial of the proposed assignment and transfer applications. Rather, the MTA Supplement reinforces the view that MTA Wireless is merely intent upon delaying action on the applications for competitive purposes.

Despite having taken an inordinate period of time to file its Supplement, MTA Wireless has failed to uncover any aspect of the proposed transaction that poses public interest concerns. MTA Wireless has failed to demonstrate that the transaction documents vest in GCI control over the soon-to-be reorganized DigiTel. Nor has MTA Wireless demonstrated that GCI would be legally barred from controlling DigiTel if that was in fact the effect of the transaction. MTA Wireless also has failed to offer any cogent support for its novel theory that spectrum owned and/or controlled by Dobson should be attributed to the Applicants in the competitive analysis.

The conclusion the Commission must reach is that MTA Wireless has failed to show that a grant of the applications would be inconsistent with the public interest. The combined spectrum to be held by the Applicants does not exceed the concentration thresholds allowed in prior cases. In the meantime, another 90 MHz of Advanced Wireless Service ("AWS") spectrum is now coming on line, and MTA Wireless is a

qualified bidder in the AWS auction. Thus, the completely unjustified claim made by MTA Wireless that the Applicants will have too great a concentration of spectrum in Alaska has been even further undermined by the AWS allocation.

The Commission must dismiss the MTA Wireless objection promptly, and grant the subject applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and Transfer of Control of Interest in Alaska DigiTel, L.L.C. to General Communication, Inc.	)	WC Docket No. 06-114
	)	
	)	

JOINT OPPOSITION TO MTA WIRELESS' SUPPLEMENTAL COMMENTS

General Communication, Inc. ("GCI"), Denali PCS, L.L.C. ("Denali") and Alaska DigiTel, L.L.C. ("DigiTel" and, collectively with GCI and Denali, the "Applicants"), by their attorneys, jointly respond to the Supplementary Comments of MTA Communications, Inc. d/b/a MTA Wireless in Support of Petition to Deny Applications (the "MTA Supplement") filed on July 24, 2006, in the above-captioned proceeding. As is set forth in detail below, the MTA Supplement is completely lacking in substantive merit. All MTA Wireless has managed to do by filing its supplement is confirm the oft-expressed view of the Applicants that MTA Wireless's primary motive here is to delay action upon the captioned applications for anti-competitive purposes.[1] Consequently,

[1] The fact that MTA Wireless is intent upon delaying action on the applications is evidenced by the total disregard it has shown for proper procedure in this application proceeding. MTA Wireless delayed filing its supplement well beyond any reasonable timeframe, *See* Letter from Carl Northrop to Erin McGrath on July 13, 2005, and has further disregarded proper procedure by adopting a "tag team" approach with ACS Wireless, Inc. ("ACS") by commenting on the grossly
(continued...)

Applicants urge that the applications filed in the above-referenced docket be granted as soon as possible.

I. INTRODUCTORY STATEMENT

Before responding point-by-point to the misguided allegations contained in the MTA Supplement, the Applicants ask the Commission to step back and put this controversy into proper perspective. First, MTA Wireless devotes much of the MTA Supplement to arguing the proposition that a change from less than 50% ownership to more than 50% ownership of a license constitutes a transfer of control. Here, the Applicants filed a transfer application and, thus, MTA Wireless is seeking to delay action on the application by debating an *uncontested* proposition. The Applicants have pointed out, correctly, that the reconstituted DigiTel will not be affirmatively controlled by GCI because GCI does not control the DigiTel board. The fact remains, however, that there is no legal reason that GCI would be precluded from controlling DigiTel since, in combination, the two companies hold spectrum well below the 70 MHz spectrum threshold that the Commission has used to determine whether additional scrutiny of a merger is required.[2] In effect, MTA Wireless has chosen to argue *ad nauseam* about an

(...continued)

untimely filings made by ACS. *See* Comments of MTA Wireless, Inc. d/b/a MTA Wireless on filing of ACS Wireless, Inc., filed August 2, 2006.

[2] As has been pointed out by the Applicants before, and is discussed further within, the 70 MHz threshold was adopted by the Commission before the 90 MHz of AWS spectrum came on line. Both objectors to the captioned applications, MTA Wireless and ACS, are applicants in FCC Auction No. 66. *See* discussion *infra* at p. 3. Thus both should be aware that the historical spectrum concentration limits should no longer apply.

issue – whether GCI will exercise control over DigiTel -- that has no practical or legal public interest ramifications.

Second, as is demonstrated in detail below, the MTA Supplement utterly fails to establish that spectrum owned and controlled by Dobson Communications, Inc. ("Dobson") should be attributed to GCI in the competitive analysis. However, even if MTA Wireless were to succeed in its unprecedented claim that resellers must count as their own spectrum on which they have mere marketing and distribution rights – which it will not do – the addition of the 90 MHz of AWS spectrum to the competitive mix means that there is no undue concentration. Neither GCI nor DigiTel nor Denali is an AWS auction participant. However, both MTA Wireless and ACS are participants and qualified bidders for Auction 66.[3] Thus, both companies have not just a theoretical prospect, but an actual and immediate capability, to buy substantial spectrum capacity and to provide additional facility-based competition throughout Alaska. Under these circumstances, the Commission cannot lightly dismiss the prospect that both MTA Wireless and ACS are motivated by the desire to impede FCC action on the legitimate GCI, DigiTel and Denali applications for self-serving competitive purposes, and not by a desire to raise any legitimate competitive or public interest issues.

With specific reference to the arguments made in the MTA Supplement, analysis reveals that MTA Wireless merely repeats and restates the losing arguments set forth previously in its filings in this proceeding. MTA Wireless has failed to identify any

[3] *See* FCC Public Notice *Auction of Advanced Wireless Services; 168 Bidders Qualified to Participate in Auction No. 66; Information Disclosure Procedures Announced,*" Attachment A (rel. July 28, 2006).

aspect of the documents filed by the Applicants in response to the FCC request for information that would justify denial of the applications or the imposition of any special conditions. A proper review of the documents submitted by Applicants in this proceeding reveals standard business agreements establishing that (1) GCI does not have the power or authority to control DigiTel's management or operations and (2) GCI and Dobson have entered into a normal reseller arrangement that certainly would not justify the Commission in attributing the Dobson spectrum to GCI in a proper competitive analysis. As has been demonstrated by the Applicants before, the Commission has never attributed spectrum to a reseller in the past, and MTA Wireless has offered no reason for the Commission to alter this long-standing policy in this case.

In sum, properly viewed, these supplementary late-filed comments are yet another transparent attempt by MTA Wireless to obstruct and delay this transaction for its own competitive purposes, and do not raise any public interest issues.

II. POST-TRANSACTION, DIGITEL WILL CONTINUE TO BE IN SUBSTANTIAL CONTROL OF ITS ASSETS AND BUSINESS, UNDER ESTABLISHED COMMISSION STANDARDS

MTA Wireless distorts the facts concerning the GCI, DigiTel and Denali transaction in a vain attempt to raise issues. The true facts, viewed in light of the controlling Commission precedents, reveal that the MTA Wireless challenges are without merit.

MTA Wireless claims that the Applicants have "gone to great lengths" to convince the Commission to consider the merits of their applications under the

"alternative standard" of §1.948(b)(2) of the FCC Rules.[4] MTA Wireless does not point to where the Applicants went to such lengths. It certainly was not in the Applicants' Joint Opposition,[5] which contained no mention whatsoever of §1.948(b)(2) or any suggested alternative. MTA Wireless then argues incorrectly that, "if a *de jure* transfer under §1.948(b)(1) of the Rules has occurred, the determination of whether *de facto* control of the licensee by the majority equity owner is never reached under §1.948(b)(2)."[6] This MTA Wireless contention is wrong. Under a proper analysis, even if the Commission determines that there will be a *de jure* transfer under § 1.948(b)(1), it still must reach a decision as to whether the transfer will involve a "substantial" change in control under § 309(c)(2)(B) of the Act or §§ 1.929(a)(2) and 1.948(c)(1) of the Rules.

The Applicants rely on precedent which recognizes that "a change from less than 50% ownership to more than 50% ownership" will result in a transfer of control under §1.948(b)(1), but will not necessarily result in a "substantial" change in control under §§1.929(a)(2) and 1.948(c)(1).[7] In determining whether a transfer of control of a CMRS license will result in a substantial change in control or a "non-substantial" or *pro forma* change, the Commission distinguishes between the presence of *de jure* and *de facto*

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[4] MTA Supplement at 4.

[5] Joint Opposition to Petition to Deny Applications filed by GCI, DigiTel and Denali (Mar. 1, 2006) ("Joint Opposition").

[6] *Id.* at 6.

[7] *See id.* at 8 & nn.17, 18.

control.[8] That distinction forms the foundation for the Commission's guidelines that apply under the streamlined processing procedures of §1.948 of the Rules:

> If there is a change in *de facto* control, the transfer is considered substantial, and prior Commission approval is required. A change in *de jure* control is generally considered substantial, but if there is an indication that *de facto* control has not changed, the transfer may be considered *pro forma*, and prior approval is not required. The inquiry is fact specific and done on a case-by-case basis.[9]

The Commission defines *de jure* control as "control as a matter of law and is based on who holds the equity shares of an entity."[10] *De facto* control is defined as "actual control of the licensee, and rests with the party or entity in question that has the power to control or dominate management of the licensee."[11] In contrast to *de jure* control, the size of an entity's ownership is relevant, but "not necessarily a determinative factor in establishing *de facto* control."[12] Because it inherently involves issues of fact, *de facto* control must be determined on the basis of "the circumstances presented by each licensee,"[13] taking into consideration the "totality of the circumstances."[14] The

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[8] *See FCBA's Petition for Forbearance from § 310 of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, 13 FCC Rcd 6293, 6297-98 (1998) ("*FCBA Forbearance Order*").

[9] *2000 Biennial Regulatory Review*, 15 FCC Rcd 24264, 24270 (2000) (citing *FCBA Forbearance Order*, 13 FCC Rcd at 6297-99).

[10] *Id.* at 24270 (citing *FCBA Forbearance Order*, 13 FCC Rcd at 6297).

[11] *Id.* at 24270-71 (citing *FCBA Forbearance Order*, 13 FCC Rcd at 6297).

[12] *FCBA Forbearance Order*, 13 FCC Rcd at 6298.

[13] *2000 Biennial Regulatory Review*, 15 FCC Rcd at 24271 (citing *FCBA Forbearance Order*, 13 FCC Rcd at 6297-98).

[14] *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses under Section 310 of the Communications Act of 1934, as amended*, 19 FCC Rcd. 22612, 22633 (2004).

Commission has identified various formulations of the six factors set forth in the landmark case of *Intermountain Microwave*[15] as being determinative to a finding of *de facto* control.[16]

Under the Commission's licensing standards as applied, if a new entity will acquire *de jure* control, then a transfer of control will occur, but the transfer can be "non-substantial" under §§1.929(a)(2) and 1.948(c)(1) depending on the analysis of the relevant factors.[17] Thus, there is no "bright line" test to determine whether or not a change in *de jure* control will result in "a change in the actual controlling party."[18] The determination must be based on a "case-by-case basis" similar to that called for under the alternative standard of § 1.948(b)(2).[19]

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[15]Under *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983, 984 (1963), the Commission examines who will: (1) have unfettered use of all facilities and equipment; (2) control daily operations; (3) determine and carry out the policy decisions, including preparing and filing applications with the Commission; (4) be in charge of employment, supervision, and dismissal of personnel; (5) be in charge of the payment of financial obligations, including expenses arising out of operations; and (6) receive monies and profits from the operation of the facilities. More than 40 years after their adoption, the *Intermountain Microwave* factors are still employed by the Commission, *see Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Bidding Rules and Procedure*, 21 FCC Rcd 4753, 4758 n.46 (2006), and the courts. *See Kay v. FCC*, 396 F.3d 1184, 1188 (D.C. Cir. 2005). The Commission has also employed variations of the *Intermountain Microwave* factors. *See infra* note 16.

[16] In its *2000 Biennial Regulatory Review*, the Commission stated that the factors relevant to *de facto* control "include, but are not limited to: (1) power to constitute or appoint more than fifty percent of the board of directors or partnership management committee; (2) authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; (3) ability to play an integral role in major management decisions of the licensee; (4) authority to pay financial obligations, including expenses arising out of operations; (5) ability to receive monies and profits from the facility's operations; and (6) unfettered use of all facilities and equipment." 15 FCC Rcd at 24271 (citing *FCBA Forbearance Order*, 13 FCC Rcd at 6298-99).

[17] *See id.*

[18] *Id.* at 24271, 24272.

[19] *Compare FCBA Forbearance Order,* 13 FCC Rcd. at 24271 *with* 47 C.F.R. § 1.948(b)(2).

The Commission's guidelines comport with precedent. For example, in *Baton Rogue MSA L.P.*, 9 FCC Rcd 561 (1994), the Common Carrier Bureau ("CCB") found that an entity violated the predecessor rule to §1.948(b)(1) by acquiring a holding in a licensee corporation that exceeded 50 percent without obtaining prior Commission approval.[20] However, the CCB found that there was no unauthorized transfer of control under 47 U.S.C. § 310(d), which requires approval prior to a transfer of control of a cellular license, because the licensee had not "abdicated control" of the licensed operations.[21] The *Baton Rogue* case completely refutes MTA Wireless' contention that a transfer of more than a 50 percent ownership interest necessarily brings with it a *de facto* or "substantial" transfer of control.

With regard to the GCI, DigiTel and Denali transaction, the issue is whether GCI's acquisition of 78 percent of the issued "Common Units" in DigiTel will give it control as a matter of law. The Operating Agreement of the post-transaction DigiTel clearly indicates that the reorganized Company will not be member-controlled, but rather "[m]anagement of the Company will be vested exclusively in the Board of Managers," which GCI does not control.[22] Nevertheless, the Applicants opted to take the conservative approach and seek prior Commission consent to the proposed transactions under its streamlined processing procedures.[23] However, the fact that the Applicants

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[20] *See Baton Rouge*, 9 FCC Rcd at 563. At the time, § 22.39(a)(1) of the Rules employed language identical to that of current § 1.948(b)(1). *See id.* at 562 & n.10.

[21] *Id.* at 563.

[22] Operating Agreement, Section 7.1.

[23] *See* Joint Opposition at 9.

treated the proposed GCI acquisition as if it would result in a transfer of *de jure* control of DigiTel does not mean that it would effect a substantial change in DigiTel's control.

MTA Wireless was given unredacted copies of all contracts entered into among GCI, DigiTel and Denali regarding the proposed GCI acquisition on June 28, 2006.[24] Thus, MTA Wireless had nearly a month to scour the contracts for provisions that will afford GCI "actual control" of DigiTel by empowering it to "control or dominate" DigiTel's management, or to obtain any other evidence relevant to a finding that GCI will exercise *de facto* control over DigiTel. However, MTA Wireless was unable to point to any contractual provisions, or produce extrinsic evidence, that would allow it to plead a *prima facie* case of *de facto* control using any variation of the six *Intermountain Microwave* criteria.

MTA Wireless claims that four factors, considered together, are sufficient to show GCI will exercise *de facto* operational control over DigiTel: "GCI's majority ownership position, its ability to control the budget process, its veto rights over other major decisions of the Board of Managers,

."[25] Notably, all of these alleged indicia of control are relevant to *only one* of the six *Intermountain Microwave* factors: whether GCI will have the ability to play an integral role in DigiTel's major management decisions.[26] MTA Wireless has failed to make specific allegations of fact sufficient to show that GCI will

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[24] *See* Letter from Carl W. Northrop to Erin McGrath, at 1 (July 13, 2006).

[25] MTA Supplement at 9.

[26] *See supra* notes 15 and 16.

have: (1) the power to constitute or appoint more than 50 percent of DigiTel's Board of Managers; (2) the authority to appoint, promote, demote and fire senior executives that control DigiTel's day-to-day activities; (3) responsibility for paying DigiTel's financial obligations, including expenses arising out of operations; (4) the ability to receive monies and profits from DigiTel's operations; and (5) the unfettered use of all of DigiTel's facilities and equipment.[27] Research shows that the Commission has never found evidence relevant to only a single *Intermountain Microwave* factor to be sufficient to establish *de facto* control.

The MTA Supplement effectively concedes that *Alaska Native Wireless, L.L.C.*, 17 FCC Rcd 4231 (WTB 2002) stands as a significant obstacle to MTA Wireless' contentions that the investor protection provisions in the DigiTel reorganization and operating agreements vest control in GCI. MTA Wireless tries to pigeonhole *Alaska Native Wireless* as a Designated Entity ("DE") case which examined *de facto* control under an "entirely separate set of rules."[28] However, MTA Wireless has failed to offer any legal support for its bald assertion that the *de jure* and *de facto* control standards applied by the Commission in the assessment of DE applications are somehow less rigorous than the standards to be applied in other settings. *Alaska Native Wireless* simply

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[27] *See supra* note 16.

[28] MTA Supplement at 5-6 . MTA Wireless then turns around and places heavy reliance on *Baker Creek Communications, L.P.*, 13 FCC Rcd 18709 (PS&PWD 1998). Of course, *Baker Creek* was another DE case. It is completely disingenuous for MTA Wireless to dismiss the DE cases cited by the Applicants while continuing to rely so heavily on *Baker Creek*. This is particularly inexcusable since there is no similarity between the egregious combination of control factors that existed in the *Baker Creek* case and the circumstances here.

cannot be distinguished on the ground that it was a DE case decided under the DE rules. Since 2000 the Commission has been employing the same criteria both to determine *de facto* control for the purposes of the transfer requirements of § 310(d) of the Act and for the DE attribution rules.[29]

Both *Baker Creek* - - which is relied upon by MTA Wireless - - and *Alaska Native Wireless* were decided employing variations of the *Intermountain Microwave* criteria.[30] Indeed, the *Baker Creek* holding rested on an exhaustive analysis of the record under each of the six *Intermountain Microwave* factors,[31] and a finding of *de facto* control based on the DE rules and *Intermountain Microwave criteria*.[32] Here, MTA Wireless never looked at the record under *Intermountain Microwave*.[33] Thus, it utterly failed to establish a *prima facie* case that GCI will exercise *de facto* control over DigiTel and, therefore, that the proposed transaction will result in a "substantial" change in DigiTel's control.

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[29] *See Implementation of the Commercial Spectrum Enhancement Act*, 21 FCC Rcd at 4758 & n.46 (citing *Ellis Thompson Corp.*, 9 FCC Rcd 7138, 7138-39 (1994) and the *Intermountain Microwave* factors).

[30] In *Alaska Native Wireless*, the Commission applied the § 1.2110(c)(2)(i)(A-C) factors which were nothing more than three of the *Intermountain Microwave*-like factors articulated by the Commission in its *2000 Biennial Regulatory Review*. *Compare Alaska Native Wireless*, 17 FCC Rcd at 4238 n.49 *with* note 3, *supra*. Moreover, the Commission cited such cases as *Ellis Thompson* and *Baker Creek*. *See Alaska Native Wireless*, 17 FCC Rcd at 4238 n.48, 4239 nn.53, 54. *Ellis Thompson* is a quintessential *Intermountain Microwave* case. *See* 9 FCC Rcd at 7140-43. So too is *Baker Creek*. *See* 13 FCC Rcd at 18713-27.

[31] *See Baker Creek*, 13 FCC Rcd at 18713-18726.

[32] *See id.* at 18726-27.

[33] *See* MTA Supplement at 1-9.

MTA Wireless conveniently neglects to mention the many important decisionally significant factors which serve to completely distinguish the situation here from the *Baker Creek* facts. For example, in *Baker Creek* the Commission was very troubled by the fact that the non-eligible member of the Applicant controlled the daily operations of the business pursuant to a turn key services agreement which had the effect of shifting control of the license to the managing entity.[34] In the case of the GCI, DigiTel and Denali transactions, Management Agreements have been entered into with principals of DigiTel and Denali – not with GCI or its principals. Standing alone, this key fact serves to alter the totality of the circumstances presented here from those in the principal authority cited by MTA Wireless.[35]

Finally, among the *Intermountain Microwave* factors that MTA Wireless did not address is the question of whether GCI would have "unfettered use" of all of DigiTel's facilities and equipment. The Applicants submit that there is no evidence that would support a finding that GCI will enjoy such unfettered use of DigiTel's facilities and equipment. If GCI will not have unfettered use of the DigiTel spectrum, there is no factual basis for the Commission to consider the applications as proposing the

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[34] *Baker Creek* at paras. 16-17.

[35] Other distinguishing factors include the family relationship that existed between the ostensible control party in *Baker Creek* and principals of the non-eligible investor, (*See* 13 FCC Rcd. at 18715-16), control of the non-eligible over the Business Plan. (*see id.* at 18716), the right of first refusal that the non-eligible had on the provision of financing (*see id.* at 18718), control of the non-eligible over compensation of the General Partner (*see id.* at 18720), the sharing of common facilities (*see id.* at 18720-21), and control over policy decisions (*see id.* at 18724-28). In sum, as has been earlier stated by the Applicants, there is no meaningful relationship between totality of the circumstances in *Baker Creek* and those here.

aggregation of control over the "60 MHz of state-wide-licensed spectrum in the Alaska market" used by Denali, DigiTel, and GCI.[36]

Rather than analyzing all of the relevant facts, MTA Wireless seeks to seize upon isolated non-controlling investor protections in the transaction documents as the basis of its claim that GCI will be able to exercise control. However, the Commission repeatedly has recognized that minority veto provisions of managerial decisions are not equal to maintaining control over the majority ownership of a company.[37] The minority protection provisions in the operating agreement are closely patterned after provisions that have been previously approved by the Commission. While GCI would be able to participate in managerial decisions, it would not be able to exert its will upon the majority controlling ownership of DigiTel post-transaction.

MTA Wireless claims that the representation GCI has on the Budget Committee, and the fact that the Budget Committee is expected to act by consensus, serves to vest control in GCI.[38] However, MTA Wireless has failed to cite any case in which, standing alone, the participation of a non-controlling investor in the budget process served to shift *de facto* control. However, in order to eliminate any concern over this provision, the Applicants are willing to agree to amend the Operating Agreement to provide that the consent of the GCI Member on the Budget Committee to the annual budget "shall not be

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[36] *See* MTA Supplement at 18.

[37] *Alaska Native Wireless*, 17 FCC Rcd at 4239, n. 53 ("We therefore clarify that under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control").

[38] MTA Supplement at 7.

unreasonably withheld." While this change should not be deemed necessary to garner the approval of the Commission to the transaction, the Applicant's are glad to make this change because it never was the intention of GCI to utilize its participation on the Budget Committee as a means to bring the operating to a standstill. This voluntary change completely rebuts the MTA Wireless claim since any withholding by GCI of its consent to the budget in an effort to control other aspects of the operation would be unreasonable and impermissible under the proposed language.

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[39] MTA Supplement at 9.

[40] *Id.* at 8.

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In sum, despite the long time MTA Wireless took to review the Applicant's transaction documents, MTA Wireless has failed to point out any aspects of the Agreements that should be of concern to the Commission.[42]

III. GCI'S AGREEMENTS WITH DOBSON DEMONSTRATE A RELATIONSHIP IN WHICH DOBSON MAINTAINS COMPLETE AND UNQUALIFIED INDEPENDENCE FROM GCI

The MTA Supplement continues to advance the unprecedented theory that spectrum which is owned and/or controlled by Dobson must be attributed to the Applicants. MTA Wireless continues to neglect to cite any legal precedent for its novel proposition that Dobson spectrum should be attributed to the Applicants simply because GCI has a resale agreement with Dobson. This is not simply an oversight, but rather reflects the fact that no legal precedent exists for this outrageous assertion.[43] The Commission's spectrum aggregation analysis is intended to assess the level and extent of facility-based competition in the market and the Commission never has taken resale arrangements into consideration in its spectrum aggregation assessments. This

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[42] MTA Wireless mentions the fact that the Reorganization Agreement was not formally executed by the parties until shortly before it was filed with the Commission. MTA Supplement, note 4. This fact is readily explained and raises no adverse inferences. The parties' relationship initially was governed by a detailed Memorandum of Understanding ("MOU"), and the definitive Reorganization Agreement was in process when the FCC applications were filed. Since the reorganization could not take place prior to FCC approval, there was no urgency in getting the definitive agreement signed. However, when the Commission asked to see the transaction documents, the parties took the occasion to formally execute the Reorganization Agreement. Notably, the final document conforms to the business deal as set forth in the MOU (which also has been filed with the Commission), and with the description of the transaction set forth in the FCC application. Under these circumstances, the timing of the execution of the Reorganization Agreement is not an issue.

[43] *See* Joint Opposition at 10-13.

transaction provides a perfect example of why spectrum available to a party under a resale arrangement should not count against it in the competitive analysis. The Commission should encourage resellers who have established a customer base to become effective facility-based service providers because, in doing so, they will be in a better position to exert competitive pressure on the retail market.[44] Counting resold spectrum against an applicant would completely undermine this useful market development by which resellers often become network service providers in their own right.

A. The Distribution Agreement Between GCI and Dobson is a Standard Reseller Agreement

MTA Wireless attempts to support its claim that Dobson's spectrum should be attributable to GCI by cutting and pasting isolated provisions from agreements between Dobson and GCI in order to demonstrate a "close cooperative relationship between competitors."[45] However, it is because the reseller does not own and control the underlying network facilities, and is beholden to the underlying carrier in all critical aspects of service deployment (service area, pricing, features, functionality) that reseller agreements typically contain general cooperation provisions designed to give the reseller notice of network changes and input on certain operational aspects of the business. These provisions do not alter the stark reality that the reseller exercises no "control." Simply stated, MTA Wireless is completely unsuccessful in its attempt to convert the resale

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[44] A reseller has difficulty competing on price, because its cost of service is dictated by the wholesale rate of the incumbent whose service is being resold, and has difficulty competing on the quality and breadth of service, since the nature and scope of the underlying network is controlled by the underlying facility based carrier.

[45] MTA Supplement at 9.

agreement between GCI and Dobson, dated ("Distribution Agreement"), into some sort of unholy competitive alliance. MTA Wireless has not demonstrated in any respect why the Commission should take the unprecedented step of attributing all of Dobson's spectrum to GCI, or that the Distribution Agreement is anything other than a common reseller arrangement.

The quotations used by MTA Wireless from the Distribution Agreement reveal nothing more than an arms-length working relationship between the parties

In sum, it is clear that the non-exclusive Distribution Agreement between GCI and Dobson is nothing out of the ordinary. The Commission's rules on spectrum allocation should continue to focus on facilities-based competitors, as demonstrated by prior precedent.[59]

B. The Spectrum Under the Long-Term *De Facto* Spectrum Transfer Lease Arrangement is Clearly Attributable to Dobson Under Commission Rules

Having demonstrated above that spectrum owned and controlled by Dobson should not be attributed to GCI in assessing the competitive impact of this transaction, the final issue is how the spectrum leased by GCI to Dobson under the long term *de facto* transfer lease should be handled. Analysis reveals that MTA Wireless has failed to make any point about this lease that alters the core fact that - - as is contemplated by the Commission's *de facto* transfer leasing rules - - Dobson exercises day-to-day control over the network facilities operated on this leased spectrum. Consequently, this spectrum should be attributed to Dobson, not to GCI, in the competitive analysis. The Applicants note, however, that attributing this spectrum to GCI still would not cause the combined spectrum licensed to GCI, DigiTel and Denali to exceed the 70 MHz threshold.

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[59] *Western Wireless Corporation*, 20 FCC Rcd. 13,053 (2005).

IV. CONCLUSION

In the final analysis, there is no legitimate basis for MTA Wireless's assertion that in key Anchorage markets, GCI would have an aggregation of control over 115 MHz of cellular and PCS spectrum. Based on the foregoing, we urge the Commission to grant approval of the above referenced applications as soon as possible.

Respectfully submitted,

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