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

In re Applications of	)	
	)	
TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc.	)	
	)	
and	)	WT Docket No. 00-130
	)	DA 00-1589
TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C., PolyCell Communications, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC	)	
	)	
For Consent to Transfer of Control and Assignment of Licenses and Authorizations	)	
	)	
and	)	
	)	
Royal Wireless, L.L.C. and Zuma PCS, L.L.C.	)	
	)	File Nos. 0000163408
For Consent to Transfer of Control Licenses and Authorizations	)	0000163410
	)	WTB Report No. 578
and	)	
	)	
Southwest Wireless, L.L.C., Poka Lambro Ventures, Inc., Poka Lambro PCS, Inc., Poka Lambro/PVT Wireless, L.P., and Denton County Electric Cooperative, Inc.	)	File Nos. 0000177844
	)	0000178897
	)	0000179413
	)	0000178796
	)	WTB Report No. 578
For Consent to Assignment of Licenses And Authorizations	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 27, 2000 Released: November 3, 2000

By the Chief, Wireless Telecommunications Bureau:

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I. INTRODUCTION

1. In this Order, we grant the applications underlying the proposed merger of TeleCorp PCS, Inc. ("TeleCorp"), Tritel, Inc. ("Tritel"), and Indus, Inc. ("Indus"), as well as a number of related applications involving affiliates of TeleCorp, affiliates of PolyCell Communications, Inc. ("PolyCell"), and/or AT&T Wireless PCS, LLC ("AT&T Wireless"). Specifically, in connection with the proposed merger, we grant: (1) the applications filed by TeleCorp, Tritel, and Indus for consent to transfer control of, or assign, various broadband Personal Communications Services ("PCS") and Local Multipoint Distribution Service ("LMDS") licenses from Tritel or Indus to TeleCorp; and (2) applications to assign various PCS licenses in a series of license swaps between affiliates of TeleCorp, affiliates of PolyCell, and/or AT&T Wireless. We deny the petition to deny filed by Nextel Communications, Inc. ("Nextel") with respect to the applications underlying the proposed merger of TeleCorp, Tritel, and Indus. Further, we deny TeleCorp and Tritel's request for waiver of the unjust enrichment payment owed in connection with TeleCorp's acquisition of Tritel's licenses.

2. We also grant herein the following related applications, each of which involves a proposed license acquisition by a TeleCorp affiliate: (1) the transfer of control of various PCS licenses of Zuma PCS, L.L.C. ("Zuma") to Royal Wireless, L.L.C. ("Royal"), a TeleCorp affiliate; and (2) the assignment of various PCS authorizations from Poka Lambro Ventures, Inc., Poka Lambro PCS, Inc., Poka Lambro/PVT Wireless, L.P. (collectively, "Poka Lambro"), and Denton County Electric Cooperative, Inc. ("Denton County") to Southwest Wireless, L.L.C. ("Southwest"), another TeleCorp affiliate. We deny petitions to deny these transfer and assignment applications filed by Leaco Rural Telephone Cooperative, Inc. ("Leaco") and Comanche County Telephone Company, Inc. ("Comanche County").

II. BACKGROUND

A. TeleCorp and Tritel

3. TeleCorp, a publicly traded Delaware corporation headquartered in Arlington, Virginia, indirectly holds A, B, C, D, E, and F block PCS licenses, LMDS licenses, and common carrier point-to-point microwave licenses. TeleCorp is controlled by Gerald Vento and Thomas Sullivan.[1] Through wholly-owned subsidiaries, TeleCorp holds a number of entrepreneurs' block licenses (C and F block PCS licenses). TeleCorp has designed its corporate structure so that the entrepreneurs' block licenses are held through a different wholly-owned subsidiary of the parent public company than the A, B, D, and E block PCS licenses.[2] The qualifying investors for purposes of the entrepreneur's block rules governing eligibility for the C and F block PCS licenses are several individuals (most notably, Messrs. Vento and Sullivan) who, collectively: (1) hold 50.1 percent of the voting rights in the parent company; (2) hold 11.8 percent of the total number of shares issued by the parent; and (3) control the board of directors.[3] Two of TeleCorp's classes of stock, however, are tracked to the assets of the subsidiary holding entrepreneurs' block licenses. The qualifying investors hold just over fifteen percent of the tracking shares in the entrepreneurs' block licensee subsidiary.

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1 *See* Applications of TeleCorp PCS, Inc., Tritel, and Indus, and Applications of TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C., PolyCell, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC for Consent to Transfer of Control and Assignment of Licenses and Authorizations, WT docket No. 00-130, File No. 0000123402 (lead application), filed April 27, 2000, May 4, 2000, and May 9, 2000 ("TeleCorp/Tritel Applications") at Exhibit A: Description of Transaction and Public Interest Statement ("Public Interest Statement") at 2, as supplemented by TeleCorp/Tritel Merger Applications Supplemental Exhibit, filed June 22, 2000 ("June 2000 Supplement"). According to the applicants, Messrs. Vento and Sullivan currently have *de jure* and *de facto* control over TeleCorp. *See* Public Interest Statement at 2.

2 TeleCorp Holding Corp., Inc., which will become TeleCorp Holding Corp., LLC after consummation of the merger, holds TeleCorp's entrepreneur's block licenses and other licenses obtained with bidding credits; TeleCorp PCS LLC holds TeleCorp's other PCS licenses. A third subsidiary, TeleCorp Communications, Inc. holds microwave licenses. Public Interest Statement at 1, n. 2.

3 *See* June 2000 Supplement at 9-11. *See also* TeleCorp Tritel Merger Joint Proxy Statement – Prospectus, filed with the U.S. Securities and Exchange Commission ("SEC"), dated June 20, 2000 ("Joint Proxy Statement – Prospectus").

4. Tritel, a publicly traded Delaware corporation headquartered in Jackson, Mississippi, currently holds, through its subsidiaries, A, B, C, and F block PCS licenses. Tritel holds licenses to provide PCS to approximately fourteen million people in the south-central United States.[4] William M. Mounger, II and E.B. Martin, Jr. together hold shares that constitute a majority of the total voting power of Tritel capital stock.[5] Both TeleCorp and Tritel offer service using the AT&T Wireless brand name, marketing as a "Member, AT&T Wireless Services Network."[6]

5. On May 9, 2000, pursuant to section 310(d) of the Communications Act of 1934, as amended ("the Act"),[7] TeleCorp, Tritel, and Indus filed applications for (1) the *pro forma* transfer of control or assignment of TeleCorp's C and F block PCS and LMDS licenses to newly formed subsidiaries of a new TeleCorp parent holding corporation that will assume the name TeleCorp PCS, Inc. ("TPI"); (2) the transfer of control of authorizations currently held by Tritel subsidiaries to TPI; and (3) the assignment of the one broadband PCS licenses of Indus to Wisconsin Acquisition Corp. ("Wisconsin Acquisition"), an indirect subsidiary of TPI.[8] In addition, as part of the same transaction, TeleCorp affiliates, PolyCell affiliates, and AT&T Wireless filed applications for the cross-assignments involved in various license swaps.

6. The essence of the merger is that, in simultaneous transactions, TeleCorp and Tritel stockholders will become stockholders in the new parent holding company, TPI, through the exchange of their current capital stock for stock in TPI.[9] Thus, both TeleCorp and Tritel will become wholly-owned subsidiaries of TPI. Simultaneous to these conversions, TPI will assume the TeleCorp name and trading symbol, and TeleCorp will be renamed TeleCorp Wireless, Inc ("TWI").[10] The proposed merger will effect a transfer of control of Tritel from Messrs. Mounger and Martin, the controlling shareholders of Tritel, to Messrs. Vento and Sullivan, the controlling shareholders of TeleCorp.[11]

7. On July 17, 2000, by delegated authority, the Wireless Telecommunications Bureau (the "Bureau") issued a Public Notice to announce that all of the applications had been accepted for filing and to establish a pleading cycle to enable interested parties to comment on the applications involved in the TeleCorp/Tritel merger and the license swaps.[12] In response to the *Acceptance Public Notice*, Nextel filed a petition to deny the applications, raising questions regarding TeleCorp's current

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4 *See* Joint Proxy Statement – Prospectus at 5.

5 *Id.* at Tritel, Inc. Notice of Special Meeting to Tritel Stockholders.

6 June 2000 Supplement at 12.

7 47 U.S.C. § 310(d).

8 *See* TeleCorp/Tritel Applications. We note that on October 5, 2000, the applicants filed a minor amendment to their applications to change the assignee of the assignment of the Indus authorization from Black Label Wireless, Inc. to Wisconsin Acquisition, another wholly owned, indirect subsidiary of TPI. *See* Amendment to Pending Application File No. 00001117340, filed Oct. 5, 2000.

9 Public Interest Statement at 3.

10 *Id.*

11 *Id.* at 8.

12 *See* TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. Seek FCC Consent to Transfer Control of, or Assign, Broadband PCS and LMDS Licenses, *Public Notice*, WT Docket No. 00-130, DA 00-1589 (rel. July 17, 2000) ("*Acceptance Public Notice*").

eligibility to hold C and F block PCS licenses and its eligibility to acquire additional C and F block licenses.[13] Leaco and Comanche jointly filed reply comments supporting the concerns raised by Nextel about TeleCorp's eligibility and incorporating arguments they had raised in petitions to deny pending applications of other TeleCorp affiliates -- Royal and Southwest – to acquire additional entrepreneurs' block licenses.[14] Alpine PCS, Inc. ("Alpine") also filed reply comments supporting Nextel.[15]

B. Royal and Southwest

8. Royal and Southwest are limited liability companies organized under the laws of Delaware. Royal and Southwest are owned and controlled by Messrs. Vento and Sullivan, with each holding fifty percent of the voting rights and equity interest of each company.[16] Royal and Southwest currently hold no C or F block PCS licenses.

9. On June 15, 2000, Royal and Zuma filed applications for the transfer of control to Royal of two C block licenses currently controlled by Zuma.[17] On June 30, 2000, Southwest and Poka Lambro filed applications for the assignment to Southwest of nine F block and seven C block PCS licenses of Poka Lambro, and Southwest and Denton County filed an application for the assignment to Southwest of two C block PCS licenses held by Denton County.[18] All six applications involving Royal and Southwest appeared on public notice as accepted for filing on July 5, 2000.[19]

10. In response to the *July 5th Public Notice*, Leaco and Comanche jointly filed petitions to

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[13] *See* Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc., filed August 16, 2000 ("Nextel Petition").

[14] *See* Reply Comments of Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, Inc. in Support of Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc., filed Aug. 28, 2000 ("Leaco/Comanche County Reply Comments").

[15] *See* Reply Comments of Alpine PCS, Inc., filed Aug. 28, 2000 ("Alpine Reply Comments'). In response to Leaco and Comanche County and Alpine, TeleCorp filed a motion to strike the Leaco/Comanche County Reply Comments and the Alpine Reply Comments, alternatively requesting leave to file a response to those reply comments. *See* Motion to Strike of TeleCorp PCS, Inc., *et al.*, or in the Alternative, Request for Leave to File Substantive Response to Late Filed Comments, filed Sept. 1, 2000 ("TeleCorp Motion to Strike"). In further response, Alpine, Leaco, and Comanche filed oppositions to TeleCorp's Motion to Strike. *See* Opposition of Alpine PCS, Inc. to Motion to Strike, filed Sept. 14, 2000 ("Alpine Opposition"); Opposition to Motion to Strike Reply Comments of Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, Inc., filed Sept. 14, 2000 ("Leaco/Comanche Opposition"). We deny TeleCorp's Motion to Strike because the issues raised by Leaco and Comanche County are relevant in this proceeding, are interrelated with the issues raised by Nextel, and were timely raised with respect to the applications involving proposed acquisitions by Royal and Southwest, both TeleCorp affiliates.

[16] *See* File Nos. 0000163408, 0000163410 ("Zuma Applications"), Exhibit 1, at 1; File Nos. 0000177844, 0000179413, 0000178897 ("Poka Lambro Applications"), Exhibit 1 at 2; File No. 0000178796 ("Denton County Application"), Exhibit 1 at 1. Messrs. Vento and Sullivan hold their interest in Southwest indirectly through Southwest Lending, L.L.C. *Id.*

[17] *See* Zuma Applications.

[18] *See* Poka Lambro Applications and Denton County Application.

[19] *See* Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing, Public Notice, Report No. 578 (rel. July 5, 2000) ("*July 5th Public Notice*").

deny the applications for transfer of control to Royal and the applications for assignment to Southwest.[20] Leaco and Comanche County argue generally that Royal and Southwest are not eligible to acquire C and F block PCS licenses pursuant to section 24.839 of the Commission's rules,[21] and that Poka Lambro has retained a reversionary interest in the licenses proposed to be assigned to Southwest in violation of the Act.

II. DISCUSSION

A. Statutory Authority

11. Section 310(d) of the Act provides, in pertinent part, that "[n]o construction permit, or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."[22] Section 310(d) also requires the Commission to consider a license transfer of control or assignment application as if it were filed pursuant to section 308 of the Act, which governs applications for new facilities and for renewal of existing licenses.[23]

12. In applying the public interest test under section 310(d), the Commission considers four overriding questions: (1) whether the transaction would result in a violation of the Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Act or interfere with the objectives of that and other statutes; and (4) whether the transaction promises to yield affirmative public interest benefits.[24] In summary, the

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[20] *See* Petition to Deny the Applications of Zuma PCS, LLC For Consent to Transfer Control of Zuma/Odessa, Inc. and Zuma/Lubbock, Inc. to Royal Wireless, L.L.C., filed Aug. 4, 2000, by Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company ("Zuma Petition to Deny"); Petition to Deny the Applications of Poka Lambro Ventures, Inc., Poka Lambro PCS, Inc., and Poka Lambro/PVT Wireless, L.P. for Consent to Assign C and F Block Personal Communications Services Licenses to Southwest Wireless, L.L.C., filed Aug. 4, 2000, by Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company ("Poka Lambro Petition to Deny"); and Petition to Deny the Application of Denton County Electric Cooperative, Inc., for Consent to Assign C Block Personal Communications Services Licenses to Southwest Wireless, L.L.C., filed Aug. 4, 2000, by Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company ("Denton County Petition to Deny").

[21] 47 C.F.R. § 24.839.

[22] 47 U.S.C. § 310(d).

[23] Section 310 provides that the Commission shall consider any such applications "as if the proposed transferee or assignee were making application under section 308, 47 U.S.C. 308, for the permit or license in question." 47 U.S.C. § 310(d). Furthermore, the Commission is expressly barred from considering "whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." *Id.*

[24] *See Applications of GTE Corporation and Bell Atlantic Corporation for Transfer of Control*, CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, at ¶ 22 (rel. June 16, 2000) ("*Bell Atlantic/GTE Order*"); *Applications of Ameritech Corp. and SBC Communications Inc. for Transfer of Control*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14,712, ¶¶ 49-50 (1999); *Applications of MCI Communications Corporation and British Telecommunications P.L.C*, Memorandum Opinion and Order, 12 FCC Rcd 15, 351, 15,367 ¶ 33 (1997) ("*BT/MCI Order*")); *Applications of WorldCom, Inc. and MCI Communications Corporation for*

applicants bear the burden of demonstrating that the transaction will not violate or interfere with the objectives of the Act or Commission rules, and that the predominant effect of the transaction will be to advance the public interest.[25] Prior to approving the applications, we must determine whether the applicants have met this burden.[26]

B. Qualifications and Eligibility

13. In evaluating assignment and transfer applications under section 310(d) of the Act, we do not re-evaluate the qualifications of assignors and transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.[27] In the TeleCorp/Tritel transaction, no issues were raised with respect to the basic qualifications of Tritel as transferor or assignor. Also, no issues have been raised with respect to Indus as assignor. With regard to the intermediate *pro forma* assignments and transfers of control of the TeleCorp licenses, Nextel has raised concerns regarding TeleCorp's qualifications as assignor/transferor. Specifically, Nextel claims that TeleCorp's current use of tracking stock to comply with control group ownership requirements violates the Commission's rules, calling into question TeleCorp's eligibility to hold C and F block PCS licenses.[28] No issues have been raised as to the basic qualifications of Zuma, Poka Lambro, or Denton County as assignors/transferors.

14. As a regular part of our public interest analysis, we also determine whether the

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Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18,025, 18,030-33, ¶¶ 9-12 (1998) ("*WorldCom/MCI Order*")). *See also Applications of SBC Communications, Inc, and BellSouth Corporation for Transfer of Control or Assignment*, WT Docket No. 00-81, Memorandum Opinion and Order, 2000 WL 1455744 at ¶ 13 (WTB/IB rel. Sept. 29, 2000) ("*SBC/BellSouth Order*"); *Applications of Vodafone AirTouch and Bell Atlantic Corporation*, Memorandum Opinion and Order, 2000 WL 332670 (WTB/IB rel. Mar. 30, 2000) ("*Bell Atlantic/Vodafone AirTouch Order*"); *Applications of Aerial Communications, Inc., and VoiceStream Wireless Holding Corporation for Transfer of Control*, Memorandum Opinion and Order 15 FCC Rcd 10,089, at ¶ 9 (WTB/IB rel. Mar. 31, 2000) ("*VoiceStream/Aerial Order*").

[25] *Bell Atlantic/GTE Order*, FCC 00-221, at ¶ 22, n. 63; *WorldCom/MCI Order*, 13 FCC Rcd at 18,031 ¶ 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant) and *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 F.C.C. 2d 734, 736-37 ¶¶ 2-3 (1975) (burden of proof is on licensee on issue of whether applicants have the requisite qualifications to be or to remain Commission licensees and whether grant of applications would serve public interest, convenience and necessity). *See also*, *SBC/BellSouth Order*, 2000 WL 1455744 at ¶ 13; *Bell Atlantic/Vodafone AirTouch Order*, 2000 WL 332670, at ¶ 13, n. 23;*VoiceStream/Aerial Order*, 15 FCC Rcd 10,089, at ¶ 9, n. 20.

[26] *See Applications of NYNEX Corporation and Bell Atlantic Corporation*, Memorandum Opinion and Order, 12 FCC Rcd at 20,001, 20,007, ¶¶ 29, 36 (1997) ("*Bell Atlantic/NYNEX Order*"); *BT/MCI Order*, 12 FCC Rcd at 15,367 ¶ 33. *See also .SBC/BellSouth Order*, 2000 WL 1455744 at ¶ 13; *Bell Atlantic/Vodafone AirTouch Order*, 2000 WL 332670, at ¶ 13, n. 24; *VoiceStream/Aerial Order*, 15 FCC Rcd 10089, at ¶ 9, n. 21.

[27] *See SBC/BellSouth Order*, 2000 WL 1455744 at ¶ 14; *Bell Atlantic/Vodafone AirTouch Order*, 2000 WL 332670, at ¶ 14, n. 25; *VoiceStream/Aerial Order*, 2000 WL 339806, at ¶ 9, n. 22 (citing *MobileMedia Corporation et al.*, 14 FCC Rcd 8017 ¶ 4 (1999) (citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964)). *See also* Stephen F. Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934," 43 Fed. Comm. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. *Id.*

[28] *See* Nextel Petition at 3-5.

proposed assignee or transferee is qualified to hold Commission licenses.[29] In addition, because the instant applications propose the assignment and/or transfer of control of C and F block PCS licenses, we must determine whether the proposed assignee or transferee meets the eligibility criteria under the Commission's rules.[30] In addressing the various applications before us, Nextel, Leaco, and Comanche County argue that neither TeleCorp nor TPI, the post-merger parent, is a qualified assignee/transferee.

15. With respect to the TeleCorp/Tritel transaction, Nextel raises the only concerns about TPI's qualifications, all of which relate to TPI's eligibility to acquire C and F block PCS licenses. Specifically, Nextel argues that: (1) a discrepancy exists between TeleCorp's reporting of assets to the Commission and to the SEC;[31] (2) TeleCorp's current and proposed use of tracking stock does not comply with control group ownership structure requirements;[32] (3) based upon Nextel's review of the Merger Agreement,[33] the proposed intermediate assignments and transfers of TeleCorp's licenses to TPI are not, in fact, *pro forma*;[34] (4) TeleCorp does not explain TPI's eligibility to hold the C and F block PCS licenses at issue;[35] and (5) based on TeleCorp's current revenues, the transfers of control would require unjust enrichment payments.[36]

16. Leaco and Comanche County have raised similar issues with regard to the eligibility of Royal and Southwest, each of which based its eligibility on the underlying eligibility of TeleCorp, to hold C and F block PCS licenses. Leaco and Comanche County argue that the Zuma, Poka Lambro, and Denton County applications should be denied because: (1) neither Royal nor Southwest meets the eligibility criteria of section 24.709 of the Commission's rules as of the filing of the assignment applications;[37] (2) neither Royal nor Southwest holds other C or F block licenses or falls within the grandfather provision of section 24.839(a)(2) of the Commission's rules;[38] (3) the assignment agreement gives Poka Lambro a prohibited reversionary interest in the license;[39] and (4) the Zuma to Royal and the Denton County to Southwest assignment applications fail to satisfy the disclosure requirements of section 1.2111(a) of the Commission's rules.[40]

17. Because the claims of Nextel and Leaco and Comanche County ultimately require a

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29 *See In re applications of AirTouch Communications, Inc. and Vodafone Group, Plc*, Memorandum Opinion and Order, DA 99-1200, 1999 WL 413237 (WTB rel. June 22, 1999) at ¶¶ 5-9 ("*Vodafone/AirTouch Order*").

30 *See* 47 C.F.R. §§ 24.709, 24.839.

31 *See* Nextel Petition at 2.

32 *Id.* at 3-5.

33 *See* TeleCorp/Tritel Applications, Agreement and Plan of Reorganization and Contribution by and Among TeleCorp PCS, Inc., Tritel, Inc., and AT&T Wireless Services, Inc., dated as of Feb. 28, 2000 ("Merger Agreement").

34 *See* Nextel Petition at 6-7.

35 *Id.* at 7.

36 *Id.* at 7-8.

37 Poka Lambro Petition to Deny at 4; Denton County Petition to Deny at 3; Zuma Petition to Deny at 4.

38 Poka Lambro Petition to Deny at 7; Denton County Petition to Deny at 7; Zuma Petition to Deny at 7.

39 Poka Lambro Petition to Deny at 10.

40 Denton County Petition to Deny at 10; Zuma Petition to Deny at 10.

determination of TeleCorp's and TPI's eligibility to hold and acquire C and F block licenses, we address their concerns jointly in the sections below. We address four basic issues: (1) eligibility of commonly controlled affiliates of TeleCorp to acquire and hold C and F block PCS licenses; (2) TeleCorp's "permissible growth" under section 24.709(a)(3); (3) TeleCorp's current and proposed use of tracking stock to comply with the control group ownership structure requirements of section 24.709(b)(5); and (4) whether unjust enrichment payments are required for the instant transactions. In addition, we discuss separately below the argument of Leaco and Comanche County that Southwest and Poka Lambro have created a prohibited reversionary interest.

18. We note that TeleCorp, Tritel, and PolyCell challenge the standing of Nextel and, to the extent their filings are considered petitions to deny in the TeleCorp/Tritel transaction, also of Leaco and Comanche.[41] Similarly, Royal and Southwest have challenged the standing of Leaco and Comanche County with respect to the Zuma, Poka Lambro, and Denton County applications.[42] We need not address these procedural arguments because we have determined that the public interest would be served by grant of these applications.

1. Eligibility of Commonly Controlled Affiliates

19. Leaco and Comanche County argue, first, that Royal and Southwest are not eligible to acquire the C and F block licenses at issue pursuant to section 24.709 of the Commission's rules,[43] because the attributable assets of Royal and Southwest at the time of the filing of the applications for transfer of control or assignment were in excess of $500 million.[44] Second, Leaco and Comanche County argue that Royal and Southwest are not qualified assignees/transferees because they do not currently hold (and have never held) other C or F block licenses.[45] They argue that section

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41 *See* TeleCorp Joint Opposition at 20-22; Opposition of Tritel Communications, Inc. to the Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc., filed August 28, 2000 at 1-2 ("Tritel Opposition"); Opposition of PolyCell Communications, Inc. to the Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc., filed August 28, 2000 at 1-2 ("PolyCell Opposition"); TeleCorp Motion to Strike at 2-3.

42 *See* Royal Wireless Opposition to Petition to Deny, filed August 17, 2000 at 2-3 ("Royal Opposition"); Southwest Wireless, L.L.C., Poka Lambro Ventures, Inc., Poka Lambro PCS, Inc., Poka Lambro/PVT Wireless Limited Partnership, and Denton County Electric Cooperative, Inc. Joint Opposition to Petition to Deny, filed August 17, 2000 at 2-4 ("Southwest Opposition").

43 47 C.F.R. § 24.709. This rule section states the general eligibility requirements to hold C and F block PCS licenses. Eligibility to hold C and F block licenses is limited to an entity, that, together with its affiliates and persons or entities that hold interests in the entity and their affiliates, with gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million. 47 C.F.R. § 24.709(a)(1). In calculating the revenues and assets thresholds, the Commission's rules permit entities to exclude the revenues and assets of some of its affiliates and attributable interest holders if the entity's control group is structured in a manner consistent with certain exceptions. 47 C.F.R. § 24.709(b). Eligibility must be maintained by any entity holding a C or F block PCS license for at least five years from the date of initial license grant, provided that a C/F block PCS licensee, together with its attributable interest holders, may exceed the gross revenues and total assets thresholds if any such increase is due to "nonattributable equity investments," as defined in section 24.709(a)(3) of the Commission's rules. 47 C.F.R. § 24.709(a)(3); *see also*, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 420, ¶ 27 (1994) ("*Competitive Bidding Fifth MO&O*").

44 *See* Zuma Petition to Deny at 4-7; Poka Lambro Petition to Deny at 4-7; Denton County Petition to Deny at 4-7.

45 *See* Zuma Petition to Deny at 7-9; Poka Lambro Petition to Deny at 7-10; Denton County Petition to Deny at 7-9.

24.839(a)(2) should be interpreted strictly so as to limit eligibility only to current C or F block licensee entities, and that neither section 24.839(a)(2) nor Commission precedent permits new entities that do not independently qualify at the time of filing the application to acquire C or F block PCS licenses."[46]

20. In response, Royal, Southwest, TPI, and Wisconsin Acquisition (the TeleCorp affiliates that will acquire licenses or control of licenses in these transactions) claim that they are eligible to acquire the C and F block licenses at issue under section 24.839 of the Commission's rules, because they are affiliated with entities that are qualified holders of C and F block PCS licenses.[47] Further, these TeleCorp affiliates argue that they are also controlled by Messrs. Vento and Sullivan, and that, because *pro forma* assignments and transfers of C and F block licenses are permitted by section 24.839(a)(5) of the Commission's rules, they would be eligible to acquire these licenses from TeleCorp on a *pro forma* basis.[48] Therefore, they should be eligible to acquire them outright.[49] They explain that Messrs. Vento and Sullivan could use one of their existing C and F block licensee entities to acquire the licenses at issue, and pursuant to section 24.839(a)(5), could *pro forma* assign or transfer control of these licenses to Royal, Southwest, TPI, or Wisconsin Acquisition.[50]

21. Section 24.839(a) of the Commission's rules prohibits the assignment or transfer of control of C or F block PCS licenses within the first five years after initial licensing, except pursuant to one of the specific exceptions set forth in the rule. The exception stated in Section 24.839(a)(2) permits the assignment or transfer of C and F block PCS licenses to an entity that either (1) is eligible at the time it files the assignment or transfer application or (2) holds other C or F block PCS licenses and was eligible when it acquired those licenses.[51] We find that section 24.839(a)(2) permits assignments and transfers of control of C and F block licenses directly to commonly controlled affiliates of existing C and F block licensees, provided that those licensees remain eligible pursuant to section 24.709. We believe Leaco and Comanche County read section 24.839(a)(2) too narrowly, emphasizing form over substance. Here, the real parties-in-interest to the proposed assignments and transfers of control are the same – Messrs. Vento and Sullivan.

22. In these circumstances, we see no reason to prohibit these entities from acquiring directly licenses that they could acquire indirectly. Section 24.839 permits *pro forma* assignments and

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46 *See* Zuma Petition to Deny at 7-8; Poka Lambro Petition to Deny at 8; Denton County Petition to Deny at 7-8. No objections were raised in the TeleCorp/Tritel transaction about Wisconsin Acquisition's eligibility, as assignee of the Indus C block license.

47 *See* Royal Applications, Exhibit 1 at 2; Poka Lambro Applications, Exhibit 1 at 2-3; Denton County Application, Exhibit 1 at 2; Public Interest Statement at 18-20.

48 *Id*.

49 *See* Royal Applications, Exhibit 1 at 2; Poka Lambro Applications, Exhibit 1 at 2-3; Denton Applications, Exhibit 1 at 2; Public Interest Statement at 18-20.

50 *Id.*

51 47 C.F.R. § 24.839(a)(2). We note that the Commission recently modified its broadband PCS service and auctions rules, including its rules on eligibility for C and F block licenses, making certain licenses available in future auctions to non-entrepreneurs in "open" bidding, while other licenses remain available only to entrepreneurs in "closed" bidding. *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket No. 97-82, Sixth Report and Order, FCC 00-313, 2000 WL 1224710, ¶¶ 46-51 (2000) ("*C Block 6th R&O*").

transfers, which means that Messrs. Vento and Sullivan could, in compliance with the Commission's rules, achieve the very thing that Leaco and Comanche County argue against by acquiring these licenses through TeleCorp and assigning them on a *pro forma* basis to Royal, Southwest, or another entity they control. We agree with Royal, Southwest, TeleCorp, and Wisconsin Acquisition that the distinction Leaco and Comanche County try to draw in section 24.839(a)(2) would create a result with no regulatory benefit.[52]

23. We also reject Leaco and Comanche County's suggestions that limiting the scope of section 24.839(a)(2) to actual licensees, rather than affiliates, would serve the regulatory purpose of providing the Commission a superior opportunity to review an assignee's or transferee's eligibility.[53] We believe our interpretation of section 24.839(a)(2) does not compromise our determination of the eligibility of the real party-in-interest to acquire C and F block licenses. We note, however, that while we find that section 24.839(a)(2) allows assignments and transfers directly to commonly controlled affiliates of C and F block licensees, such assignees and transferees and their real parties-in-interest must continue to remain eligible under section 24.709.

2. Permissible Growth

24. An entity holding C and F block licenses must, for five years from the date the license was initially granted, continue to meet the basic eligibility criteria of gross revenues of less than $125 million (in each of the last two years) and total assets of less than $500 million, except that an entity, and its attributable interest holders, may exceed the gross revenues and total assets thresholds if any such increase is due to permissible growth, as permitted in section 24.709(a)(3).[54] Total assets is defined as "the book value . . . as evidenced by the most recent audited financial statements . . .."[55] Although no party has raised concerns regarding any party's gross revenues, Nextel, Leaco, and Comanche County all raise concerns and questions about the total assets of Royal, Southwest, and, ultimately, of TeleCorp.

25. Nextel raises questions with regard to the amount of TeleCorp's total assets provided in the TeleCorp/Tritel applications.[56] Specifically, Nextel points out that, while TeleCorp reports its total assets as $495,776,440 in the TeleCorp/Tritel applications, which were filed in mid-2000, TeleCorp reported total assets of $952,202,000 as of December 31, 1999 to the SEC.[57] Similarly, Leaco and Comanche County argue that Royal and Southwest are not eligible to acquire C and F block licenses, because Royal's and Southwest's attributable total assets must include those of TeleCorp, which exceed $500 million. Therefore, according to Leaco and Comanche, Royal and Southwest are not eligible under section 24.709.[58] Like Nextel, Leaco and Comanche County also point out that

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52 *See* TeleCorp Motion to Strike at 8-9. *See also* Royal Opposition at 6; Southwest Opposition at 7.

53 *See* Opposition to Motion to Strike Reply Comments of Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, Inc., filed Sept. 14, 2000, at 5-6 ("Leaco/Comanche County Opposition").

54 *See* 47 C.F.R. § 24.709(a)(3).

55 47 C.F.R. § 24.720(g).

56 *See* Nextel Petition at 2.

57 *Id.*

58 *See* Zuma Petition to Deny at 4-7; Poka Lambro Petition to Deny at 4-7; Denton County Petition to Deny at 4-7.

TeleCorp reported greater total assets to the SEC than it did to the Commission. Finally, Leaco and Comanche County argue that the increase in assets over $500 million should be considered attributable, particularly AT&T Wireless' investment in TeleCorp, as well as increases created by TeleCorp's acquisition of non-C and F block licenses.[59]

26. TeleCorp, Royal, and Southwest respond that their total assets are irrelevant for eligibility to acquire C and F block licenses through assignment and transfer pursuant to section 24.839(a)(2), because eligibility is premised on ownership of other C and F block licenses, rather than on meeting the asset limit.[60] In their applications, TeleCorp, Royal, and Southwest show their total assets as $495,776,440.[61] However, all of the applications contain a footnote explaining that the number was used by entities commonly controlled by Messrs. Vento and Sullivan for Auction No. 22 purposes in 1999 and has likely changed due to non-attributable transactions.[62]

27. As we read the balance sheet that TeleCorp provided attached to its Motion to Strike, TeleCorp's most recent audited financial statement shows that, in 1999, TeleCorp's total assets were $952 million.[63] TeleCorp argues that its attributable assets remain within the $500 million cap because the increase in its assets over the cap are not attributable as they are the result of permissible growth under section 24.709(a)(3).[64] Specifically, TeleCorp states that all of its assets, "as well as TeleCorp's cash reserves, intangibles, deferred financing costs, and other non-current assets can only be considered arising from 'business development or expanded service' incident to the business of offering PCS to the public."[65] Further, TeleCorp explains that its license assets reflect the acquisition of additional licenses, which the Commission has found to be permissible growth permitted under section 24.709(a)(3),[66] and all the money raised to acquire its assets came from non-attributable sources.[67] Likewise, TeleCorp shows those amounts it considers "debt financing."[68] As for Leaco and Comanche County's claims that AT&T Wireless' investment should be attributable, TeleCorp states that AT&T's investment is

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59 *See* Zuma Petition to Deny at 6-7; Poka Lambro Petition to Deny at 6-7; Denton County Petition to Deny at 6-7.

60 *See* Public Interest Statement at 17, n. 12; TeleCorp Joint Opposition at 7-8; Royal Opposition at 4; Southwest Opposition at 5. TeleCorp argues that "the only reason *any* [total asset] figure was provided was because the application could not be filed without placing some figure in that field on the ULS system." TeleCorp Joint Opposition at 8 (emphasis in original).

61 *See* TeleCorp/Tritel Applications, FCC Form 603, Schedule A; Zuma Applications, FCC Form 603, Schedule A; Poka Lambro Applications, FCC Form 603, Schedule A; Denton County Application, FCC Form 603, Schedule A.

62 *See* Public Interest Statement at 17, n. 12; Zuma applications, Exhibit 1 at 2, n.1; Poka Lambro applications, Exhibit 1 at 2, n.2; Denton County application, Exhibit 1 at 2, n. 2.

63 *See* TeleCorp Motion to Strike at 5 and attached TeleCorp Balance Sheet. Leaco and Comanche County request that their arguments as to TeleCorp's eligibility (and permissible growth) contained in their petitions to deny the Zuma, Poka Lambro, and Denton County applications be incorporated in the TeleCorp/Tritel proceeding. *See* Leaco/Comanche County Reply Comments at 2

64 *See* TeleCorp Motion to Strike at 4-8.

65 *Id.* at 6.

66 *Id.*

67 *Id.* at 7.

68 *Id.*

non-attributable based on the control group structure by which TeleCorp qualifies as an entrepreneur.[69] Under that structure, no investor may hold more than twenty-five percent of TeleCorp's total equity, and AT&T's investment has always been below that benchmark.[70] Therefore, AT&T's investment is not attributable for purposes of TeleCorp's asset calculation.[71]

28. We agree with TeleCorp's characterization of its assets and, based upon information provided in the TeleCorp Motion to Strike, filed September 1, 2000, find that TeleCorp has exceeded the total asset limit by means of permissible growth under section 24.709(a)(3). Therefore, TeleCorp remains eligible to hold its C and F block licenses and to acquire additional licenses pursuant to section 24.839. A further implication of this finding is that Royal and Southwest also meet the asset cap for eligibility and are eligible to acquire C and F block licenses in the secondary market in accordance with Section 24.839 of the Commission's rules.

29. We disagree, however, with TeleCorp's claims that total assets are irrelevant for purposes of acquiring C and F block licenses pursuant to section 24.839(a)(2). While section 24.839(a)(2) does not reference total assets, the underlying eligibility of an entity currently holding a C or F block license is premised on its continued compliance with the $500 million total assets cap in section 24.709(a). An entity currently holding C and F block licenses may acquire additional C and F block licenses by assignment or transfer only if it meets the total assets cap or has exceeded the cap by permissible growth pursuant to section 24.709(a)(3). To implement these rules, Schedule A to FCC Form 603 asks for the proposed assignee/transferee's total assets, which is defined in the Commission's rules as the most recent audited financial statement.[72] Therefore, TeleCorp should have provided the amount as stated in its most recent audited financial statement. Rather than provide the correct figure of its total assets, TeleCorp provided an admittedly incorrect response to this item in its application, apparently in the mistaken belief that the figure was irrelevant.[73] For the reasons discussed above, this figure is relevant, and applicants proposing to assign or transfer C and F block licenses must provide asset and revenue determinations, pursuant to sections 24.720(f) and (g) of the Commission's rules,[74] for the proposed assignees or transferees. Further, to the extent those assets and revenues exceed the $125 million/$500 million limits in section 24.709(a), applicants must explain how these increased revenues and assets are nonattributable pursuant to section 24.709(a)(3).

3. Qualifying Investors' Equity Requirements

30. Nextel has challenged TeleCorp's ownership structure, arguing that the structure does not comply with the equity benchmarks applicable to TeleCorp's qualified investors under the

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69 *Id.*

70 *Id.*

71 *Id.* at n. 11.

72 *See* 47 C.F.R. § 24.720(g).

73 TeleCorp argues that it was unsure whether an electronic application would be accepted in the ULS system if the assets listed exceeded $500 million on the Schedule A of the FCC Form 603. *See* TeleCorp Motion to Strike at 5. We note both that TeleCorp does not represent that it attempted to file the correct figures that were rejected by the ULS system, and that the ULS system will accept such applications.

74 47 C.F.R. §§ 24.720(f), (g).

Commission's entrepreneurs' block rules. Specifically, Nextel claims that: (1) TeleCorp's qualifying investors do not hold the required fifteen percent equity in the entrepreneurs' block licensees by holding fifteen percent of the tracking stock, because the appropriate measure of equity in a wholly-owned subsidiary is the percentage of equity held in the parent;[75] (2) TeleCorp's structure exposes the entrepreneurs' block licensees to poor financial performance of other TeleCorp affiliates, and the Commission did not intend that entrepreneurs' block licensees would be subject to the viability of another entity;[76] (3) the structure places conflicting obligations on the board of directors with respect to the tracking shareholders and the other shareholders, which could work to the detriment of the entrepreneurs' block licensees;[77] and (4) the status of an entrepreneurs' block licensee's control group in a liquidation affecting any entrepreneurs' block entity was a "touchstone" in the Commission's analysis of entrepreneurs' block qualifications, and the tracking stock mechanism is inconsistent with this principle.[78]

31. TeleCorp responds that: (1) the tracking stock structure was approved when its initial licensing applications were approved;[79] (2) the particular structure of the TeleCorp tracking stock is such that, although the tracking stock is issued by the parent and not the subsidiary, the qualifying investors hold the requisite amount of equity in the entrepreneurs' block licenses by holding fifteen percent of the tracking shares;[80] and (3) the interests of the tracking shareholders in the entrepreneurs' block subsidiary are the same as those required under the Commission's rules to show an equity interest in licensees with non-traditional or non-corporate ownership structures and fully consistent with the indicia of an equity interest articulated in the Commission's *Competitive Bidding Fifth Report & Order*.[81]

32. More specifically, TeleCorp states that its entrepreneurs' block tracking stock is structured such that the rights of the tracking shareholders in the entrepreneurs' block assets constitute direct equity in those assets because the tracking stock provides the holders with all of the indicia of a direct equity interest -- namely, the right to all the dividends or profits related to the entrepreneurs' block assets and the right to receive the net entrepreneurs' block assets in the event of dissolution/liquidation.[82] Further, TeleCorp points to the specific provisions in its Certificate of Incorporation that tie the dividend rights and the liquidation preferences of tracking stock holders to the entrepreneurs' block assets to the exclusion of other shareholders,[83] and vest the power to declare dividends in the qualified investors in their capacity as directors.[84]

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75 Nextel Petition at 3. Nextel does not specifically state this as its position. Based on our review of Nextel's petition, however, we extrapolate this as Nextel's position.

76 *Id.* at 5.

77 *Id.*

78 *Id.* at 4-5. Nextel provides no supporting precedent for this argument.

79 TeleCorp Joint Opposition at 8-9; Letter from Eric W. DeSilva, Counsel for Telecorp PCS, Inc., to Magalie Roman Salas, Secretary, Federal Communications commission, filed October 5, 2000 ("*October 5th Ex Parte*") at 7.

80 Telecorp Joint Opposition at 9; *October 5th Ex Parte* at 7.

81 *October 5th Ex Parte* at 2-3 (citing 47 C.F.R. § 24.720(k); *Competitive Bidding Fifth Report & Order*, 9 FCC Rcd. at 5605).

82 *Id.* at 1-2.

83 *Id.* at 3-6 (citing Fifth Amended and Restated Certificate of Incorporation of TeleCorp PCS, Inc. at section 4.9(b)

33. TeleCorp counters Nextel's argument regarding undue risk by pointing out that the theoretical bankruptcy of the non-entrepreneurs' block subsidiaries would not adversely affect the entrepreneurs' block licensees if the entrepreneurs' block aspects of the business are performing well financially because the TeleCorp parent is a holding company with no assets of its own other than its interests in its subsidiaries, and because the tracking stock structure gives the tracking shareholders a direct interest in the entrepreneurs' block subsidiary.[85] With respect to potential conflicts for TeleCorp's board of directors, TeleCorp states that the directors of the TeleCorp parent owe to non-tracked shareholders are no different from the duties that directors in a entrepreneurs' block entity owe to equity holders that are not part of the control group.[86]

34. We agree with TeleCorp that the specific characteristics of its current and proposed post-merger corporate structure comply with the entrepreneurs' block rules regarding control group equity. In the *Competitive Bidding Fifth Report and Order*, the Commission stated that the indicia of equity ownership are: (a) the right to share in the profits and losses, and receive assets or liabilities on liquidation, of the enterprise *pro rata* in relationship to the entrepreneurs' block licensee's ownership percentage; and (b) the absence of opportunities to dilute the interests of the entrepreneurs' block licensee (through capital calls or otherwise) in the venture.[87] The Commission did not require that, to be considered equity, a security must be issued by the legal entity in which the equity is granted.

35. We find that TeleCorp has structured its particular stock structure in a manner that gives the holders rights in the entrepreneurs' block subsidiary that mirror what the Commission would otherwise expect of a direct equity interest, and denies other common shareholders of the parent corporation such rights in the entrepreneurs' block subsidiary. Further, TeleCorp and Tritel's stock prospectus for the merger states that the tracking stockholders may receive a greater value upon the payment of dividends, and that a risk of buying the general public shares is that

> the ability to pay dividends [on the tracked shares] . . . is based on the value of specific subsidiaries . . . The management of [TPI, the post-merger parent company] and the initial investors of TeleCorp and Tritel own all of the [TPI] tracking stock. Management can cause payment of any future dividends on the [TPI] tracking stock. The value received by the [TPI] tracking stockholders is not available to other [TPI] stockholders.[88]

("TeleCorp Fifth Certificate of Incorporation")).

84 *Id.* at 4 (citing TeleCorp Fifth Certificate of Incorporation at section 4.9(b)(iii)).

85 *Id*. at 6.

86 *Id* at 7.

87 *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5605. Although these indicia were articulated in the context of evaluating equity in non-corporate partnerships, we believe that they apply with equal force in this context. Further, the Commission's entrepreneurs' block rules incorporate these concepts. *See* 47 C.F.R. § 24.720(k) (requiring that the control group entity have the right to receive dividends, profits, and regular and liquidating distributions from the business in proportion to the amount of equity held in the business).

88 *See* Joint Proxy Statement-Prospectus at 26.

The way that the tracked shareholders would be paid on dissolution, liquidation, or winding up of the parent is the same as would be expected if TeleCorp's entrepreneurs' block entity were not a subsidiary corporation; the tracking shareholders are entitled to receive *pro rata* the net assets of the entrepreneurs' block licensee subsidiary.[89]

36. We are willing, for these purposes, to view the TeleCorp tracking stock as direct equity in the entrepreneurs' block subsidiary because the stock displays all of the characteristics of direct equity in THC that the Commission would otherwise expect, including the right to distributions based specifically on the entrepreneurs' block business and residual rights in the specific entrepreneurs' block business assets upon liquidation. Therefore, for purposes of assessing whether TeleCorp's ownership structure meets the fifteen-percent equity requirement in Section 24.709(b)(5), we will in this case treat the tracking shares, rather than all of TeleCorp's issued shares, as the total amount of equity in the entrepreneurs' block licenses. A similar issue arose in *Fox Television Stations, Inc.*[90] with respect to application of the Act and the Commission's rules regarding foreign control of broadcast licenses. In that case, the Commission declined to apply a "count the shares" approach to calculate ownership, but rather analyzed Fox's ownership structure based on the particular attributes of Fox's stock structure, as we do here with respect to TeleCorp.[91] Therefore, under the facts presented before us, we find that, because the qualified investors hold more than fifteen percent of the tracking shares, they should be considered to meet the fifteen-percent threshold of section 24.709(b)(5) of the Commission's rules, which currently applies to TeleCorp's control group structure.[92]

37. We do not agree with Nextel that the TeleCorp tracking stock structure should be invalidated because parties other than the qualifying investors have superior rights in the shares. That the TeleCorp tracking stockholders do not have superior rights to all parties in all circumstances does not alter the analysis. Relying on commonly accepted definitions of equity, the Commission has held that the nature of a class of stock as equity is not diminished by the existence of superior rights of debt holders and other equity holders.[93] Therefore, that the tracked shareholders' rights in the subsidiary

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89 *See* TeleCorp Fifth Certificate of Incorporation at section 4.9(d).

90 *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995).

91 In *Fox Television Stations, Inc.*, a single foreign investor in the licensee's parent company owned common stock constituting only twenty-four percent of both the voting power and all stock issued by the corporation. The common stock, however, also had the right to virtually all of the profits and, upon liquidation, the assets of a the company. *See* 10 FCC Rcd at 8474, ¶ 48. The Commission concluded that "where the ownership of corporate shares does not correspond to the beneficial ownership of the corporation, we will not be bound by a formalistic 'count-the-shares' approach that understates the true extent of foreign ownership." *Id.*

92 In another case involving tracking stock, the Commission based a finding of attribution for purposes of the CMRS spectrum aggregation limit on the specific percentage of tracking stock holdings rather than the percentage of shares owned in the parent issue. *See TCI-AT&T*, 14 FCC Rcd 3160, 3208 ¶ 99 (1999). In that case, TCI's holdings of 23.8 percent of Sprint Corp.'s tracking stock in Sprint PCS led the Commission to attribute to TCI and post-merger AT&T all of Sprint's CMRS licenses. *Id.*

93 *See Algreg Cellular Engineering*, 12 FCC Rcd 8148 (1997). In *Algreg*, the Commission approvingly cited the definition of "equity" from Fletcher's Cyclopedia that "[e]quity securities represent ownership rights which, in varying degrees, depending on the type of equity security, entitle the holder to a right to participate in surplus profits, and, upon dissolution, to share in those assets that remain after all debts have been paid." *See* 12 FCC Rcd at 8164. Thus, the Commission has implicitly subscribed to the common understanding that the nature of rights as equity is not diminished because they are subsidiary or junior to rights of certain other parties.

holding the C and F block licenses are junior to the preferred shareholders and creditors of the TeleCorp parent does not require us to find that the tracking stock structure does not comply with the requirement that TeleCorp's qualifying investors hold fifteen percent of the equity in the entrepreneurs' block licenses.

38. With respect to the level of risk conferred on the entrepreneurs' block licenses based on TeleCorp's structure, we also do not agree with Nextel that the TeleCorp structure is fatally flawed because the C and F block licensees may be at risk of financial failure if an affiliate turns in poor financial performance.[94] Nextel contends that the Commission did not intend that entrepreneurs' block licensees would be subject to the viability of another entity,[95] and argues that the TeleCorp parent's possible insolvency, or the poor financial performance of other TeleCorp affiliates, could diminish funds earmarked for distribution to the tracking stock shareholders.[96] While the Commission has required that control group members be entitled to receive their fair share on the sale or dissolution of the licensee,[97] the Commission has never found that C and F block licenses should not be held in corporate structures that also involve non-entrepreneurs' block licenses or that mixing C and F block licenses in the same corporate structure with non-entrepreneurs' block licenses exposes the C and F block licenses to undue risk. As a practical matter, the Commission probably could not shield C and F block PCS licensees from the effects of poor financial performance of every company with which they are affiliated.

39. Further, we do not see how requiring the qualifying investors to hold fifteen percent of the total equity in TeleCorp, as we understand Nextel to argue, solves the problem that Nextel suggests. It appears that the qualifying investors are equally at risk in the event of the insolvency or poor performance of either the entrepreneurs' block licensees, the non-entrepreneurs' block licensees, or the TeleCorp parent. The logical endpoint of Nextel's argument is that entrepreneurs' block licenses could never be held in the same corporate structure with non-entrepreneurs' block licenses. We do not believe that the Commission intended to inhibit combinations of entrepreneurs' block and non-entrepreneurs' block licenses under a common parent to form a larger and more efficient network. In this case, the presence of the non-entrepreneurs' block subsidiary is far more likely to strengthen the performance and enhance the value of the entrepreneurs' block entity because the entrepreneurs' block licenses are part of a larger network that has greater opportunities to obtain financing and creates the opportunity for greater economy of scale. Further, in the case of entrepreneurs' block licensees that have no affiliated non- entrepreneurs' block licenses, the bankruptcy of a significant non-attributable equity holder could have a significant and adverse effect on the entrepreneurs' block licensee as a whole. Therefore, we do not believe that the TeleCorp ownership structure puts the entrepreneurs' block licenses at risk in a manner that contravenes either the Commission's rules or the analysis in the

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94 *See* Nextel Petition at 4.

95 Nextel Petition at 4.

96 *See* TeleCorp Fifth Certificate of Incorporation at section 4.9(b)(ii). This clause in unredacted form restricts on payment of dividends to "the lesser of (A) the funds of the Corporation legally available therefor and (B) Tracked Business Available Dividend Amount." *Id.* The restriction contained in subsection (A) of this provision is common for corporations and merely prevents TeleCorp from payment of dividends that would cause it to become insolvent. Notably, the same restriction applies to the payment of dividends on non-tracked common stock. *Id.* at section 4.9(b)(i).

97 *Competitive Bidding Fifth Report &Order*, 9 FCC Rcd at 5604-5605 ¶ 165.

Competitive Bidding Fifth Report and Order.

40. Similarly, we disagree with Nextel's argument that TeleCorp's structure is flawed because the tracking stock arrangement confers inconsistent obligations on the directors of the parent company.[98] As with Nextel's argument regarding undue risk, the Commission has not addressed entrepreneurs' block corporate structures in this level of detail. That the directors of the TeleCorp parent have fiduciary obligations to the non-tracked shareholders as well as the tracked shareholders does not appear to us to create undue conflict that is likely to work to the detriment of the entrepreneurs' block licensees. We agree with TeleCorp that the duties that the directors of the TeleCorp parent owe to non-tracked shareholders appear no different from the duties that directors in an entrepreneurs' block entity owe to equity holders that are not part of the control group.[99] Further, as TeleCorp states, the fact that the entrepreneurs' block and non-entrepreneurs' block assets are controlled by one parent and are parts of a single network minimizes the possibility that any inconsistency of director obligations by virtue of the tracking shares could actually have an effect on the entrepreneurs' block licensees.

41. For these reasons, we find that TeleCorp's current and proposed ownership structure complies with section 24.709(b)(5) of the Commission's rules.

4. Unjust Enrichment

42. In establishing the entrepreneurs' blocks and providing bidding credits for small businesses participating in auctions, the Commission also, as mandated by statute,[100] adopted provisions to prevent unjust enrichment should licenses acquired using these provisions be subsequently transferred to ineligible entities.[101] With respect to bidding credits, the unjust enrichment rule requires those seeking to transfer or assign licenses to entities that do not qualify for a bidding credit, or that qualify for a different level of bidding credit, to reimburse the government for the amount of the bidding credit or for the difference between the bidding credit obtained by the seller and the bidding credit for which the buyer would qualify.[102]

a. TeleCorp's Licenses

43. Nextel asserts that the transaction described in the Merger Agreement does not comport with the applications filed by TPI and Tritel. Nextel argues that, contrary to description in the applications, the Merger Agreement specifies that, at some point, TeleCorp will have ceded negative control to Tritel, and therefore, the transfer or assignment of TeleCorp's licenses is not *pro forma* and

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98 Nextel Petition at 5.

99 *See October 5th Ex Parte* at 6-7.

100 47 U.S.C. § 309(j)(4)(E).

101 *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2394, ¶ 258 (1994) (*"Competitive Bidding Second Report and Order")*; *see also*, *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5592, ¶ 136.

102 *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2395, ¶ 264; C*ompetitive Bidding Fifth MO&O*, 10 FCC Rcd at 469 ¶ 127; 47 C.F.R. § 1.2111(d).

requires the payment of unjust enrichment.[103] We disagree, and find that at no time in the transaction is there a substantial change in control of the TeleCorp licenses. Both TeleCorp and TPI are (and will be) controlled by Messrs. Vento and Sullivan so that, even if Nextel were correct about the structure of the transaction, the assignments and transfers of TeleCorp's licenses to TPI will be *pro forma* in nature.[104] Accordingly, unjust enrichment payments do not apply in the transactions involving these licenses.[105]

b. Other C Block Licenses

44. All of the other C block licenses for which the parties seek consent for assignment or transfer of control to TeleCorp were acquired by entities that qualified in Auction No. 5 as "small" businesses (*i.e.*, with gross revenues not exceeding $40 million).[106] Because the assignees/ transferees of these licenses continue to qualify as small businesses, Commission rules do not require unjust enrichment payments with respect to these C block licenses. We note that the Commission recently eliminated bidding credit unjust enrichment payments with respect to assignments/transfers of C block licenses won in Auctions Nos. 5 or 10.[107]

c. Other F Block Licenses

45. TeleCorp/Tritel. As part of the proposed merger, Tritel will transfer control of its F block PCS licenses to TPI. Those licenses were awarded with a bidding credit for "very small" businesses (*i.e.*, with gross revenues of less than $15 million) in Auction No. 11. Nextel argues that transfer to TPI of the licenses held by Tritel as a "very small" business will require unjust enrichment payments because TeleCorp qualifies only as a "small" business.[108] TeleCorp and Tritel assert that no unjust enrichment is owed because both TeleCorp and Tritel are entrepreneur block licensees that qualified for the same bidding credit level at the time the license was awarded to the transferor, even though the transferee may have since outgrown the bidding credit eligibility.[109] For the reasons outlined below, we find that bidding credit unjust enrichment payment is due on the transfers of Tritel's F block licenses to TPI. In addition, we deny TeleCorp/Tritel's request for waiver of the unjust enrichment rules in connection with TPI's acquisition of these Tritel licenses.

46. TeleCorp and Tritel assert that as entrepreneurs' block licensees, they may become a transferee of such licenses during the holding period for those licenses and remain eligible for bidding

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103 Nextel Petition at 6.

104 In a similar situation, the Bureau found that acquisition of fifty percent of the equity in the parent of a licensee constituted a *pro forma* transfer of control because *de facto* control remained with the party who had held 100 percent before the transaction. *See Wireless Telecommunications Bureau and International Bureau Complete Review of Proposed Investment by Teléfonos de México, S.A. de C.V. in Parent of Cellular Communications of Puerto Rico,* Public Notice, DA 99-2286 (rel. Oct. 22, 1999).

105 *See* File Nos. 0000117757, 0000117768, 0000117802, 50005-CW-AL-00, and 50006-CW-TC-00.

106 *See* File Nos. 0000123402, 0000117340, 00000123380, 0000178796; 0000178897, 0000177844, 0000179413, 0000163408, and 0000163410.

107 *See C Block 6th R&O*, 2000 WL 1224710 at ¶ 51.

108 Nextel Petition at 8.

109 Public Interest Statement at 20-21; TeleCorp Joint Opposition at 19.

credits at the level for which they qualified at auction, despite growth beyond the eligibility criteria.[110] TeleCorp and Tritel rely in part on a sentence in paragraph 125 of the *Competitive Bidding Fifth MO&O*, which states that the Commission will "under certain circumstances allow licensees to retain their eligibility during the holding period, even if the company has grown beyond our size limitations for the entrepreneurs' block and for small business eligibility."[111] TeleCorp and Tritel mischaracterize the above sentence as a statement that entities may apply their past bidding credit eligibility to acquisition of a new license. In doing so, the parties ignore the introductory sentence of the paragraph, which states that it addresses "the application of our holding rule to our financial caps."[112] Thus, this statement does not apply to "grandfathering" of a company's size for purposes of bidding credit eligibility and unjust enrichment in future transactions. Rather, it allows entrepreneur block licensees to retain their eligibility to continue to hold entrepreneur block licenses during the five-year holding period despite growth beyond the financial caps, and to hold those licenses without being subject to unjust enrichment for such growth.[113]

47. TeleCorp and Tritel further rely on paragraph 126 of the *Competitive Bidding Fifth MO&O*, which clarifies that transfers of control and assignments are permitted during the holding period from one entrepreneurs' block licensee to another such licensee that at the time of the auction "satisfied the entrepreneurs' block criteria," and states that "unjust enrichment penalties . . . apply if these requirements are not met, or if they qualified for different provisions at the time of licensing."[114] TeleCorp and Tritel argue that since both parties to the transaction qualified for the same bidding credit when Tritel's predecessor won the F block PCS licenses at Auction No. 11, this sentence supports their conclusion that no unjust enrichment applies. We find that TeleCorp and Tritel's reading of the *Competitive Bidding Fifth MO&O* is misguided. Paragraph 126, rather than discussing bidding credit eligibility, clarifies the Commission's transfer rule in the context of the eligibility of transferees and assignees to receive licenses during the initial license term.[115] While the sentence cited by TeleCorp and Tritel addresses unjust enrichment, the logical conclusion, given the subject of the paragraph, is that it intended to address unjust enrichment relating to the entrepreneurs' block set-aside as opposed to unjust enrichment with respect to bidding credits.[116] In fact, the Commission used the very next

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110 Public Interest Statement at 21; TeleCorp Joint Opposition at 19-20.

111 *See Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 468, ¶ 125.

112 *Id.* (". . . we wish to clarify the application of our holding rule to our financial caps."). *See also* 47 C.F.R. § 24.709(a) (a C or F block applicant (together with its affiliates and persons or entities that hold interests in the applicant and their affiliates) must have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the short-form deadline).

113 Specifically, the holding rule, Section 24.709(a)(3), allows licensees to maintain their eligibility despite growth beyond the size limitations for entrepreneur block eligibility, provided that increased gross revenues or increased total assets is due to "nonattributable equity investments . . . , debt financing, revenue from operations or other investments, business development or expanded service."

114 *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 468, ¶ 126; *see* Public Interest Statement at 20-21.

115 The first sentence of the applicable paragraph states that "we clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneur block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer." *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 468, ¶ 126.

116 *See* 47 C.F.R. § 1.2111(b); *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 466, ¶ 119. *See also, Competitive Bidding Second Report andOrder*, 9 FCC Rcd at 2394, ¶¶ 258-65 (indicating that Commission would adopt different methods to prevent abuse and unjust enrichment with respect to designated entity set-asides, installment payments,

paragraph to address unjust enrichment with respect to bidding credits.[117] Paragraph 127 states:

> [W]e reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller and bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC.[118]

48. Indeed, the Commission has explicitly rejected the interpretation of the *Competitive Bidding Fifth MO&O* now proffered by TeleCorp and Tritel.[119] In the *Omnipoint Waiver Order,* the Commission upheld an order of the Bureau's Auctions and Industry Analysis Division ("AIAD") refusing to allow Omnipoint Corporation ("Omnipoint") to qualify for bidding credits in Auction No. 22 on the basis of its business size at the time of Auction No. 5. Grant of the waiver would have allowed Omnipoint to participate in Auction No. 22 with a "grandfathered" bidding credit, despite that Omnipoint had grown since Auction No. 5. Disagreeing with Omnipoint's reading of the *Competitive Bidding Fifth MO&O*, the Commission rejected Omnipoint's argument that, because Omnipoint would be able to avoid unjust enrichment in a secondary market transaction, it should receive a "grandfathered" bidding credit. As we noted above, in the *Omnipoint Waiver Order* we determined that paragraph 127 makes unjust enrichment applicable in the context of secondary market transactions. Subsequently, in the *D&E Communications Order,*[120] AIAD issued an order refusing to grant D&E Communications a waiver of the unjust enrichment provisions where D&E Communications had at the time of the transfer application outgrown the bidding credit eligibility it held at the time of Auction No. 5, when the transferor had won the subject license. The order noted that for purposes of determining bidding credit eligibility the Commission evaluates an entity's status at the time the relevant application is filed, which in that case, as here, was the date on which the application for transfer of control was filed.[121]

49. Consistent with our findings in the *Omnipoint Waiver Order* and the *D&E Communications Order*, we find TeleCorp's interpretation of the *Competitive Bidding Fifth MO&O* to

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and bidding credits) and *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5588-89, ¶ 128-29 (creating five-year holding period and limited transfer period to prevent winners in closed set-aside auctions from being unjustly enriched by early license transfers to non-entrepreneurs).

[117] *See* Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Memorandum Opinion and Order*, 14 FCC Rcd 20543, 20545-46 (1999) ("*Omnipoint Waiver Order*") (the Commission indicated that paragraph 127 addresses unjust enrichment with respect to bidding credits).

[118] *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 469, ¶ 127.

[119] *See Omnipoint Waiver Order*, 14 FCC Rcd at 20545-46.

[120] *D&E Communications, Inc. Request for Waiver of Sections 24.712, 24.720(b)(1), 1.2111(d), and 24.839(a) of the Commission's Rules Regarding Eligibility to Acquire License as a Small Business*, Order , 15 FCC Rcd 61 ("*D&E Communications Order*").

[121] *Id.* at 67.

be flawed. In refusing to grant a "grandfathered" bidding credit in the *Omnipoint Waiver Order*, the Commission expressly rejected Omnipoint's argument that, under the *Competitive Bidding Fifth MO&O*, bidding credit status is grandfathered for secondary market transactions. Further, as explained in *D&E Communications*, the Commission evaluates an entity's status at the time the relevant application (*i.e.*, assignment/transfer or short-form) is filed, not at the time the licenses are awarded to the transferor or assignor at auction. Finally, TeleCorp and Tritel have not convinced us that the circumstances of their transaction justify waiver of the bidding credit unjust enrichment rules.[122]

50. Zuma, Poka Lambro, and Denton County applications. Independent of the TeleCorp/Tritel transaction, Southwest filed applications for the assignment of nine F block PCS licenses held by Poka Lambro. As stated previously, Southwest and TPI (the post-merger TeleCorp parent) base their eligibility to acquire the F block licenses on section 24.839.[123] Although Southwest and TPI do not hold other C or F block licenses, they are commonly controlled by Messrs. Vento and Sullivan, the real parties-in-interest to the proposed assignment, who remain eligible to acquire C and F block licenses. Accordingly, Southwest is eligible to receive the F block licenses pursuant to section 24.839. However, before Poka Lambro can complete the assignment, it must first reimburse the government for benefits it received at auction. Like the TeleCorp/Tritel transaction, unjust enrichment applies since Poka Lambro won these F block licenses at auction qualifying as a "very small" business with a twenty-five-percent bidding credit, and Southwest, as a TeleCorp affiliate, only qualifies for a fifteen-percent bidding credit at the time of filing the assignment applications.

d. Section 1.2111(a) Disclosure Requirements

51. In conjunction with the Commission's unjust enrichment provisions, section 1.2111(a) of the Commission's rules requires applicants seeking to assign or transfer control of a license within three years of having received such license through a competitive bidding procedure to file documents which reveal, among other things, the consideration to be paid for such license.[124] Leaco and Comanche County challenge the Zuma and Denton County applications because the licenses to be acquired from Zuma and Denton County were acquired in 1999 pursuant to Auction 22, and, while the applicants filed with the Commission the associated asset purchase agreements, the purchase price has been redacted.[125] Leaco and Comanche County argue that the applications should be denied, or at a

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122 *See* 47 C.F.R. § 1.925(b)(3).

123 47 C.F.R. § 24.839(a)(2).

124 *See* 47 C.F.R. § 1.2111(a). Specifically, this section states that "an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission's statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, options agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license … This information should include not only a monetary purchase price, but also any future, contingent in-kind, or other consideration (e.g., management or consulting contracts wither with or without an option to purchase; below market financing)." *Id.*

125 *See* Zuma Petition to Deny at 10-11; Denton County Petition to Deny at 10-11. We note that Leaco and Comanche County have not raised objections with regard to the Poka Lambro Applications, although the purchase price also has been redacted from those applications. *See* Poka Lambro Asset Agreement at section 2.2. Likewise, no party has raised a section 1.2111(a) objection with respect to the TeleCorp/Tritel Applications.

minimum, the applicants should be required to amend their applications to disclose the information.[126] Royal and Southwest respond that it is common industry practice to redact commercially sensitive material from purchase agreements attached to applications, and that the Commission has granted assignment and transfer of control applications for other C and F block licenses wherein the purchase prices were redacted.[127]

52. When the Commission adopted the transfer disclosure provisions of section 1.2111(a), the Commission stated that is "important to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and judge whether 'licenses [have been] issued for bids that fall short of the true market value of the license.'"[128] The Commission also stated that it would give "particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context."[129] Further, the Commission found that any competitive concerns raised by the possible disclosure of sensitive information contained in purchase agreements and similar documents can be addressed by the applicants requesting that the information be withheld from public inspection pursuant to section 0.459 of the Commission's rules.[130]

53. We find that the section 1.2111(a) disclosure requirement should be waived in this instance, and that the purposes of the rule would not be fulfilled by requiring this disclosure. In this case, we are able to determine that this transaction is in the public interest without the provision of this information.

5. Reversionary interest

54. With respect to the Poka Lambro applications, Leaco and Comanche County also argue that Southwest has afforded to Poka Lambro a reversionary interest in the underlying licenses to be assigned, which is prohibited by the Act.[131] Specifically, Leaco and Comanche County attack provisions contained in the asset purchase agreement between Southwest and Poka Lambro, which provide that Poka Lambro has the option to purchase any of the licenses proposed to be assigned to Southwest that are not constructed within two years from the closing date of the proposed assignments to Southwest.[132] Leaco and Comanche County argue that the Buy-Back Option violates section 301

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126 *See* Zuma Petition to Deny at 10-11; Denton County Petition to Deny at 10-11.

127 *See* Royal Opposition at 7-8; Southwest Opposition at 8-9.

128 *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385 (citing H.R. Rep. No. 103-111 at 257).

129 *Id.*

130 *Id.* at 2386; *see also* 47 C.F.R. § 0.459.

131 *See* Poka Lambro Petition to Deny at 10-11.

132 *See* Poka Lambro applications, Exhibit 2 (Asset Purchase Agreement among Poka Lambro Telephone Cooperative, inc., Poka Lambro PCS, Inc., Poka Lambro Ventures, Inc., Poka Lambro/PVT Wireless limited Partnership, and Southwest Wireless, L.L.C., Dated as of June 12, 2000, at Section 10.1 ("Poka Lambro Asset Agreement")). Section 10.1 ("Buy-Back Option") defines unconstructed as those licenses for which Southwest has not "erected or otherwise caused the placement or positioning of cell sites capable of covering at least 30% of the POPs in the territory covered by such Option License." *Id.* Further, Southwest may extend the option period by an additional two years. *Id.*

of the Act,[133] by creating a right beyond the terms, conditions and period of the licenses.[134] In addition, Leaco and Comanche County raise concerns that the Buy-Back Option, in conjunction with a proposed agreement by which Poka Lambro will manage the licenses, deprives Southwest of control over the licenses subject to the option.[135]

55. Southwest and Poka Lambro respond that the Buy-Back Option is not analogous to those instances in which the Commission has found a prohibited reversionary interest, because it does not confer any property interest to the optionee in the licenses, and the option, which lasts a maximum of four years, does not extend past the license terms.[136] If Poka Lambro is eligible to exercise its option to buy-back the licenses due to Southwest's failure to build out the licenses, "both parties acknowledge that the subsequent assignment would still require Commission approval."[137] Finally, Southwest and Poka Lambro state that Southwest will have complete control over the ownership of the licenses, and that despite the management agreement, Southwest, as licensee, will make all construction build-out decisions, consistent with Commission rules.[138]

56. All the licenses at issue are subject to construction build-out requirements pursuant to the Commission's rules.[139] The relevant five-year construction build-out date is September 17, 2001 for the C block licenses at issue, and April 28, 2002 for the Poka Lambro F block licenses. Specifically, at the five-year mark, the C block licenses must be constructed to provide sufficient signal strength to provide adequate service to one-third of the population of the market, and the F block licenses must be constructed to provide sufficient signal strength to provide adequate service to one-quarter of the population in the relevant market.[140] As we read the Buy-Back Option, it would not become exercisable before November 2002, at the earliest.[141] Because the Buy-Back Option is only relevant to any licenses for which coverage is less than 30 percent of population and the C block licenses at issue will have already been required to construct sufficient to provide service to 33 percent of the market, the Buy-Back Option is not applicable as to the C block licenses.

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133 47 U.S.C. § 301.

134 *See* Poka Lambro Petition to Deny at 10.

135 *Id.* at 11. Section 10.4 of the Poka Lambro Asset Agreement provides that Southwest and Poka Lambro will negotiate a management agreement, whereby Poka Lambro will manage the licenses. *See* Poka Lambro Asset Agreement at Section 10.4.

136 *See* Southwest Opposition at 9-10 (citing *Application of Kirk Merkley, Receiver, For Involuntary Assignment of License of Station KPRQ, Murray, Utah*, Memorandum Opinion and Order, 94 F.C.C. 2d 829 (1983) ("*Merkley*")). In *Merkley*, the Commission found that the reversionary interest at issue contradicted its policy because it treated "the broadcast licenses as the property of the former licensee, Wilkinson. The provision allows him to 'take possession of the license, reestablishing him in his 'first and former estate.' Second, it provides Wilkinson a right to the license in excess of the license term . . . Finally, contract provisions also allow the former licensee to take control of the license without seeking prior Commission approval. Specifically, the agreements allow Wilkinson to take possession 'without legal processes.'" *See* 94 F.C.C. 2d at 839 ¶ 19 and n. 10.

137 *See* Southwest Opposition at 10.

138 *Id.* at 11.

139 *See* 47 C.F.R. § 24.203.

140 *See* 47 C.F.R. § 24.203(a) and (b).

141 The Buy-Back Option is only exercisable within a 90-day period which begins two years from the date of closing of the Poka Lambro/Southwest underlying transaction. *See* Poka Lambro Asset Agreement at Section 10.1.

57. With respect to the possible application of the Buy-Back Option to the F block PCS licenses, we agree with Southwest and Poka Lambro that the Buy-Back Option granted to Poka Lambro does not constitute a prohibited reversionary interest. Those instances where the Commission has found a prohibited reversionary interest to exist involved egregious cases that far exceed the type of arrangement involved here.[142] The option provided to Poka Lambro differs from those types of reversionary interests the Commission has found in violation of its policies. The option at issue does not extend beyond the license term. Further, the parties agree that the license cannot be transferred or assigned without prior Commission approval. As the Commission has previously found, "the fact that the Commission is required to undertake such review, and that no permit can be assigned or transferred prior to Commission approval, ensures that the Federal Government retains control over the use of the spectrum, consistent with Sections 301 and 304."[143] Therefore, we find that the Buy-Back Option does not constitute a prohibited reversionary interest.

C. Public Interest Analysis

1. Competitive Framework

58. Where an assignment or transfer of control of licenses involves telecommunications service providers, our public interest determination must be guided primarily by the Act.[144] Our analysis of competitive effects under the Commission's public interest standard consists of three steps. First, we determine the markets potentially affected by the proposed transaction.[145] Second, we assess the effects that the transaction may have on competition in these markets.[146] Third, we consider whether the proposed transaction will result in transaction-specific public interest benefits.[147] Ultimately, we must weigh any harmful and beneficial effects to determine whether, on balance, the transaction is likely to enhance competition in the relevant markets.

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142 *See Merkely*, 94 F.C.C. 2nd at 839 ¶ 19 and n. 10; *see also Churchill Tabernacle v. FCC*, 160 F. 2d 244 (1947) ("*Churchill Tabernacle*"). In *Churchill Tabernacle*, the prohibited reversionary interest at issue gave the holder of the reversionary interest the "unfettered use and control" of broadcast facilities, the "sole and absolute" use of certain broadcast periods for nearly 100 years, and upon written notice of the interest holder, "all right, title and interest in the property, including the operating license" would revert to the interest holder. *See* 160 F. 2d at 245-246.

143 *See Application of Bill Welch for Commission Consent to Transfer Control of the Florence, Alabama Non-Wireline Cellular Permit to McCaw Communications of Florence, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6502, 6503 at ¶ 14 (1988).

144 We note that the 1996 amendments to the Communications Act were specifically intended to produce competitive telecommunications markets. *AT&T Corporation, et al., v. Iowa Utils. Bd.*, 525 US 366, 371 (1999).

145 Our determination of the affected markets requires us to identify the applicants' existing and potential product offerings, and may require us to determine which products offered by other firms compete or potentially compete with these offerings.

146 Depending on circumstances, this step may include the identification of market participants and analysis of market structure, market concentration, and potential entry.

147 These include but may extend beyond factors relating to cost reductions, productivity enhancements, or improved incentives for innovation. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,014, ¶ 49; *BT/MCI Order*, 12 FCC Rcd at 15,368, ¶ 35). *See also*, Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41,552, §§ 2.1, 2.2, 4 (dated Apr. 2, 1992, as revised, Apr. 8, 1997).

2. Analysis of Potential Adverse Effects

a. Domestic Mobile Voice Telephone Services

59. TeleCorp and Tritel subsidiaries are both licensed to provide PCS services.[148] TeleCorp and Tritel subsidiaries currently offer only interconnected mobile phone service and ancillary products associated with such service, such as handsets and voicemail.[149] For purposes of conducting our public interest analysis, we also consider the license holdings of other entities whose interests are attributable to either TeleCorp or Tritel under the Commission's cross ownership rules.[150] For present purposes, we attribute to TeleCorp and Tritel the licenses of ABC Wireless, an entity controlled by Messrs. Vento and Sullivan.[151]

i. Overlapping Interests

60. In this section, we examine the competitive impact of overlapping interests attributable to the applicants and determine that the proposed assignments and transfers of control will not reduce actual competition in any market for mobile voice services. The mobile voice interests of TeleCorp and Tritel are, for the most part, geographically complementary.[152] TeleCorp currently operates in a region covering portions of the New Orleans, Little Rock, Memphis-Jackson, Boston, St. Louis, Houston, and Louisville-Lexington-Evansville MTAs, while Tritel currently operates in portions of the Atlanta, Nashville, Memphis-Jackson, Louisville-Lexington-Evansville, and Knoxville MTAs.[153]

61. According to the applicants, the combined footprints of TeleCorp and Tritel overlap in only one county, but the overlap does not exceed the Commission's spectrum aggregation limit.[154] The applicants have identified twenty-eight markets in which Tritel properties would overlap with attributable properties of TeleCorp, through the spectrum held by TeleCorp affiliate ABC Wireless.[155] Of these overlaps, the CMRS spectrum aggregation limit would be exceeded in only two markets.[156]

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148 With respect to the provision of commercial communications services, TeleCorp, through its subsidiaries also holds LMDS licenses. *See* Public Interest Statement at 5. TeleCorp, through other affiliates, also recently obtained 39 GHz licenses. *See The Wireless Telecommunications Bureau Announces the Grant of 1961 License to Operate in the 39 GHz Band*, Public Notice, DA 00-2379 (rel. Oct. 20, 2000). No competitive issues are raised with respect to these licenses, however, because Tritel does not hold licenses in this service, nor does it provide any service that competes with the service TeleCorp would provide with these licenses.

149 *See* June 2000 Supplement at 12, 16.

150 *See generally* 47 C.F.R. §§ 20.6(d) and 22.942(d).

151 We note that there are number of other entities owned or controlled by Messrs. Vento and Sullivan, which also hold Commission licenses. *See* FCC Ownership Disclosure Information for the Wireless Telecommunications Services (FCC Form 602) of TeleCorp PCS, Exhibit 1 and Exhibit 2, filed June 22, 2000. As explained below, ABC Wireless is the only entity attributable to TeleCorp that holds properties overlapping geographically with the licenses of Tritel.

152 *See* Public Interest Statement at 14-15; June 2000 Supplement at 12-13.

153 *See* Public Interest Statement at 15.

154 *See* June 2000 Supplement at 17. According to the applicants, the footprints of TeleCorp and Tritel overlap by only 10 MHz in Montgomery County, Mississippi in the Memphis, TN BTA (BTA290). *Id.*

155 *See id.* at 17-33.

156 *See id.* at 17-22.

ABC Wireless and Tritel currently do not compete against each other for business in these markets.[157] We therefore conclude that this transaction will not result in the elimination of an existing competitor in the provision of domestic mobile voice services in any market. We recognize the possibility that ABC Wireless and Tritel might have become competitors at some future date, and that the TeleCorp/Tritel transaction eliminates any such prospects. Our general policy, however, has been to permit the aggregation of CMRS spectrum and interests therein up to the limits permitted under the spectrum cap rule, provided that such aggregation neither reduces actual competition nor stymies the development of competition in any market.[158] We find no special circumstances present here that warrant adopting a different view.

62. No overlaps with TeleCorp's or Tritel's current licenses are created by the proposed acquisitions of Royal and Southwest from Zuma, Poka Lambro, and Denton County. These licenses are attributable for spectrum aggregation purposes to TeleCorp through their common control by Messrs. Vento and Sullivan. In addition, TeleCorp affiliates recently were assigned approximately fourteen C or F block licenses, none of which creates additional overlaps with current TeleCorp or Tritel properties.[159] Though not attributable to TeleCorp for purposes of the CMRS spectrum aggregation limit, TeleCorp and Tritel identify overlaps between AT&T Wireless and TeleCorp and Tritel spectrum holdings, all of which they state are "competitively insignificant" and in compliance with the CMRS spectrum aggregation limit.[160]

ii. Spectrum Cap Issues

63. As discussed above, the proposed transaction would result in the aggregation of spectrum in two areas in a manner that would exceed the Commission's CMRS spectrum aggregation limit.[161] In the first instance, applicants would hold 60 MHz of spectrum throughout the Bowling Green-Glasgow, Kentucky BTA (BTA 052). In this area, applicants hold a 30 MHz BTA-based C block PCS license, a 10 MHz BTA-based F block PCS license, and 20 MHz of disaggregated spectrum in an MTA-based A block PCS license.[162] Because the Bowling Green-Glasgow, Kentucky BTA consists entirely of rural areas as we have defined them,[163] the relevant spectrum aggregation limit is 55 MHz. Hence, a divestiture of 5 MHz of spectrum is required to achieve compliance with the Commission's rules.

64. In the second case, the applicants would hold 50 MHz of spectrum throughout the Owensboro, Kentucky BTA (BTA 338). In this area, applicants hold a 30 MHz BTA-based C block

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157 *Id.* at 12.

158 *See Applications of VoiceStream Wireless Corp. or Omnipoint Corp and VoiceStream Wireless Holding Co., Cook Inlet/VS GSM II PCS, LLC or Cook Inlet/VS GSM III PCS, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 3341, ¶ 26; *see also, VoiceStream/Aerial Order*, 15 FCC Rcd 10,089, at ¶ 32.

159 *See* Wireless Telecommunications Bureau Grants Consent to Assign C and F Block Broadband PCS Licenses, Public Notice, *Public Notice*, DA 00-2322 (rel. Oct. 12, 2000).

160 *See* June 2000 Supplement at 17, n. 23 and 33-35.

161 *See* 47 C.F.R. § 20.6; *see also* June 200 Supplement at 18-22.

162 *See* Public Interest Statement at 12-13; June 2000 Supplement 18-20.

163 47 C.F.R. §§ 20.6(a), 22.909.

PCS license and 20 MHz of disaggregated spectrum in an MTA-based A block PCS license.[164] The Owensboro, Kentucky BTA consists principally of rural areas where the spectrum cap is 55 MHz, but also one county (Daviess County, Kentucky) where the cap remains 45 MHz because is part of a Metropolitan Statistical Area. Accordingly, the applicants must divest 5 MHz of spectrum in Daviess County to achieve compliance with the Commission's rules.

65. The applicants have not requested a waiver with respect to these markets, and therefore, pursuant to section 20.6(e) of the Commission's rules, the applicants must come into compliance with the spectrum cap in these two markets prior to consummating the instant transfers and assignments by filing an application to divest the requisite amount of spectrum prior to closing on the TeleCorp/Tritel merger.[165]

3. Public Interest Benefits

66. TeleCorp and Tritel contend that the proposed merger will generate several public interest benefits. The companies claim that consumers will benefit from the merger of two contiguous footprints in terms of enhanced in-network coverage and the creation of additional competition to national industry players such as BellSouth, Verizon, and Sprint Spectrum.[166] According to the applicants, they believe that there is a significant amount of inter-city traffic among the residents of the major cities in the southeastern TeleCorp footprint and the contiguous Tritel footprint, and vice-versa.[167] Applicants claim that, given the proliferation and success of rate plans that involve blanket rates without roaming charges, the combined single-company regional footprint created by the merger would provide TeleCorp pricing flexibility and allow it to develop both larger and more targeted home rate plans and extended home rate plans for customers that travel in-region.[168]

67. We agree with applicants that subscribers will benefit from the expanded regional footprint offered by TeleCorp, and better allow these new entrants to compete with existing competitors. While applicants' remaining claims are certainly plausible, we are unable to gauge the likelihood or significance of these benefits based on the information in this record.[169]

III. CONCLUSION

68. Based upon our review under section 310(d), we determine that this transaction will not result in harm to competition in any relevant market.[170] We also determine that the proposed

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164 *Id.*

165 *See* 47 C.F.R. § 20.6(e)(1).

166 *See* June 2000 Supplement at 15.

167 *Id.*

168 *Id.*

169 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20,063 ¶ 157.

170 The required international section 214 authorizations and any related international service issues in the TeleCorp/Tritel transaction are being addressed by the International Bureau in a separate proceeding. *See Streamlined International Applications Accepted for Filing*, Public Notice, File No. ITC-214-20001016-00596, Report TEL-00306S (rel. Oct. 27, 2000).

transaction will likely result in public interest benefits. We therefore conclude that, on balance, applicants have demonstrated that these assignments serve the public interest, convenience, and necessity. Accordingly, we grant the applications.

IV. ORDERING CLAUSES

69. IT IS ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc., filed August 16, 2000, ARE DENIED.

70. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Petition to Deny the Applications of Zuma PCS, LLC For Consent to Transfer Control of Zuma/Odessa, Inc. and Zuma/Lubbock, Inc. to Royal Wireless, L.L.C., filed August 4, 2000, by Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, IS DENIED.

71. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Petition to Deny the Applications of Poka Lambro Ventures, Inc., Poka Lambro PCS, Inc., and Poka Lambro/PVT Wireless, L.P. for Consent to Assign C and F Block Personal Communications Services Licenses to Southwest Wireless, L.L.C., filed August 4, 2000, by Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, IS DENIED.

72. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Petition to Deny the Application of Denton County Electric Cooperative, Inc., for Consent to Assign C Block Personal Communications Services Licenses to Southwest Wireless, L.L.C., filed August 4, 2000, by Leaco Rural Telephone Cooperative, Inc. and Comanche County Telephone Company, IS DENIED.

73. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Motion to Strike of TeleCorp PCS, Inc., *et al*., or in the Alternative, Request for Leave to File Substantive Response to Late Filed Comments, filed September 1, 2000, IS DENIED.

74. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and sections 0.331 and 20.6 of the Commission's rules, 47 C.F.R. §§ 0.331 and 20.6, that the authorizations and licenses referenced in the TeleCorp/Tritel Applications and related thereto are subject to the condition that the parties come into compliance with 47 C.F.R. § 20.6 with respect to the Bowling Green-Glasgow, Kentucky BTA and Daviess County, Kentucky in the Owensboro, Kentucky BTA prior to consummating the TeleCorp/Tritel Applications.

75. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and sections 0.331 and 1.2111(d) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2111(d), that TeleCorp and Tritel's request for waiver of the unjust enrichment provisions in section 1.2111(d) of the Commission's rules, 47 C.F.R. § 1.2111(d), is DENIED.

76. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and sections 0.331 and 1.2111(d) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2111(d), that, to the extent discussed above, Commission approval of the assignment and transfer of licenses granted herein is conditioned upon assignors and transferors making unjust enrichment payments to the U.S. government pursuant to section 1.2111(d) of the Commission's rules, 47 C.F.R. § 1.2111(d).

77. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and sections 0.331, 1.2110(g) and 1.2111(c) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.2110(g), 1.2111(c), that Commission approval of the assignment and transfer of the various PCS licenses granted herein is conditioned upon the execution by the assignees, assignors, and the Commission of all Commission loan documents, unless the licenses being assigned and transferred have been paid in full. Unless the licenses that will be assigned and transferred have been paid in full, this approval is conditioned upon execution of the applicable financing statements (i.e., the UCC-1 Forms) and payment, on or before the consummation date, of all costs associated with the preparation and recordation of the financing statements. In addition, all installment payments must be current on the consummation date. To be current, the installment payment may not be in the non-delinquency period or grace period. In addition, there must be no outstanding fees, including late fees, due to the Commission. No licenses will be issued to the assignees and transferees until the Commission receives notification pursuant to section 1.948(d) of the Commission's rules, 47 C.F.R. § 1.948(d), that all conditions that must be met at or before consummation have been satisfied, including execution of the appropriate financing documents. Failure of the parties to comply with any of the financial obligations described above will result in automatic cancellation of the Commission's approval hereunder and in dismissal of the relevant assignment or transfer of control applications.

78. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and sections 0.331, 1.925(a), and 1.2111(a) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925(a), 1.2111(a), that the underlying purposes of the disclosure requirements of section 1.2111(a) of the Commission's rules would not be served by application of the rule to the instant applications, and therefore, section 1.2111(a), IS WAIVED.

79. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Applications of Zuma PCS, LLC For Consent to Transfer Control of Zuma/Odessa, Inc. and Zuma/Lubbock, Inc. to Royal Wireless, L.L.C., filed August 4, 2000, File Nos. 0000163408, 0000163410, ARE GRANTED subject to the above conditions.

80. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Applications of Poka Lambro Ventures, Inc., Poka Lambro PCS, Inc., and Poka Lambro/PVT Wireless, L.P. for Consent to Assign C and F Block Personal Communications Services Licenses to Southwest Wireless, L.L.C., filed August 4, 2000, File Nos. 0000177844, 0000179413, 0000178897, ARE GRANTED subject to the above conditions.

81. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 309, and 310(d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Application of Denton County Electric Cooperative, Inc., for Consent to Assign C Block Personal Communications Services Licenses to Southwest Wireless, L.L.C., filed August 4, 2000, File No. 0000178796, IS GRANTED subject to the above conditions.

82. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 309, and 310 (d), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the applications of TeleCorp PCS, Inc., Tritel, and Indus, and applications of TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C., PolyCell Communications, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC for Consent to Transfer of Control and Assignment of Licenses and Authorizations in WT Docket No. 00-130, filed April 27, 2000, May 4, 2000, and May 9, 2000, ARE GRANTED subject to the above conditions.

83. This action is taken pursuant to authority delegated by 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau