

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

In the matter of)
)
Applications of Alaska Native Wireless, L.L.C.)
File Nos. 0000364320 and 0000363827)
)
Auction No. 35 – C & F Block Broadband PCS)

Order

Adopted: March 1, 2002

Released: March 4, 2002

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 9, 2001, TPS Utilicom, Inc. (“TPS Utilicom”) filed a Petition to Deny (“Petition”) against the above-captioned applications of Alaska Native Wireless, L.L.C. (“Alaska Native Wireless”) for forty-four markets in the C and F Block Broadband Personal Communications Services auction (“PCS Auction No. 35”). TPS Utilicom challenges Alaska Native Wireless’ qualifications as an entrepreneur eligible for C and F block “closed” bidding licenses and as a designated entity eligible for bidding credits as a very small business for “open” bidding licenses.¹ TPS Utilicom claims that AT&T Wireless PCS Interests, LLC (“AT&T Wireless”) exerts both *de jure* and *de facto* control over Alaska Native Wireless and that AT&T Wireless’ gross revenues and assets accordingly should have been included in Alaska Native Wireless’ entrepreneurial eligibility and designated entity calculations. TPS Utilicom further argues that the failure to include AT&T Wireless’ gross revenues and assets constitutes a lack of candor disqualifying Alaska Native Wireless as a licensee. For the reasons stated herein, we dismiss TPS Utilicom’s Petition for lack of standing. Moreover, as discussed below, even if we were to ignore the procedural defect and address the Petition on the merits, TPS Utilicom fails to raise any arguments that would warrant denying the Applications.

¹ Licenses auctioned in “closed” bidding are available only to bidders qualifying as “entrepreneurs.” See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 9773, 9794, ¶ 42 (2000) (stating that eligibility restrictions apply in closed bidding); see also TPS Utilicom, Inc., *Order*, 16 FCC Rcd. 14,835, 14,836 n.11 (CWD Policy and Rules Br., 2001) (“TPS Utilicom”); see also 47 C.F.R. § 24.709(a) (criteria for entrepreneurs); Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16,266, 16,282, ¶ 30 (2000) (“Sixth Report and Order”). Licenses offered in “open” bidding are available to all bidders, regardless of size. The Commission recently removed entrepreneur restrictions for some, but not all, licenses available in Auction No. 35 and in future C and F Block auctions. See 47 C.F.R. § 24.709(e); Sixth Report and Order, 15 FCC Rcd. at 16,276, ¶ 20 (explaining which licenses remained subject to entrepreneur eligibility restrictions, e.g., available only in “closed” bidding, and which ones were not subject to such restrictions, e.g., available in “open” bidding); see also TPS Utilicom, 16 FCC Rcd. at 14,836 n.11.

II. BACKGROUND

2. When the Commission instituted competitive bidding, as directed by Congress,² it wanted to ensure that small businesses would be able to participate in the wireless market.³ To ensure such participation, the Commission set aside certain PCS licenses for businesses satisfying the entrepreneurial eligibility criteria.⁴ These C and F block PCS licenses are auctioned in closed bidding only to applicants that demonstrate that they, together with their affiliates and controlling interests, have gross revenues of less than \$125 million in each of the previous two years and total assets of less than \$500 million at the time such applicants file their short-form applications (Form 175).⁵ Additionally, the Commission offers bidding credits to discount the price of licenses acquired through open bidding to applicants meeting the designated entity criteria.⁶ In PCS Auction No. 35, the Commission made available bidding credits of fifteen and twenty-five percent for small and very small businesses, respectively.⁷ To qualify as a small business, an applicant in PCS Auction No. 35 had to certify that it, together with its affiliates and controlling interests, had average gross revenues not exceeding \$40 million for the previous three years.⁸ To qualify as a very small business, an applicant had to certify that it, together with its affiliates and controlling interests, had average gross revenues not exceeding \$15 million for the previous three years.⁹

3. In PCS Auction No. 35, Alaska Native Wireless applied for entrepreneurial eligibility status and participated in closed bidding. Alaska Native Wireless also applied for bidding credits as a very small business designated entity in open bidding markets. Alaska Native Wireless was the high bidder for forty-four markets in PCS Auction No. 35, which closed on January 26, 2001.¹⁰ Alaska Native Wireless filed two long-form applications (Form 601), each dated February 12, 2001,¹¹ which contained

² See Omnibus Budget Reconciliation Act of 1993 § 6002(a), 47 U.S.C. 309(j).

³ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, 2349, 2350, 2388-89, ¶¶ 3, 6, 227-230 (1994) (“Second Report and Order”); see also 47 U.S.C. § 309(j)(3)(B) (objectives of competitive bidding include participation of small businesses).

⁴ See Second Report and Order, 9 FCC Rcd. at 2392, ¶¶ 245-48; see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd. 5532, 5539, 5584-88, ¶¶ 14, 118-127 (1994) (“Fifth Report and Order”) (applying competitive bidding to Broadband PCS licenses).

⁵ See 47 C.F.R. § 24.709(a).

⁶ See Second Report and Order, 9 FCC Rcd. at 2391-92, ¶¶ 241-42; see also Fifth Report and Order, 9 FCC Rcd. at 5539, 5589-91, ¶¶ 15, 130-33.

⁷ See 47 C.F.R. §§ 24.712(a), 24.717(a) (small businesses), 24.712(b), 24.717(b) (very small businesses); see also Sixth Report and Order, 15 FCC Rcd. at 16,287-88, ¶¶ 43-45 (establishing the bidding credit amount available to designated entities for PCS licenses acquired through open bidding and eliminating bidding credits for licenses acquired through closed bidding).

⁸ See 47 C.F.R. §§ 24.720(b)(1), 1.2110(f)(2)(iii).

⁹ See *id.* §§ 24.720(b)(2), 1.2110(f)(2)(ii).

¹⁰ See C and F Block Broadband PCS Auction Closes, *Public Notice*, 16 FCC Rcd. 2339, 2339, 2356-66 (2001) (“Closing PN”).

¹¹ The above-captioned applications originally were filed on February 12, 2001, but have been amended and supplemented since the initial filing. Alaska Native Wireless filed two long-form applications in order to separate those markets for which it was not applying for tribal land bidding credits (file no. 0000364320) from the seventeen markets for which it was seeking tribal land bidding credits (file no. 0000363827). Alaska Native Wireless later reduced the number of markets for which it was seeking tribal land bidding credits from seventeen to five. See Alaska Native Wireless, L.L.C., Request for Partial Waiver, filed Aug. 7, 2001; see also Alaska Native Wireless Application No. 0000363827, filed Aug. 16, 2001. It subsequently withdrew its request for tribal lands bidding credits in the remaining markets. See Letter from Conrad N. Bagne, Arctic Slope Regional Corp., *et al.* to Thomas

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exhibits regarding its compliance with the Commission's entrepreneurial eligibility and designated entity rules.¹² The exhibits contained information concerning Alaska Native Wireless' current assets and gross revenues.¹³ The Applications were placed on the Accepted for Filing Public Notice, dated February 27, 2001, which announced that petitions to deny had to be filed no later than March 9, 2001.¹⁴

4. According to its Applications, Alaska Native Wireless is a manager-managed limited liability company ("LLC")¹⁵ with two members: Council Tree Alaska Native Wireless, L.L.C. ("Council Tree") and AT&T Wireless, a subsidiary of AT&T Wireless Services, Inc.¹⁶ Council Tree, the manager of Alaska Native Wireless, has "manager member interests" and holds 60.1 percent of the total member interests.¹⁷ The managers of Council Tree are ASRC Wireless Services, Inc. ("ASRC Wireless"), Sealaska Telecommunications, LLC ("Sealaska Telecommunications"), and Doyon Communications, Inc. ("Doyon Communications"), which ultimately are controlled by Arctic Slope Regional Corporation ("Arctic Slope"), Sealaska Corporation ("Sealaska"), and Doyon, Limited ("Doyon"), respectively. Arctic Slope, Sealaska, and Doyon are "Alaska Native Regional Corporations" organized pursuant to the Alaska Native Claims Settlement Act.¹⁸ AT&T Wireless has "non-manager member interests" in Alaska Native Wireless and holds 38.2 percent of all member interests, along with convertible debt securities.¹⁹ The Applications represent that on a fully-diluted basis, "AT&T Wireless would be considered to hold not more than 79.4 percent of all member interests in Alaska Native Wireless."²⁰

5. Alaska Native Wireless states that its controlling interests and affiliates are Council Tree, ASRC Wireless, Arctic Slope, Sealaska Telecommunications, Sealaska, Doyon Communications, and

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Sugrue, Chief, Wireless Telecommunications Bureau, dated Oct. 11, 2001; *see also* Alaska Native Wireless Application No. 0000363827 at Schedule B (filed Oct. 12, 2001).

¹² *See* 47 C.F.R. §§ 24.709 (entrepreneurial eligibility rules), 1.2110, 24.712, 24.717, 24.720(b) (designated entity rules); *see also* Alaska Native Wireless Application, ULS No. 0000363320, at Exhibits C, Minor Amendment to Exhibit C, D (filed Aug. 3, 2001); Alaska Native Wireless Application, ULS No. 0000363827, at Exhibits C, Minor Amendment to Exhibit C, D (filed Oct. 10, 2001) ("Applications").

¹³ *See* Applications at Exhibits C, Minor Amendment to Exhibit C, D.

¹⁴ *See* C and F Block Broadband Personal Communications Services (PCS) Auction; Applications Accepted for Filing, *Public Notice*, 16 FCC Rcd. 4742, 4742 (2001); *see also* 47 C.F.R. § 1.2108 (requirements for petitions to deny).

¹⁵ LLCs may be organized with management authority residing in one or more of the members, in the form of manager(s), or in all of the members. *See, e.g.*, DEL. CODE ANN., tit. 6, § 18-402 (stating that the management of an LLC is vested in either the members, or alternatively, in a manager(s) pursuant to the LLC Agreement). If all of the members are vested with management authority, the LLC is considered to be member-managed, and all of the members would be attributed to an applicant as having controlling interests. If only some of the members are vested with management authority, the LLC is considered to be manager-managed. A manager-managed LLC, similar to a limited partnership, may insulate members who are not directly or indirectly involved in the management or operation of the applicant. Thus, such insulated members would not be attributed to the applicant. *See, e.g.*, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, *Report and Order*, 14 FCC Rcd. 12,559, 12,619-20, ¶¶ 134-141 (1999) ("Broadcast/Cable Order"). We note that this treatment of LLCs has been the practice of the Wireless Telecommunications Bureau ("Bureau").

¹⁶ *See* Applications at Exhibit A-1, 6.

¹⁷ *See* Applications at Exhibit A-2.

¹⁸ 43 U.S.C. §§ 1601-1629h. *See also* Applications at Exhibit A-3-4, A-8.

¹⁹ *See* Applications at Exhibit A-2-3.

²⁰ Applications at Exhibit A-2.

Doyon.²¹ The Applications disclose that Alaska Native Wireless, along with its controlling interests and affiliates, had no gross revenues in the three years preceding the date of filing the short-form application and had total assets valued at \$1000.²²

6. The Petition was filed on March 9, 2001, requesting that the Commission deny Alaska Native Wireless' Applications. TPS Utilicom argues that: (1) Alaska Native Wireless failed to include the gross revenues and assets of AT&T Wireless PCS Interests, L.L.C. ("AT&T Wireless") in its calculations to determine eligibility for designated entity status and closed bidding licenses,²³ and (2) Alaska Native Wireless' failure to report AT&T Wireless' assets and gross revenues constitutes lack of candor disqualifying Alaska Native Wireless as a licensee.²⁴ Alaska Native Wireless filed an Opposition to the Petition to Deny ("Alaska Native Wireless Opposition"), dated March 21, 2001, to which TPS Utilicom responded by filing a Response to Opposition to Petition to Deny ("TPS Utilicom Response"), dated March 28, 2001.

7. After its Applications were filed, Alaska Native Wireless entered into a management agreement ("Management Agreement") with Edge Wireless Ventures, LLC ("Edge Ventures") on October 19, 2001. TPS Utilicom filed a letter, dated December 18, 2001, alleging that AT&T Wireless "maintains a 40 percent voting membership interest in certain 'Edge Entities'" and exercises control over the manager, Edge Ventures.²⁵ TPS Utilicom further argues that AT&T Wireless exercises control over Alaska Native Wireless by virtue of the manager of Edge Ventures, Wayne Perry ("Perry"), having a position on AT&T Wireless' board of directors.²⁶ Alaska Native Wireless responded to TPS Utilicom's allegations regarding Edge Ventures by letters, dated December 20, 2001 and January 8, 2002.²⁷

²¹ See Applications at Exhibit A-14.

²² See Applications at Exhibits C, D. Alaska Native Wireless was formed on October 30, 2000 and had no gross revenues prior to the filing of the short-form application on November 6, 2000. See Applications at Exhibits C-1, D-1. Moreover, the gross revenues and total assets of Arctic Slope, Sealaska and Doyon, and entities owned and controlled by them, except for gaming revenues, are not attributed for the purpose of determining Alaska Native Wireless' eligibility for entrepreneurial eligibility closed licenses or designated entity status. See Applications at Exhibits C-2, D-2; see also 47 C.F.R. §§ 1.2110(c)(5)(xi); 24.720(l)(ii) ("Alaska Regional . . . Corporations . . . , or entities owned and controlled by such . . . corporations, are not considered affiliates of an applicant. . . ."). Alaska Native Wireless reports that Arctic Slope, Sealaska, Doyon, and their affiliates, do not have gaming revenues and that therefore all of their respective gross revenues and total assets are excluded from attribution. See Applications at Exhibits C-2, D-2; see also 47 C.F.R. §§ 1.2110(c)(5)(xi); 24.720(l)(ii) (stating that gaming revenues will be included in an applicant's entrepreneurial and designated entity determination pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21). For further explanation regarding the exclusion of Alaska Native Regional Corporation from affiliation coverage, see Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403, 427-28, ¶¶ 42-44 (1994) ("Fifth MO&O"); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Order on Reconsideration*, 9 FCC Rcd. 4493, 4493-94, ¶¶ 3-7 (1994).

²³ See Petition at 1-5.

²⁴ See Petition at 5-6.

²⁵ Letter from Raymond J. Quianzon, Counsel to TPS Utilicom, to Linda Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, dated Dec. 17, 2001, at 2 ("TPS Utilicom Letter"). We will accept the TPS Utilicom Letter even though it was received after the pleading period had closed. As the Management Agreement had not been entered into by Alaska Native Wireless and Edge Ventures until after the pleading period had expired, TPS Utilicom was unable to comment on the management company prior to the end of the pleading period. The arguments raised in the TPS Utilicom Letter are discussed *infra* paragraph 19.

²⁶ See TPS Utilicom Letter at 1.

²⁷ Letter from Michele C. Farquhar and Angela E. Giancarlo, Counsel to Alaska Native Wireless, to Linda Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, dated Dec. 20, 2001 ("Alaska Native
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III. DISCUSSION

A. Procedural Issues

8. As an initial matter, we determine that TPS Utilicom has failed to establish standing to file a petition to deny challenging the Applications by demonstrating that it is a “party in interest” as required by Section 309(d)(1) of the Communications Act, as amended.²⁸ To establish standing, a petitioner must make specific allegations of fact sufficient to demonstrate that grant of the subject application would cause the petitioner to suffer a direct injury.²⁹ Additionally, the Petitioner must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action and the injury would be prevented or redressed by the relief requested.³⁰

9. TPS Utilicom fails either to argue in its Petition that it has standing or to set forth sufficient facts establishing that grant of Alaska Native Wireless’ Applications would cause it direct injury. TPS Utilicom did not participate in competitive bidding for any markets for which Alaska Native Wireless was the high bidder.³¹ Additionally, TPS fails to demonstrate that the award of the Alaska Native Wireless licenses would somehow deprive it of a valid auction process with respect to the markets for which it did bid.³² TPS Utilicom instead alleges in its Response that it “suffered from the improper presence of [Alaska Native Wireless]” because Alaska Native Wireless “removed [TPS Utilicom] from high bidder status and thus forced [TPS Utilicom] to bid larger amounts” for closed market licenses in Binghamton and Elmira, New York, where TPS Utilicom was the winning bidder.³³ This bare allegation,

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Wireless Letter”); Letter from Michele C. Farquhar and Angela E. Giancarlo, Counsel to Alaska Native Wireless, to Linda Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, dated Jan. 8, 2001.

²⁸ 47 U.S.C. § 309(d)(1). See *Minnesota PCS Limited Partnership, Order*, 17 FCC Rcd. 126, 128, ¶ 6 (CWD 2002) (“*Minnesota PCS*”); *Black Crow Wireless, L.P., Order*, 16 FCC Rcd. 15643, 15644-45, ¶ 4 (CWD Policy and Rules Br. 2001) (“*Black Crow*”); *Applications of ABC Wireless, L.L.C., Order*, 15 FCC Rcd. 6787, 6789, ¶ 4 (CWD Policy and Rules Br. 1999) (“*ABC Wireless*”); *Application of Los Angeles Cellular Telephone Company, Order*, 13 FCC Rcd. 4601, 4603-04, ¶ 5 (CWD 1998) (“*Los Angeles Cellular*”).

²⁹ See *Minnesota PCS*, 17 FCC Rcd. at 128, ¶ 6; *Black Crow*, 16 FCC Rcd. at 15644-45, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; *Americatel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd. 3993, 3995, ¶ 9 (1994) (“*Americatel Corporation*”); see also *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 73-74 (1978) (“*Duke*”); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

³⁰ See *Americatel Corporation*, 9 FCC Rcd. at 3995, ¶ 9; *Black Crow*, 16 FCC Rcd. at 15645, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; see also *Duke*, 438 U.S. at 72, 74, 78, 81.

³¹ See *High Plains Wireless v. FCC*, No. 00-1292, 2002 WL 27222, at *4 (D.C. Cir. Jan. 11, 2002) (stating that a petitioner had standing to file a Petition to Deny against a winning bidder in a market where the petitioner had participated in the bidding, but denying the petitioner’s standing to challenge the grant of the winning bidder’s thirty-one other licenses in markets in which the petitioner did not participate in the bidding). Compare Short Form Application (Form 175), filed by TPS Utilicom, Inc. (Nov. 6, 2000) (list of markets for which TPS Utilicom applied) with Closing PN, 16 FCC Rcd. at 2346-66 (list of high bidders with corresponding market information).

³² See *High Plains Wireless*, No. 00-1292, 2002 WL 27222, at *4.

³³ TPS Utilicom Response, at 4-5, ¶ 6. TPS Utilicom was not granted any of the four licenses for which it was the high bidder in PCS Auction No. 35, because it defaulted on its obligation to submit the down payment necessary to bring its total deposits up to twenty percent of its high bids by February 12, 2001. See *TPS Utilicom*, 16 FCC Rcd. at 14,835 (denying a request for waiver of the Commission’s rules requiring a down payment and assessing initial default payments, obligations, and procedures); see also 47 C.F.R. § 1.2107(b). We note that TPS Utilicom has filed

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however, is not sufficient to demonstrate how granting Alaska Native Wireless' licenses for which TPS Utilicom did not bid would harm TPS Utilicom. Moreover, TPS Utilicom does not explain how Alaska Native Wireless' winning bids in markets in which TPS Utilicom did not participate could have caused TPS Utilicom to increase its bids in the markets in which it was the high bidder.³⁴ Finally, even if TPS Utilicom had demonstrated that such harm happened, it does not explain how this alleged injury would be redressed by the relief requested. If the Commission were to refuse Alaska Native Wireless the bidding credits or closed licenses for which it was the highest bidder, in markets in which TPS Utilicom did not participate, such an action would not redress TPS Utilicom's supposed injury in the competitive bidding process in the Binghamton and Elmira, New York markets. Accordingly, we will dismiss the Petition for lack of standing.

B. Substantive Issues

10. Even if we were to address the Petition on the merits, we would deny it. TPS Utilicom has not alleged any facts demonstrating that AT&T Wireless is a controlling interest or affiliate of Alaska Native Wireless that would warrant the attribution of AT&T Wireless' gross revenues and assets to Alaska Native Wireless. Additionally, TPS Utilicom has not raised any facts demonstrating that Alaska Native Wireless acted with a lack of candor in filing its PCS Auction No. 35 Applications that would make it ineligible to be a Commission licensee.

1. Control

11. The gross revenues and assets of an entity (such as AT&T Wireless) holding interests in an applicant are attributed to the applicant if the entity is determined to directly or indirectly control or be controlled by the applicant, pursuant to the Commission's affiliation rules and controlling interest standard.³⁵ Application of the affiliation rules and controlling interest standard determines whether the applicant qualifies: (i) to hold C and F block closed licenses; and (ii) as a designated entity. Under the Commission's rules, any entity that exercises *de jure* (legal) or *de facto* (actual) control of the applicant is deemed to control the applicant.³⁶

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a Petition for Reconsideration of the denial of its waiver request. See TPS Utilicom, Inc., Petition for Reconsideration, filed Aug. 30, 2001.

³⁴ Although TPS Utilicom did not provide facts to support its allegation in its Petition, we note that Alaska Native Wireless did participate initially in competitive bidding for the Binghamton (BTA043, block C1) and Elmira (BTA127, block C1) markets. Alaska Native Wireless, however, concluded its bidding for these two markets in the early rounds, and there was significant bidding on these markets, by TPS Utilicom and by other auction participants, after AT&T Wireless' last bids. It was those participants, not AT&T Wireless, that TPS Utilicom had to outbid to be the winning bidder for those licenses.

³⁵ See 47 C.F.R § 1.2110(c)(2),(5). An entity is an affiliate of an applicant if the entity:

- (A) Directly or indirectly controls or has the power to control the applicant, or
- (B) Is directly or indirectly controlled by the applicant, or
- (C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or
- (D) Has an "identity of interest" with the applicant.

Id. § 1.2110(c)(5)(i).

³⁶ See 47 C.F.R § 1.2110(c)(2); see also Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd. 15,293, 15,325, ¶ 63 ("Part 1 Order").

a. ***De Jure Control***

12. TPS Utilicom argues that AT&T Wireless has *de jure* control over Alaska Native Wireless because the Commission's rules state that, when reporting ownership interests, non-voting stock shall be attributed as an interest in the issuing entity,³⁷ and that "all agreements such as warrants, stock options and convertible debentures" will be treated on a fully-diluted basis as if fully exercised.³⁸ TPS Utilicom concludes from these requirements that AT&T Wireless "exercises control by virtue of its ownership" because if its interests are considered on a fully-diluted basis AT&T Wireless could have a 79.4 percent *membership* interest in Alaska Native Wireless.³⁹ As explained below, TPS Utilicom has misunderstood what constitutes *de jure* control under the Commission's rules.

13. In essence, *de jure* control is established only by ownership of more than 50 percent of an entity's *voting* interests.⁴⁰ The Commission's rules state that *de jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests.⁴¹ In the case of limited partnerships, the general partners are considered to have *de jure* control, provided that the limited partners are insulated. If so insulated, limited partners are not attributed to the applicant. The Commission has explained that for attribution purposes, LLCs are treated like limited partnerships.⁴² Under this construction, managers would be analogous to general partners, and non-controlling investors – i.e., non-managing members – would be analogous to limited partners. Thus, non-controlling investor interests in an LLC would be similar to limited partnership interests and would not be attributed to the applicant.⁴³

14. As explained above, Alaska Native Wireless is a manager-managed LLC.⁴⁴ Council Tree is the sole manager of the LLC and, as the manager, holds all of the "manager member interests."⁴⁵ The "manager member interests" provide Council Tree with decision-making authority on all business

³⁷ See 47 C.F.R. § 1.2110(c)(2)(ii)(D).

³⁸ See Petition at 2-3; see also 47 C.F.R. §§ 1.2110(c)(2)(ii)(A), 24.720(l)(5).

³⁹ Petition at 3.

⁴⁰ See GTE Corporation, Memorandum Opinion and Order, 15 FCC Rcd. 14,032, 14,075, ¶ 76 & n.198 (2000) ("*GTE Corp.*"); Application of Baker Creek Communications, L.P., *Memorandum Opinion and Order*, 13 FCC Rcd. 18,709, 18,712, ¶ 6 (PSPWD 1998) ("*Baker Creek*"); see also Fox Television Stations, Inc., Memorandum Opinion and Order, 10 FCC Rcd. 8452, 8513, ¶ 151 (1995); C and F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000, *Public Notice*, 15 FCC Rcd. 19,485, 19,500 (2000) ("Auction 35 Procedure Public Notice").

⁴¹ 47 C.F.R. § 1.2110(c)(2).

⁴² See, e.g., Broadcast/Cable Order, 14 FCC Rcd. at 12,619-20, ¶¶ 138-141; see also *supra* note 15 (discussing possible management structures of LLCs and attribution consequences).

⁴³ See Broadcast/Cable Order, 14 FCC Rcd. at 12,619, ¶ 138 ("[LLC] owners would be treated as attributable unless the owner can certify their lack of direct or indirect involvement in the management and operations . . . of the [LLC]. . . ."). In practice, the Bureau requires that the applicant demonstrate such lack of involvement in its long-form application (Form 601).

⁴⁴ See discussion *supra* note 15 (explaining management structures of LLCs).

⁴⁵ While Council Tree is the manager of the LLC, pursuant to the Management Agreement with Edge Ventures, Edge Ventures will perform designated duties for Alaska Native Wireless under the control and supervision of Council Tree as manager of the LLC. See Applications at Attachment to Exhibit E (providing a copy of the management agreement). Although TPS Utilicom does not put forth any specific arguments regarding the Management Agreement, we note that the Management Agreement does not confer control of Alaska Native Wireless on Edge Ventures.

decisions, except for delineated permissible investor protection provisions⁴⁶ and, with those exceptions, Council Tree exercises its decision-making authority without having to put matters to a vote by the other LLC member – AT&T Wireless. Council Tree effectively controls 100 percent of the voting interests, except as limited by permissible investor protection provisions and, under the Commission’s rules, accordingly retains *de jure* control over Alaska Native Wireless. AT&T Wireless holds “non-manager member interests” in Alaska Native Wireless and does not have any voting interest, except to the extent provided in investor protection provisions.⁴⁷ Thus, even if we were to consider TPS Utilicom’s Petition on the merits (*i.e.*, on the basis that TPS Utilicom has standing), we would not conclude that AT&T Wireless has *de jure* control of Alaska Native Wireless.

b. De Facto Control

15. The existence of *de facto* control is determined on a case-by-case basis by evaluating the totality of circumstances in a particular case.⁴⁸ Although the determination of *de facto* control accordingly must be made individually for a particular applicant, the Commission has established minimum requirements of actual control that must be demonstrated by an applicant seeking entrepreneurial eligibility and designated entity status.⁴⁹ TPS Utilicom argues that Alaska Native Wireless fails to meet these minimum requirements under the controlling interest standard because certain investor protection provisions in Alaska Native Wireless’ LLC Agreement confer *de facto* control on AT&T Wireless.⁵⁰ Specifically, TPS Utilicom claims that AT&T Wireless has authority, in the form of

⁴⁶ See Applications at Exhibit E-3-5. The Commission has stated that permissible investor provisions, under our rules and precedent, do not confer control on an otherwise non-controlling interest holder. See discussion *infra* paragraph 16.

⁴⁷ The Commission has recognized that non-controlling investors may have a decision-making role in major corporate decisions that would affect their interests, such as “(1) issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt or otherwise encumbering corporate assets; (5) sale of major corporate assets; and (6) fundamental changes in corporate structure, including merger or dissolution.” Fifth MO&O, 10 FCC Rcd. at 448, ¶ 81.

⁴⁸ See Fifth MO&O, 10 FCC Rcd. at 446-47, ¶¶ 78, 80; see also Applications of AirGate Wireless, L.L.C., *Memorandum Opinion and Order*, 14 FCC Rcd. 11,827, 11,840, ¶ 26 (CWD 1999); *Baker Creek*, 13 FCC Rcd. at 18,712, ¶ 6.

⁴⁹ Section 1.2110(c)(2)(i)(A-C) of the Commission’s Rules states in relevant part that:

De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

- (A) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;
- (B) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and
- (C) The entity plays an integral role in management decisions.

47 C.F.R. § 1.2110(c)(2)(i)(A-C). See Fifth MO&O, 10 FCC Rcd. at 447, ¶ 80 (discussing particular matters concerning *de facto* control); see also Application of ClearComm, L.P., *Memorandum Opinion and Order*, 16 FCC Rcd. 18,627, 18,634-35, ¶ 13 (AIAD 2001) (discussing the minimum indicia of control for establishing control group status).

⁵⁰ See Petition at 3-4; see also TPS Utilicom Response at 9-11, ¶¶ 15-18. TPS Utilicom contends that Alaska Native Wireless’ LLC Agreement provides AT&T Wireless with seventeen investor protection provisions and that the fundamental decisions regarding business planning and operations are being exercised by negative control by an entity which clearly does not qualify for very small business status. See Petition at 4.

negative control, over key aspects of Alaska Native Wireless' business, such as the development of the business plan and budget, the incurrence of significant corporate debt and expenditures,⁵¹ and the approval of executive salaries.⁵²

16. Even though determining *de facto* control depends on the totality of the circumstances, the Commission has stated on several occasions that certain types of investor protection provisions generally are acceptable and do not *per se* confer control on an otherwise non-controlling investor.⁵³ The investor protection provisions that TPS Utilicom challenges are among the types that have been approved previously: allowing the non-controlling investor the ability to consult with the applicant on the formation of the business plan and budget⁵⁴ and approving the compensation of executive salaries, significant expenditures, and the incurrence of significant corporate debt.⁵⁵ AT&T Wireless' involvement with the formation of the business plan and budget is limited to consultation, since AT&T Wireless is not granted the power under the LLC Agreement to force Alaska Native Wireless to accept any of its suggestions.⁵⁶ AT&T Wireless' ability to approve the payment of salaries equal to or greater than \$200,000 per annum also is a permissible investor protection provision in the particular circumstances of Alaska Native Wireless' Applications, as it is limited in scope to senior executives of Alaska Native Wireless, who are likely to earn \$200,000 or more per annum.⁵⁷ Likewise, AT&T Wireless' right to approve corporate expenditures and debt in excess of two million dollars other than debt adopted in the budget or incurred by Alaska Native Wireless from financial institutions in an aggregate amount not to

⁵¹ TPS Utilicom contends that AT&T Wireless' negative control over payments or incurring any liability that is in excess of one million dollars individually or two million dollars in the aggregate and of the business plan will allow AT&T Wireless "control over the selection and deployment of facilities and equipment to operate the licensed facility" as well as the business plan. TPS Utilicom Response, at 10-11, ¶ 18. Alaska Native Wireless subsequently amended its LLC agreement to raise the amount of indebtedness and payments triggering that investor protection provision to two million dollars individually and ten million dollars in the aggregate. See Applications at Exhibit E.

⁵² TPS Utilicom argues that Alaska Native Wireless does not control 50 percent of the "relevant managing body" because "AT&T Wireless has negative control . . . over any agreement or arrangement to pay a director," which allegedly allows AT&T Wireless "to control a director of the Applicant by virtue of denying salary or reimbursement." Additionally, TPS Utilicom argues that Alaska Native Wireless does not have the authority to appoint, promote, demote and fire senior executives.⁵² TPS Utilicom bases these arguments on an investment protection provision allowing AT&T Wireless to approve salaries in excess of \$200,000. See TPS Utilicom Response, at 10, ¶ 17 & nn. 29-30.

⁵³ See, e.g., Fifth MO&O, 10 FCC Rcd. at 447-48, ¶ 81 ("With respect to provisions benefiting non-majority or non-voting shareholders, we recognize that inclusion of such provisions is a common practice to induce investment and ensure that the basic interests of such shareholders are protected. . . . We agree with petitioners that allowing such provisions enhances the ability of designated entities to raise needed financial capital from strategic investors thereby bolstering their financial stability and competitive viability. . . . We therefore clarify that under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control."); Applications of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferrees, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9797, ¶ 29 (2001); *GTE Corp.*, 15 FCC Rcd. at 14,077-78, ¶ 80-81; see also *Minnesota PCS*, 17 FCC Rcd. at 131, ¶ 12; *Baker Creek*, 13 FCC Rcd. at 18,714-15, ¶ 9; Applications of GWI PCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd. 6441, 6455, ¶ 33 (WTB 1997).

⁵⁴ See *Ellis Thompson Corp.*, *Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd. 7138, 7139, 7140-41, ¶¶ 11, 20, 24; *Summary Decision of Administrative Law Judge Joseph Chachkin*, 10 FCC Rcd. 12,554, 12,559, ¶¶ 32, 35 (1995).

⁵⁵ See, e.g., Fifth MO&O, 10 FCC Rcd. at 448, ¶ 81.

⁵⁶ See Applications at Exhibit E, 4.

⁵⁷ See *id.* at Exhibit E, 5; see also Fifth MO&O, 10 FCC Rcd. at 448, ¶ 81.

exceed ten million dollars is, considering the Applications as a whole, a permissible investor protection over the incurrence of significant extraordinary corporate expenditures and debt.⁵⁸ Thus, were we to consider TPS Utilicom's Petition on the merits, we would not conclude, based on the totality of the circumstances, that the investor protection provisions challenged by TPS Utilicom confer *de facto* control of Alaska Native Wireless on AT&T Wireless.

17. TPS Utilicom further argues that AT&T Wireless' 79.4 percent fully-diluted equity interest in Alaska Native Wireless automatically bestows *de facto* control on AT&T Wireless.⁵⁹ This argument simply misconstrues Commission requirements for determining control. The Commission has made clear that there is no minimum equity requirement for controlling interest holders, because that might hinder the ability of small businesses to acquire passive financing successfully and compete in the competitive communications marketplace.⁶⁰ The Commission has noted its concern that a lack of equity may indicate a lack of *de facto* control, but such financial arrangements alone are not dispositive.⁶¹ The Commission has explained that "[r]ather than focusing solely on equity holdings, applicants are required to identify those controlling interests that actually have control through application of the principles of either *de jure* or *de facto* control."⁶² To the extent that TPS Utilicom disagrees with the Commission's underlying eligibility rules for C and F block licenses and designated entity status, TPS Utilicom's Petition constitutes an untimely challenge to prior rulemakings and would be dismissable on that basis.⁶³

18. TPS Utilicom also argues that "the Commission has specifically stated that its 'concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of [] investor protections.'"⁶⁴ Under the controlling interest standard, however, such a corporate structure would be subject to close examination but would not automatically be deemed to confer control on such entity. In any event, AT&T Wireless does not provide management services for Alaska Native Wireless. As noted above, Alaska Native Wireless hired Edge Ventures to provide management services pursuant to the Management Agreement executed on October 19, 2001.

19. After Alaska Native Wireless executed the Management Agreement with Edge Ventures, TPS Utilicom filed a letter putting forth new arguments based on that agreement.⁶⁵ Even if we were to consider those arguments here, we would find them meritless, as they appear to be based on a misunderstanding of the facts, the Commission's requirements, or both. TPS Utilicom alleges, for example, that AT&T Wireless has a 40 percent voting membership in and is an affiliate and/or controlling interest of the manager, Edge Ventures.⁶⁶ Edge Ventures, however, is a wholly-owned subsidiary of Edge

⁵⁸ See *id.* at Exhibit E, 4-5; see also Fifth MO&O, 10 FCC Rcd. at 448, ¶ 81; *Minnesota PCS*, 17 FCC Rcd. at 131, ¶ 12 (based on totality of circumstances, limited partner's right to veto certain extraordinary expenses did not confer *de facto* control of applicant).

⁵⁹ See Petition at 3 ("With nearly 80% of the membership interest in the applicant, AT&T exercises control by virtue of its ownership.").

⁶⁰ See, e.g., Part 1 Order, 15 FCC Rcd. at 15,325-26, ¶ 65 ("We decline to adopt a minimum equity requirement for controlling interests because it is contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive financing"); see also *Minnesota PCS*, 17 FCC Rcd. at 130-31, ¶ 11; Auction 35 Procedure Public Notice, 15 FCC Rcd. at 19,501.

⁶¹ See Part 1 Order, 15 FCC Rcd. at 15,326, ¶ 66.

⁶² *Id.*

⁶³ See, e.g., *Minnesota PCS*, 17 FCC Rcd. 126, 129-30, at ¶ 9 (CWD 2002); *TPS Utilicom*, 16 FCC Rcd. at 14,841, ¶ 14.

⁶⁴ TPS Utilicom Response, at 8, ¶ 13 (quoting Fifth MO&O, 10 FCC Rcd. at 456, ¶ 96).

⁶⁵ See discussion *supra* note 25 (regarding timing of letter).

⁶⁶ See TPS Utilicom Letter at 2.

Wireless Holding Co., LLC (“Edge Holding”), which is ultimately controlled by Wayne Perry (“Perry”).⁶⁷ Although AT&T Wireless holds interests in other entities controlled by Perry, AT&T Wireless has no direct or indirect investment in Edge Ventures that we can discern based on the record before us.⁶⁸ Additionally, TPS Utilicom argues, in essence, that AT&T Wireless controls Edge Ventures because Perry is a member of AT&T Wireless’ board of directors.⁶⁹ TPS Utilicom does not explain how Perry’s position as a director of AT&T Wireless gives it control over Edge Ventures, an entity in which AT&T Wireless has no interest, much less how any such alleged control would result in AT&T Wireless’ controlling Alaska Native Wireless. Moreover, because Edge Ventures does not have a controlling interest in Alaska Native Wireless,⁷⁰ Perry’s being a member of AT&T Wireless’ board of directors, even if that somehow gave AT&T Wireless control over Edge, could not thereby give either Perry or AT&T Wireless a controlling interest in Alaska Native Wireless. Similarly, the mere fact that Perry is one of AT&T’s directors would not make AT&T an affiliate of Alaska Native Wireless unless it were shown that Perry has a controlling interest in both AT&T Wireless and Alaska Native Wireless.⁷¹ In short, TPS Utilicom’s additional allegations concerning the Management Agreement do not support a denial of Alaska Native Wireless’ Applications.

2. Lack of Candor

20. Finally, TPS Utilicom argues that Alaska Native Wireless has failed to be fully candid in its attempt “to qualify under the entrepreneur and very small business provisions . . . making [Alaska Native Wireless] ineligible to be a licensee.”⁷² We would not agree. TPS Utilicom fails to allege specific facts demonstrating that Alaska Native Wireless did not disclose information that would affect the determination of Alaska Native Wireless’ eligibility as an entrepreneur or designated entity. TPS Utilicom’s argument appears to be that merely failing to attribute the revenues of AT&T Wireless itself constitutes a disqualifying lack of candor. As discussed above, however, AT&T Wireless’ revenues would need to be attributed only if it were an affiliate under our rules.⁷³ The possibility always exists that the Commission may determine that an interest an applicant has concluded is non-controlling is, in fact, controlling and, therefore, attributable. Under such a scenario, the applicant’s failure to satisfy the controlling interest standard would not automatically compel a finding that the applicant lacked candor.⁷⁴ For this reason, as well as for the reasons discussed above, we would deny the TPS Utilicom Petition to Deny Alaska Native Wireless’ Applications even if we were to address it on the merits.

⁶⁷ See Letter from Michele C. Farquhar and Angela E. Giancarlo, Counsel to Alaska Native Wireless, to Linda Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, dated Dec. 20, 2001, at 8, Exhibit A.

⁶⁸ See Alaska Native Wireless Letter at 8, Exhibit A.

⁶⁹ See TPS Utilicom Letter at 1.

⁷⁰ See *supra* note 45 (discussing the Management Agreement).

⁷¹ See 47 C.F.R. §§ 1.2110(c)(i)(F) (director of an entity that controls an applicant shall be considered to have a controlling interest in the applicant), 1.2110(c)(5)(i)(A) (an entity is an affiliate of an applicant if such entity directly or indirectly controls or has the power to control the applicant), 1.2110(c)(5)(vii) (affiliation generally arises through common management, for example, where a director serves as the majority or otherwise as the controlling element of the board of directors of another entity).

⁷² TPS Utilicom Response at 2. See also Petition at 5-6.

⁷³ See *supra* notes 35-36 and accompanying text.

⁷⁴ In any case, Alaska Native Wireless provided the required ownership information – including the existence of AT&T Wireless’ ownership interests – within each of its Applications and also provided additional information and documents regarding the ownership and organization of Alaska Native Wireless in response to staff inquiries.

IV. ORDERING CLAUSE

21. Accordingly, IT IS ORDERED that, pursuant to Section 4(i), 309(d)(1) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(1), 309(j), and sections 0.331, 1.2108 and 24.830 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.2108, 24.830, the Petition to Deny filed by TPS Utilicom, Inc. on March 9, 2001 is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O'Brien Ham
Deputy Chief
Wireless Telecommunications Bureau