

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

CC Docket No. 90-257

In re Applications of

LA STAR CELLULAR File No. 27161-CL-P-83
TELEPHONE COMPANY

For construction permit for
facilities operating on Block B
in the Domestic Public
Cellular Radio
Telecommunications Service in
the New Orleans, Louisiana MSA

and

NEW ORLEANS File No. 29010-CL-P-83
CGSA, INC. File No. 29181-CL-P-85

To amend its construction
permit for facilities
operating on Block B in the
Domestic Public Cellular
Radio Telecommunications
Service, Call Sign KNK224, in
the New Orleans, Louisiana MSA

Appearances

L. Andrew Tollin, Luisa L. Lancetti, Pierre J. LaForce, Richard A. Hindman and F. Thomas Moran, and Martin T. Walsh and Marcy A. Bass (of counsel) on behalf of New Orleans CGSA, Inc.; *Arthur V. Belendiuk, Lisa Thornton, Robert W. Healy, Russell E. Arkin, and J. Daniel Gillick* on behalf of La Star Cellular Telephone Company; *Alan Y. Naftalin and Herbert D. Miller, Jr.* on behalf of United States Cellular Corporation; and *R. Barthen Gorman* on behalf of Chief, Common Carrier Bureau.

DECISION

Adopted: June 5, 1992; Released: June 15, 1992

By the Commission:

I. INTRODUCTION

1. In this proceeding, New Orleans CGSA, Inc. (NOCGSA), which holds a license to operate a cellular telephone system on frequency Block B in the New Orleans MSA, seeks to extend its geographic service area into St. Tammany Parish, Louisiana. La Star Cellular Telephone Company (La Star) filed a mutually exclusive application to operate a cellular system in St. Tammany

Parish. Now before the Commission is an initial decision by Administrative Law Judge Joseph Chackin dismissing La Star's application as unacceptable for filing. *La Star Cellular Telephone Co.*, 6 FCC Rcd 6860 (I.D. 1991).

2. The ALJ found that La Star is ineligible to file for frequency Block B because it is not controlled by a wireline carrier with a presence in the cellular market as required by 47 C.F.R. § 22.902(b).¹ La Star is a joint venture owned 51 percent by SJI Cellular, Inc. (SJI) and 49 percent by Star Cellular Telephone Co. (Star). SJI's parent company, SJI, Inc., also owns Lafourche Telephone Company (Lafourche), a telephone company serving a portion of the New Orleans MSA. SJI is therefore eligible to apply for frequency Block B in the New Orleans MSA. By contrast, neither Star's parent company, United States Cellular Company (USCC) nor USCC's parent, Telephone and Data Systems, Inc. (TDS), is eligible to apply in New Orleans. The ALJ found that Star, not SJI, controls La Star, making La Star ineligible. La Star has appealed its dismissal.²

3. For the reasons that follow, we find that the record demonstrates that La Star is not controlled by a wireline-eligible carrier.³ We therefore agree with the ALJ that La Star's application should be dismissed and NOCGSA's application should be granted.⁴

II. INITIAL DECISION

4. In evaluating the control of La Star, the ALJ made findings on the circumstances surrounding the formation of La Star and the prosecution of its application. On June 7, 1982, NOCGSA's predecessor-in-interest, American Mobile Phone Service, Inc. (AMPS), filed its original application to serve the New Orleans MSA.⁵ SJI, headquartered in LaRose, Louisiana, 50 miles south of New Orleans, did not file a mutually exclusive application. AMPS application was granted on July 11, 1983. 6 FCC Rcd at 6861 ¶¶ 10-12.

5. On August 1, 1983, AMPS filed an application to expand its geographic service area by constructing two cells in St. Tammany Parish, which lies across Lake Pontchartrain from the rest of the New Orleans MSA. La Star filed its mutually exclusive application to construct six cells in St. Tammany parish on September 16, 1983. 6 FCC Rcd at 6861 ¶¶ 13-14.

6. The sequence of events leading to the formation of La Star and the filing of its application began earlier in 1983. In March 1983, Star (subsequently La Star's 49 percent partner) filed an application for a cellular system on Block B in Baton Rouge, Louisiana. At that time, Star was 51 percent owned by Cail Enterprises, Inc. (wireline eligible in Baton Rouge) and 49 percent owned by Maxcell Telecom Plus (wireline ineligible). Shortly thereafter, Cail's principal, Alvin E. Kimble, told John A. Brady, Jr., the president of SJI, that one of Maxcell's principals, William Erdman, had a proposal for St. Tammany. (Maxcell has filed in several wireline markets as a minority partner and has filed in several non-wireline markets as a controlling partner.) 6 FCC Rcd at 6862 ¶¶ 16-21.

7. The ALJ found that from the beginning Maxcell's Erdman dominated the formation of La Star and the prosecution of its application, whereas SJI's Brady remained passive. John Brady and his brother James met with Erdman in Washington to execute a joint venture agreement that had been prepared and delivered by Erdman. The agreement was very similar to the agreement involved

in Baton Rouge and provided that La Star would be governed by a five-person management committee, three of whose members would represent the eligible partner. The agreement contained provisions requiring an 80 percent vote of La Star's management committee for 13 different actions including the appointment and termination of the general manager and the settlement of litigation (thereby effectively giving Star a veto over these actions). Erdman refused to modify these provisions although Brady's local attorney had advised Brady to seek their modification. The agreement provided that Star would finance the prosecution of the application and that SJI would have no financial exposure until after a construction permit had been granted. 6 FCC Rcd at 6862-63 ¶¶ 23-32.

8. Erdman then arranged for the preparation of La Star's application. He hired William Franklin, who had previously been associated with Maxcell, as La Star's attorney. Franklin, in turn, hired Dr. Andy Anderson and Dr. James Wright, both of whom were associated with Maxcell, to prepare a demand and demographic study. A Maxcell engineer, Nadia Adawi, did the engineering work for the application. A Star principal, I. V. Jeansonne, executed the cell site agreements for La Star and Star worked with a local real estate agent, Maxey Resweber, in this regard. Franklin, Anderson, Wright, Adawi, and Jeansonne also worked on the Baton Rouge application. SJI's Brady did not participate in any of these matters and testified that he gave Erdman and Franklin unlimited authority. Erdman also obtained a bank commitment from the American Security Bank for La Star (as was the case in Baton Rouge). La Star's cost-based rate structure was designed by Cornell, Pelcovits & Brenner Economists, who previously designed a similar rate structure for the Baton Rouge application. 6 FCC Rcd at 6863-64 ¶¶ 33-39, 42-43.

9. On October 1, 1984, the Common Carrier Bureau dismissed La Star's application as untimely (because it had not been filed during the original 1982 filing window for the New Orleans MSA). The ALJ found that Maxcell, rather than SJI's Brady, took the initiative in appealing this action. Maxcell General Counsel, Kent Y. Nakamura, hired Arthur V. Belendiuk, who conducted litigation for Maxcell in other proceedings, as La Star's new lawyer. Belendiuk and Nakamura filed pleadings in connection with an unsuccessful appeal to the Commission. Belendiuk then filed an appeal with the United States Court of Appeals for the District of Columbia Circuit. On April 7, 1987, the court ordered the Commission to reinstate La Star's application. 6 FCC Rcd at 6865 ¶¶ 44-46. See *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1560 (D.C. Cir. 1987).

10. Belendiuk thereupon retained personnel to do further work on the application. He hired Richard Biby as a consulting engineer, and once again retained Anderson and Wright to prepare demographic and demand studies, and Resweber to do cell site work. Brady was not involved in these decisions. 6 FCC Rcd at 6865 ¶ 47.

11. The ALJ noted that, during the pendency of La Star's appeal, SJI applied in its own right for a cellular system in the Houma-Thibodaux, Louisiana MSA. The ALJ found it significant that in prosecuting that application, which did not involve Maxcell, SJI proceeded in a manner totally different from that in New Orleans. SJI used a different law firm and bank. It did not use Belendiuk, Biby, Anderson or Wright, or Resweber. 6 FCC Rcd at 6865 ¶ 48.

12. Shortly after the court reinstated La Star's application, Star's principals decided to sell their 49 percent interest in La Star. SJI declined to exercise its option under the joint venture agreement to purchase Star's interest. On July 31, 1987, USCC purchased this interest for \$327,000. Like Maxcell, USCC is a company involved in numerous cellular systems. Despite the change in ownership, the parties did not modify the joint venture agreement, and SJI did not meet with USCC personnel until after USCC acquired the 49 percent interest. 6 FCC Rcd at 6856 ¶¶ 49-52.

13. The ALJ found that after the sale SJI did not observe the formalities of the joint venture agreement or assume control of La Star. Instead, the ALJ found that USCC took over the control of La Star formerly exercised by Maxcell.

14. The ALJ found that, after USCC acquired its interest, La Star's management committee met only once, in August 1987.⁶ Following that meeting, in Chicago, USCC assumed all responsibilities for preparing and prosecuting La Star's application. During this subsequent period, contrary to the provisions of the joint venture agreement, no management committee meetings were held, no financial audits were conducted, no general manager was appointed, and no engineering subcommittee was established. 6 FCC Rcd at 6866 ¶¶ 55, 57.

15. On October 26, 1987, La Star filed an amendment to its application. The ALJ found that, aside from updating its own ownership information, SJI had no involvement in preparing this amendment. Rather, USCC handled all of La Star's affairs. Shortly before the amendment was filed, USCC's accounting manager, Mark Krohse, prepared a memorandum listing various La Star matters requiring attention. SJI did not receive a copy of the memo. Krohse and USCC president, H. Donald Nelson, handled La Star's day-to-day finances. USCC paid La Star's expenses and kept La Star's financial records, which SJI never reviewed. USCC's Nelson, Richard Goehring (vice president of engineering and operations), and Kenneth Meyers (vice president of finance, treasurer) prepared a budget for La Star. Nelson dealt with Anderson and Wright concerning their demographic studies. Goehring coordinated the engineering work with La Star's consulting engineers. Krohse prepared La Star's proposed rate structure using data from other USCC cellular systems. Nelson and Goehring executed cell site documents in USCC's name. La Star's financial qualifications were based on a loan commitment by USCC's parent company, TDS. 6 FCC Rcd at 6866-68 ¶¶ 58-74, 76-77.

16. The ALJ found that after La Star filed its amendment, USCC continued to handle La Star's day-to-day business without any significant involvement by SJI. USCC prepared a reply to NOCGSA's opposition to La Star's amendment. Later, in February 1988, USCC prepared an application for interim authority to operate in St. Tammany Parish. 6 FCC Rcd at 6868-69 ¶¶ 78-82.

17. The ALJ also noted another matter indicating the degree of USCC's involvement. USCC (and TDS) prepared La Star's income tax returns. Beginning in 1989, Star (USCC) was designated La Star's tax partner and the address on La Star's tax returns was USCC's. In 1988, the IRS contacted SJI's Sinclair Crenshaw (SJI's house counsel and contact point for tax matters) because it did not receive La Star's 1988 tax return. Crenshaw merely referred the IRS' inquiry to USCC's Krohse, who never discussed the matter with Crenshaw. When the IRS made a

second inquiry in 1989, about the missing 1988 return, Crenshaw's secretary referred the matter to Krohse without notifying Crenshaw. 6 FCC Rcd at 6869 ¶¶ 83-87.

18. The ALJ found it significant that SJI did not take steps to involve itself in La Star's affairs until after the Commission designated an issue as to the control of La Star on May 31, 1990. Only after that time did SJI keep La Star's financial records, and sign site renewals, and deal directly with La Star's engineering consultant. Additionally, at that time, SJI first began to share the expenses of prosecuting La Star's application.⁷ 6 FCC Rcd at 6868-70 ¶¶ 75, 89-93.

19. In view of the foregoing, the ALJ concluded that, from the outset, Maxcell, and later USCC, totally dominated La Star's affairs. He further concluded that SJI had failed to explain its own nonparticipation in La Star's affairs, and, for example, had not demonstrated that it had validly delegated responsibilities to USCC or Belendiuk. Consequently, the ALJ concluded that, because La Star was not controlled by a local wireline carrier, it was ineligible to apply for the Block B frequency in New Orleans and that its application should be dismissed. 6 FCC Rcd at 6885-88 ¶¶ 212-23.

III. EXCEPTIONS

20. La Star and USCC⁸ contend that the ALJ did not have a valid basis to find that La Star was ineligible. They argue that the ALJ should not have taken into account events that occurred before USCC acquired its interest in La Star in 1987. They read the issue discussed in the hearing designation order -- whether SJI "maintains" control of La Star -- as referring only to SJI's current control, since the issue is worded in the present tense.

21. The parties also contend that the ALJ incorrectly evaluated the post-acquisition record. According to the parties, USCC's involvement in the preparation and prosecution of La Star's application has little probative value. They maintain that, once La Star receives a grant, SJI can be expected, in view of its financial interest in La Star's operations, to assert control over system operations, as it has historically done with respect to its other properties. They submit that USCC considers the New Orleans system as a relatively trivial part of its business and will treat it as a passive investment. The parties claim that SJI validly delegated the relatively ministerial function of preparing and prosecuting the application to USCC, but retained the right to make basic decisions. The parties further claim that SJI exercised its control by giving instructions to attorney Belendiuk, who, in turn, gave directions to USCC. The parties point out that, unlike a limited partner, USCC was not barred from playing this role. In this regard, the parties contend that prior to a grant there was no need to conduct management committee meetings or hire a general manager, since there was no ongoing business to manage. They claim that SJI's Brady made specific decisions indicating his control.

22. Additionally, the parties assert that there is no evidence that USCC ever coerced SJI by either: (1) exercising the provisions of the joint venture agreement giving USCC a veto over certain actions,⁹ or (2) threatening to withhold financial support.

23. Finally, the parties contend that the ALJ exaggerated USCC's role in preparing and prosecuting the application. Rather, they urge that USCC simply performed ministerial functions at the request of SJI or Belendiuk. Specifically,

they submit that: (1) USCC did not select cell sites, but merely routinely administered their renewal; (2) USCC personnel did no engineering work but only paid La Star's outside consultant to do so; (3) USCC merely contributed some factual information to the preparation of La Star's 1987 amendment; (4) because La Star had no income, the preparation of its tax returns was a mere formality; and (5) the TDS financial commitment to La Star was an arm's length transaction made after Brady was unable to get more favorable terms from any bank.

IV. DISCUSSION

24. We find that the record in this case amply demonstrates that SJI does not control La Star, and, therefore, La Star is ineligible to apply for frequency Block B in the New Orleans MSA.¹⁰ La Star's application is unacceptable for filing and will be dismissed.¹¹

25. At the outset, we disagree with La Star's arguments contesting the scope and probative weight of the record compiled here. We find that: (1) the record as to the control of La Star prior to USCC's purchase of an ownership interest in 1987 is relevant, and (2) the evidence as to the control of the preparation and prosecution of La Star's application is probative in this case. The record as to these matters indicates that SJI has not controlled La Star. As the ALJ's findings (which La Star does not challenge in any significant respect) demonstrate, during the pre-1987 period Maxcell, not SJI, controlled La Star's affairs. Additionally, as appears in the ALJ's findings and the discussion below, USCC's control of La Star is amply supported by the evidence concerning the prosecution of La Star's application after 1987.

26. In this regard, the crucial consideration is that the issue of control is essentially factual. The Commission examines not only the applicant's formal legal control but also the special factual circumstances indicating that a party which claims to have only a minority interest actually controls the applicant. *See WWIZ, Inc.*, 36 FCC 561, 579 ¶ 3 (1964). *See also Data Transmission Co* 44 FCC 2d 935, 936 (1974). We further take into account a party's demonstration of power to dominate the management of the applicant's affairs. *News International, PLC*, 97 FCC 2d 349, 355-56 ¶ 16 (1984), *citing Benjamin L. Dubb*, 16 FCC 274, 288-89 ¶ 3 (1951).

27. Because of the factual nature of this inquiry, we must give probative weight to the facts as they are developed on the record. Where a substantial question exists about the applicant's control, as here, we cannot simply accept as conclusive a party's unsupported, self-serving claim that it does, or will, exercise control. Hence, in this case, we cannot simply assume that SJI exercised control over La Star prior to USCC's participation in 1987. Absent a reliable showing that SJI, and not USCC, controlled La Star's affairs after 1987, we are justified in considering whether SJI controlled La Star prior to 1987, since USCC may have acquired *de facto* control previously exercised by Maxcell when it acquired Maxcell's interest.¹² *See Evergreen Broadcasting Co.*, 6 FCC Rcd 5599, 5600-01 ¶ 12 (1991) (in determining control of an applicant, the Commission will examine pre-formation activities of the parties, where the post-formation record is inconclusive). Indeed, the record here shows a consistent pattern, both before and after 1987, of SJI's passivity in La Star's affairs in relation to Maxcell and later USCC.

28. Similarly, as the parties point out, La Star does not currently operate its proposed St. Tammany Parish system, and we have no way of observing the *de facto* control of such a system.¹³ In the absence of such evidence, the record as to the preparation and prosecution of La Star's application provides the most probative basis to evaluate the control of La Star. For the reasons already stated, we cannot accept at face value La Star's claim that SJI will exercise control once it has received a construction permit.

29. In this regard, we do not credit the argument that SJI can be expected to control La Star because it has operated cellular systems in its own right in the past, because USCC has been a passive investor in some cellular systems in the past and because USCC considers its interest in La Star to be of minor importance. We cannot ignore what the record shows about the parties' treatment of this system specifically, especially since an incentive may have existed for SJI to "lend" its wireline eligibility to an otherwise ineligible applicant. We note that SJI had the opportunity to apply for authorization in New Orleans in its own right, when AMPS filed its original application, but chose not to do so. Tr. 837, 860. We also note that, in 1986, SJI prosecuted an application in its own right in the Houma-Thibodaux MSA and obtained legal counsel, engineering support, and a financial commitment from sources other than those used in New Orleans. Tr. 900-02, 962-63. Thus, the record indicates that SJI did not proceed in New Orleans as it did elsewhere. As a related matter, we see no justification for taking into account La Star's post-designation "corrective action" designed to demonstrate that SJI has recently sought to establish additional control over La Star. See note 20, *infra*. Crediting such belated attempts made under Commission scrutiny years after the filing of La Star's application would render the wireline eligibility requirement inefficient and unreliable.

30. With the foregoing in mind, we turn to La Star's principal argument, that USCC's involvement in the prosecution of La Star's application represented a valid delegation of day-to-day administrative functions from SJI to USCC. This point is critical since (1) La Star does not seriously challenge the ALJ's finding that prior to 1987 Maxcell controlled La Star's affairs, (2) La Star does not dispute that after 1987 USCC participated extensively in the prosecution of La Star's application, and (3) the record contains little evidence of SJI's active participation in La Star's affairs. Thus, unless La Star can demonstrate that USCC's extensive participation reflected a delegation of authority from SJI, it has no basis to dispute that USCC's activities reflected USCC's own control, which merely perpetuated the pattern established by Maxcell. (It is therefore irrelevant that, as La Star argues, USCC is not barred from participating in La Star's affairs, as a limited partner would be.) As La Star correctly points out, the Commission has said in, for example, *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715-16 (1981), that a licensee may delegate its day-to-day operations to another entity without transferring control, where the licensee retains the right to determine basic policies governing these operations. However, in *Southwest Texas*, the licensee made a specific affirmative showing that it had in fact actively established operational policies. The licensee's corporate minutes reflected that its board had formally adopted operating policies that were, in fact, carried out without delay or the need for concurrence by the licensee's delegate.¹⁴

31. Here, by contrast, the record conspicuously fails to support SJI's claim that it determined La Star's policies. Significantly, the record reflects no regular meetings (indeed, only a single meeting during USCC's ownership) -- even telephone conferences -- of the management committee designated by the joint venture agreement to govern La Star.¹⁵ Nor does the record contain minutes or other records of decision making consistent with the joint venture agreement. La Star thus failed to show that SJI exercised control over La Star's affairs as provided in the joint venture agreement -- by virtue of SJI's majority on the management committee. Compare *News International, PLC*, 97 FCC 2d at 358 ¶ 21 ("This is not a case with an existing record showing that the parties have departed from their agreement and representations."). We see no merit to La Star's argument that the failure to hold management committee meetings can be explained because the committee was not needed in the absence of an ongoing business. The fact remains that the management committee (whether acting formally or informally) reflects the provisions of the joint venture agreement. We cannot simply assume that a failure to abide by these provisions is innocuous.

32. Although La Star makes no attempt to demonstrate that SJI exercised control through the management committee, as provided in the joint venture agreement, La Star does claim that SJI exercised control in an alternative manner, which is not provided for in the joint venture agreement. According to this explanation, SJI unilaterally controlled La Star by means of instructions to USCC that were conveyed to USCC by attorney Belendiuk. The record does not, however, support this claim. La Star does not explain why USCC would be willing to forego its right to participate in management committee deliberations in this manner. Moreover, SJI's connection with Belendiuk is tenuous. Belendiuk was recommended as La Star's counsel by Maxcell's general counsel, Nakamura; SJI's Brady had not met Belendiuk at that time. Tr. 1120-22. Nakamura worked with Belendiuk on La Star's litigation. *Id.* And, according to Commission records, Belendiuk also represented Maxcell in related proceedings.¹⁶ By contrast, when SJI prosecuted its Houma-Thibodaux application, it used -- and continues to use -- counsel other than Belendiuk. Tr. 900-01. Thus, the record ties Belendiuk more closely to La Star's original minority partner rather than to SJI.

33. Significantly, La Star fails to cite any evidence -- beyond generalized, self-serving claims -- to support the contention that SJI supervised Belendiuk. Rather, the documentary evidence and the specific testimony of the witnesses describes circumstances in which, to all appearances, Belendiuk was USCC's attorney and USCC supervised the prosecution of the application. Belendiuk's communications to USCC do not demonstrate otherwise, since attorneys typically advise their clients how to proceed, and Belendiuk's actions can readily be interpreted as such typical conduct.

34. The deficiencies in La Star's showing in this regard becomes particularly evident when the actions that Brady claims demonstrate that SJI controlled La Star (La Star Exh. 12 at 12-17) are measured against the record as a whole.¹⁷ For example, Brady claimed: "In 1987, I directed the preparation of La Star's 1987 amendment." *Id.* at 14. What the record demonstrates, however, is USCC's supervision of the work related to the amendment. Matters related to the amendment -- the need to prepare a budget, to do work on cell sites, and to do engineering work --

were discussed in a September 28, 1987 memorandum from USCC official, Krohse to his superior Nelson. NOCGSA Reb. Exh. 22 at 2. Work on the amendment was coordinated by USCC officials (as suggested by the memorandum). Krohse himself prepared the budget based on information supplied by La Star's consultant, Anderson, and also prepared La Star's proposed rates, using a USCC reference book as a source (although the rates were supposedly cost-based). Tr. 1531, 1552-53, 1556. Nelson dealt directly with Anderson concerning Anderson's demographic study. NOCGSA Exh. 17; tr. 1371-74. Goehring coordinated engineering matters related to the amendment. NOCGSA Reb. Exhs. 18-20; tr. 1354, 1366, 1479, 1481, 1483-1485, 1487. Nelson signed cell site documents himself. NOCGSA Reb. Exh. 16, Bates Nos. 105-08; tr. 1368.

35. By contrast, the record contains no evidence that any of these matters were coordinated with Brady or any SJI personnel. Nelson testified that he did not discuss the amendment with Brady at all and received no specific requests directly from SJI or the management committee. Tr. 1448-49, 1453-54. At the hearing, Brady did not know, for example, how La Star's proposed rates had been calculated or who had calculated them. Tr. 1001-02.

36. Similarly, Brady states that: "I was advised of the fact that NOCGSA had filed a petition to deny La Star's application and amendment. I directed counsel to prepare and file an appropriate reply." La Star Exh. 12 at 15. The record, however, contains a February 19, 1988 memorandum from Krohse to Nelson, Meyers, and Goehring stating that Krohse had spoken to La Star's counsel and discussing the need to respond to the allegations in NOCGSA's petition to deny (that La Star had specified insufficient funds to construct the proposed system). NOCGSA Reb. Exh. 22 at 1. Goehring testified that in response to these concerns he reviewed past USCC budgets, concluded that La Star's budget was sufficient, and executed an affidavit used in responding to NOCGSA's petition. Tr. 1477-79. The record discloses no participation or oversight by SJI.

37. Also inconsistent with SJI's claimed control of La Star was SJI's lack of oversight in financial matters. Until the Commission designated a control issue against La Star, SJI had no participation in or supervision over La Star's finances. The joint venture agreement provided that USCC would pay all expenses for the prosecution of La Star's application and would be reimbursed out of the station's future revenues or external financings. SJI would have no liability until after grant of a construction permit. La Star Exh. 12, Att. B at 19. Accordingly, during the prosecution of La Star's application, USCC personnel handled all aspects of La Star's finances. Krohse issued checks for La Star expenses after they had been approved by Nelson. NOCGSA Reb. Exh. 9, Bates Nos. 169, 170. La Star's financial records were kept in Chicago, where USCC had its headquarters, and SJI received no copies. Tr. 967, 970.¹⁸

38. In some respects, USCC commingled La Star's business and its own. La Star expenses were assigned to the same account (#1306000) as some of USCC's own expenses. NOCGSA Reb. Exh. 25; tr. 1537-38, 1540. In at least one instance, an attorney from a firm retained by USCC (as opposed to La Star) requested payment of a La Star expense. NOCGSA Reb. Exh. 9, Bates No. 170; tr. 1539-40. That same attorney received a copy of a letter informing La Star's engineer of a change in invoice procedures. NOCGSA Reb. Exh. 24; tr. 1533.¹⁹

39. SJI, by contrast, received no documentation of La Star's expenses (Brady claimed that SJI was able to make an estimate of what they were based on oral statements Tr. 972-73, 1008). Despite the fact that USCC's expenses were to be reimbursed out of La Star's profits (including SJI's), SJI was unsuccessful on more than one occasion in obtaining an accounting from USCC -- although the joint venture agreement provided that an annual audit would be conducted. La Star Exh. 12, Att. B at 11; tr. 973, 1008-09, 1186-87.²⁰

40. In summary, the record fails to substantiate La Star's bald claim that SJI retained control over basic policy decisions in the prosecution of La Star's application. Rather, to all appearances, USCC controlled the applicant. In view of SJI's passivity, there is no force to La Star's argument that the record does not disclose any instances in which USCC coerced SJI. The record shows no need for coercion. The record fully supports the conclusion that La Star is not controlled by SJI, the wireline-eligible carrier, and that therefore its application should be dismissed.

V. ORDERING CLAUSES

41. ACCORDINGLY, IT IS ORDERED, That the Supplemental Motion to Strike filed January 10, 1992 by La Star Cellular Telephone Company IS DENIED.²¹

42. IT IS FURTHER ORDERED, That the Exceptions to Initial Decision of Administrative Law Judge Joseph Chachkin filed December 26, 1991 by La Star Cellular Telephone Company, and the Exceptions of United States Cellular Corporation filed December 26, 1991 ARE DENIED; that the application of La Star Cellular Telephone Company (File No. 27161-CL-P-83) IS DISMISSED with prejudice; and that the applications of New Orleans CGSA, Inc. (File Nos. 29010-CL-P-83, 29181-CL-P-85) ARE GRANTED.

43. IT IS FURTHER ORDERED, That the Motion for Declaratory Ruling Seeking to Terminate Hearing Controversy, and the Motion for Stay, filed November 5, 1991 by La Star Cellular Telephone Company, the Exceptions of NOCGSA to Initial Decision filed December 26, 1991, and the Motion to Strike filed January 6, 1992 by La Star Cellular Telephone Company ARE DISMISSED as moot.

44. IT IS FURTHER ORDERED, That the Petition for Leave to File Minor Amendment filed January 27, 1992 by Louisiana CGSA, Inc. IS GRANTED, and the associated amendment IS ACCEPTED,²² and the Motion to Strike and the Motion to Dismiss filed February 10, 1992 by United States Cellular Corporation, the Motion to Strike filed February 27, 1992 by United States Cellular Corporation, and the Petition for Reconsideration filed March 17, 1992 by United States Cellular Corporation ARE DISMISSED as unauthorized.²³

45. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ The ALJ also made contingent findings on the comparative merits of the La Star and NOCGSA proposals and preferred NOCGSA. In light of the ALJ's dismissal of La Star, these findings are moot.

² Now before the Commission are: (1) a Motion for Declaratory Ruling Seeking to Terminate Hearing Controversy filed November 5, 1991 by La Star, and oppositions filed November 15, 1991 by the Common Carrier Bureau and November 20, 1991 by NOCGSA; (2) a Motion for Stay filed November 5, 1991 by La Star, and oppositions filed November 12, 1991 by NOCGSA and the Bureau; (3) Exceptions to Initial Decision of Administrative Law Judge Joseph Chachkin filed December 26, 1991 by La Star, and Exceptions of United States Cellular Corporation filed December 26, 1991, and replies filed January 6, 1992 by NOCGSA and the Bureau; (4) a Supplemental Motion to Strike [NOCGSA's reply] filed January 10, 1992 by La Star; (5) Exceptions of NOCGSA to Initial Decision filed December 26, 1991, and replies filed January 6, 1992 by La Star and USCC; (6) a Motion to Strike [NOCGSA's exceptions] filed January 6, 1992 by La Star; (7) a Petition to File Minor Amendment filed January 27, 1992 by Louisiana CGSA, Inc. (LCI) [NOCGSA's successor-in-interest]; (8) a Motion to Strike [LCI's amendment] and a Motion to Dismiss [NOCGSA's application] filed February 10, 1992 by USCC, and an opposition filed February 24, 1992 by LCI; and (9) a motion to strike [a petition for leave to amend granted by FCC 92I-013 (Mar. 13, 1992)] filed February 27, 1992 by USCC and an opposition filed March 10, 1992 by LCI, and (10) a Petition for Reconsideration [of FCC 92I-013] filed March 17, 1992 by USCC, an opposition filed March 31, 1992 by LCI, and a reply filed April 1, 1992 by USCC.

³ Because our conclusion in this regard results in the dismissal of La Star's application, we do not reach the question raised in NOCGSA's exceptions of whether La Star's principals lacked candor in their hearing testimony concerning the control of La Star. NOCGSA's exceptions and La Star's motion to strike those exceptions will be dismissed as moot. Questions regarding the conduct of SJI and USCC in this case may be revisited in light of the relevant findings and conclusions here in future proceedings where the other interests of these parties have decisional significance. See *Character Qualifications*, 102 FCC 2d 1179, 1223-24 ¶ 92 (1986), *recon. denied*, 1 FCC Rcd 421 (1986).

⁴ Because La Star is ineligible to receive a grant in this proceeding, its contention that the Commission should terminate this hearing and conduct a lottery between NOCGSA and La Star is moot. La Star's motion to this effect and its related stay motion will be dismissed.

⁵ AMPS was a subsidiary of South Central Bell Telephone Company, which provided wireline service to New Orleans. After the AT&T divestiture, AMPS' cellular interests in the region were transferred to BellSouth Corporation. 6 FCC Rcd at 6861 ¶ 10, 6890 n.8.

⁶ Prior to the USCC acquisition, the management committee met only once, about six months before the USCC acquisition. 6 FCC Rcd at 6865-66 ¶ 54.

⁷ Additionally, La Star sought to amend its application to modify the provisions of the joint venture agreement that the Commission cited in designating an issue against La Star.

⁸ USCC was permitted to intervene in this proceeding as a party by *La Star Cellular Telephone Co.*, 6 FCC Rcd 1245 (1991).

⁹ The parties claim that the Commission has previously approved provisions of this nature. In any event, the parties assert that they ultimately modified the provisions.

¹⁰ La Star argues that, under 47 C.F.R. § 22.902(b), it does not have to be wireline eligible because NOCGSA filed an expansion application and not an initial application in the MSÄ. We disagree. In specifying the duration of the wireline set-aside, we provided that it would remain in effect until after licensees had an opportunity to file fill-in applications, as NOCGSA has done. *Amendment of the Commission's Rules*, 4 FCC Rcd 5377, 5380-81 ¶ 24 (1989). In any event, the wireline set-aside was clearly in effect when La Star originally filed its application. See *Cellular Radio Service (Lottery Selection)*, 55 RR 2d 823, 824 ¶ 3 (1984) (the wireline set-aside was originally scheduled to expire April 8, 1984). The set-aside pertains to application eligibility and thus to the acceptability of La Star's application. *Cellular Communications Systems*, 93 FCC 2d 683, 692 ¶ 24 (1983). See also *James F. Rill (Communications Industries-PacTel Transfer)*, 60 RR 2d 583, 593 ¶ 32 (1986) (purpose of the set-aside is satisfied by the issuance of construction permits to eligible parties).

¹¹ We therefore do not reach La Star's exceptions dealing with the comparative aspects of this case. In particular, we need not address La Star's contention that the Commission erred by permitting NOCGSA to amend its CGSA to upgrade its coverage. La Star also argues that acceptance of such a major amendment should have resulted in dismissal of NOCGSA's application. This argument, however, was correctly rejected in the hearing designation order. *La Star Cellular Telephone Co.*, 5 FCC Rcd 3286, 3287 ¶ 9 (1990).

¹² In any event, the wording of the issue designated -- "whether SJI maintains control over the decisions of La Star" -- is broad enough to encompass both past and present actions.

¹³ Thus, the criteria set forth in *Intermountain Microwave*, 24 RR 983, 984 (1963), which refer to the control of an operating facility, have less relevance here than in some other cases. Compare *Brian L. O'Neill*, 6 FCC Rcd 2572, 2574-76 ¶¶ 25-31 (1991) (applying the *Intermountain* criteria to the alleged premature transfer of control of an operating system).

¹⁴ Additionally, in *Southwest Texas*, the licensee was a noncommercial broadcaster and therefore totally reliant on grants for financial support. 85 FCC 2d at 716. This factor minimized the significance of the financial participation of the licensee's delegate. More generally, as here, control of finances is a powerful and effective method of control of any business. See *Cornbelt Broadcasting Corp.*, 15 FCC 2d 315, 316 ¶ 5 (1968).

¹⁵ La Star's joint venture agreement provides that management committee meetings be held at least once quarterly and may be by telephone conference call. The agreement further provides that minutes of the meeting be transmitted to each member of the management committee. La Star Exh. 12, Att. B at 8. SJI did not enforce any of these provisions. Tr. 1078-79.

¹⁶ Official notice taken of docket sheets in D.C. Circuit cases 85-1322 and 85-1332.

¹⁷ Brady described only one policy decision in which he was directly involved, claiming to have insisted on the six-cell design in La Star's application. La Star Exh. 12 at 12. On cross examination, however, Brady was unable to provide a credible explanation for his purported insistence, since he abandoned his initial testimony that the design was based on a population study and admitted that the six-cell plan provided coverage of some areas with very small populations and thus little prospective demand. Tr. 886-90. Additionally, we find no significance to Brady's claim that he participated in settlement negotiations with NOCGSA. La Star Exh. 12 at 13, 15-16. This establishes no more than that La Star held out to others that SJI was the controlling party. The internal relationship between SJI and USCC disclosed by the record tells a different story.

¹⁸ Similarly, USCC had blanket authority to prepare La Star's tax returns. USCC did so, using its own Chicago address as La Star's. NOCGSA Reb. Exh. 9, Bates Nos. 289-90; tr. 1176-77.

¹⁹ As part of La Star's direct case, Brady stated that he "negotiated with two banks and TDS [USCC's parent company] concerning financing" in connection with La Star's 1987 amendment. However, TDS' chief financial officer, Murray L. Swanson, Jr. (who executed TDS' financial commitment to La Star) recalled that the commitment was a standard TDS arrangement made without negotiation. NOCGSA Reb. Exh. 9, Att. Fat 14. See NOCGSA Reb. Exh. 9, letters following Bates No. 307.

²⁰ Only after the Commission designated a control issue against La Star -- and the parties were on clear notice that their practices were under scrutiny -- did the parties change their financial procedures. They amended the joint venture agreement to provide that SJI would pay a *pro rata* share of prosecution expenses. La Star Exh. 12, Att. C at 6; tr. 1013-14. The parties also assert that USCC will not be reimbursed for the expenses it had already incurred. Tr. 1013-14, 1193. La Star's books are now kept in La Rose, where SJI has its headquarters, and SJI pays La Star's expenses. Tr. 967, 971. Moreover, the record reflects direct communications between SJI and USCC after this time. NOCGSA Reb. Exh. 9, Bates Nos. 286, 297, 304. As discussed above, we see no justification for giving significant weight to these belated measures, made in the face of Commission scrutiny.

²¹ La Star complains that NOCGSA's reply to La Star's exceptions incorporates by reference numerous paragraphs from NOCGSA's proposed findings and reply findings, and, thereby, in effect, exceeds the page limitations for replies to exceptions. We have examined NOCGSA's reply concerning the dispositive issue here and find that NOCGSA has cited its findings only in collateral respects. Thus, NOCGSA has not impermissibly incorporated these findings.

²² The amendment reports the *pro forma* merger of NOCGSA into LCI, another subsidiary of BellSouth Corporation, without any change in beneficial ownership or of officers and directors. In view of the *pro forma* nature of the change, we find no significance in the fact that the amendment was executed by LCI rather than NOCGSA, the original applicant. See 47 C.F.R. § 1.743 (requiring amendments to be signed by an officer or duly authorized employee of a corporate applicant). Cf. *Folkways Broadcasting Co., Inc.*, 42 RR 2d 159, 162 ¶¶ 10-11 (1978) (accepting the substitution of a corporate applicant's 100 percent voting stockholder for the corporation as *pro forma*). *American Cellular Network Corp. of Nevada*, 63 RR 2d 1311, 1313-14 ¶¶ 8-9 (1987), does not hold to the contrary. There, the Commission rejected an attempt by a partnership formed through a settlement to substitute itself for the original applicant after that applicant had repudiated the settlement and refused to execute an amendment. That case did not involve an attempt to report a *pro forma* change in the identity of the original applicant, as is the case here. LCI's second amendment, reporting a minor change in its organization, is acceptable for the reasons stated in FCC 921-013, which we hereby reaffirm. USCC's motion to strike this amendment and to reconsider the order accepting the amendment are premised on its earlier objection to LCI's substitution for NOCGSA, which we reject.

²³ USCC was permitted to intervene in this proceeding for the limited purpose of participating in the litigation of the control issue. 6 FCC Rcd at 1245-46 ¶ 5. The motions before us are, therefore, beyond the scope of the participation authorized.