ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
TeleCorp PCS, Inc. Tritel, Inc. and	)	WT Dkt. No. 00-1
Indus, Inc. Seek FCC Consent to	)	DA 00-1589
Transfer Control of, or Assign,	)	
Broadband PCS and LMDS Licenses	)	

COMMENTS ON OR, IN THE ALTERNATIVE,
PETITION TO DENY OF NEXTEL COMMUNICATIONS, INC.

Pursuant to Section 309(d) of the Communications Act of 1934, as amended, and Section 1.939 of the Federal Communications Commission's ("Commission") rules, Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby comments on the above-captioned applications to transfer or assign numerous licenses, including C and F Block licenses, pursuant to the merger agreement between TeleCorp PCS, Inc. ("TeleCorp") and Tritel, Inc. ("Tritel").[1]

The Commission's Designated Entity ("DE") privileges were established to encourage participation by true small businesses in the Personal Communications Service ("PCS") marketplace. Both TeleCorp and Tritel received the benefits of these small business rules during the original C and F Block auctions. Based on the information presented in their merger applications, as well as other publicly available information, TeleCorp may currently be in violation of the DE rules and further, the merger likewise may violate the fundamental DE rules. If a PCS program favoring small businesses is to be maintained, the Commission must ensure that those who benefit from these privileges comply with the attendant requirements and responsibilities.[2]

---

[1] Nextel provides commercial mobile radio service ("CMRS") in numerous markets currently served by either TeleCorp or Tritel and, therefore, is a party in interest under 47 C.F.R. § 1.939.

[2] *See, e.g.*, Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Comments of Nextel Communications, Inc.*, WT Docket No. 97-82 (filed June 22, 2000) at 17-23. *See also* Applications of Beta

continued . . .

If TeleCorp/Tritel can explain the discrepancies discussed below to the Commission's satisfaction, the instant applications could be approved. If, however, the merger applicants are unable to resolve these questions, then the Commission must determine whether TeleCorp and Tritel currently, and post-merger, qualify for Designated Entity status.

I. THE TOTAL ASSETS REPORTED IN THE APPLICATIONS SUBSTANTIALLY UNDERSTATES THE TOTAL ASSETS REPORTED TO THE SEC OVER SEVEN MONTHS AGO.

In the applications, TeleCorp reports that its total assets are $495,776,440.[3] In its 10-K report filed in March of this year for the fiscal year ending December 31, 1999, TeleCorp reported total assets of $952,202,000.[4] TeleCorp states that the lower figure in the applications is a "number that represents [its] net assets at the last time [TeleCorp's] net assets were calculated,"[5] but does not reconcile this statement with the fact that disclosure of *total assets*, not net assets, is required by the Commission's rules.[6] In any event, this discrepancy of reported assets is substantial, considering that the figure reported to the Commission is almost $400 *million* lower than the figure reported to the SEC as of year-end 1999.

. . . continued

Communications, L.L.C., Assignor, Leap Wireless International, Inc., Assignee (WPOJ702 Roswell, NM); Beta Communications, L.L.C., Assignor, Cricket Licensee (Reauction), Inc., Assignee (WPOJ700, Phoneix, AZ and WPOJ701, Reno, NV), for FCC Consent for Proposed Assigment of Licenses, *Comments or, in the Alternative, Petition to Deny of Nextel Communications, Inc.*, FCC File Nos. 0000110639 and 0000110695 (filed May 26, 2000).

[3] *See* FCC Form 603 Schedule A at 2.

[4] TeleCorp PCS, Inc., Annual Report (SEC Form 10-K) filed March 30, 2000, Commission File No. 000-27901 at F-3.

[5] TeleCorp PCS, Inc. FCC Form 603 (April 2000) at 17 n.12.

[6] 24 C.F.R. § 24.709(a).

II. TELECORP'S CONTROL GROUP OWNERSHIP DOES NOT COMPLY WITH THE COMMISSION'S RULES.

As of April 27, 2000, when the first assignment/transfer applications for the TeleCorp/Tritel merger were filed, TeleCorp reported that the "qualifying investors" in its control group had 11.8 percent of the company's total equity.[7] TeleCorp stated that it operates under the "25-25-25-25" control group structure to qualify as a DE.[8] Under this structure, the rules allow the 25 percent control group equity to be split, with 15 percent held by "qualifying investors" and 10 percent held by "institutional investors."[9] The rules also provide that after a Designated Entity license has been held for three years, the control group "qualifying investors" equity may drop from a 15 percent threshold to 10 percent.[10] TeleCorp has not held any of its eight F Block licenses for three years as of the April 27 filing date; accordingly, TeleCorp is required to have its "qualifying investors" hold at least 15 percent of the company's equity. Given that TeleCorp reported that its "qualifying investors" hold only 11.8 percent of the company's equity, TeleCorp appears to have violated the Commission's control group "qualifying investor" equity requirement as well as the Commission's overall requirement that a DE "maintain its eligibility [to hold F Block licenses] until at least five years from the date of initial license grant. . . ."[11]

In its June Supplemental Exhibit, TeleCorp embellished its previous discussion, stating that it has issued "tracking stock" to its qualifying investors and to certain others. This "tracking stock,"

---

[7] *See* TeleCorp PCS, Inc. FCC Form 603 (April 2000) at 4.

[8] *See* TeleCorp PCS, Inc. FCC Form 603 (April 2000) at 4; 47 C.F.R. § 24.709(b)(5). Under this structure, the holdings of TeleCorp's investors will not be attributed in determining whether TeleCorp qualifies as a DE if no single outside investor holds more than 25 percent of TeleCorp's equity or vote and if TeleCorp's control group holds at least 25 percent of TeleCorp's equity and 50.1 percent of TeleCorp's vote.

[9] 47 C.F.R. §§ 24.709(b)(5)(i)(A) and (C).

[10] 47 C.F.R. § 24.709(b)(5)(i)(D).

[11] 47 C.F.R. § 24.709(a)(3).

according to TeleCorp, reflects the economic ownership in the entity that holds the F Block licenses, TeleCorp Holding, Inc. After the proposed merger, TeleCorp states that the "tracking stock" will reflect the economic interest in the new limited liability company into which TeleCorp Holding, Inc. will merge and disappear, with the new limited liability company surviving. Through use of this "tracking stock," TeleCorp asserts that it can, for most purposes, restore to its qualifying investors the economic equivalent of their having the minimum 15 percent equity interest that the rules require.[12]

TeleCorp's explanation glosses over the legal and policy concerns associated with permitting DE control group equity requirements to be satisfied through tracking stock in a consolidated successor company. If it grants the TeleCorp application on this basis, the Commission effectively will give unqualified approval for the use of tracking stock to satisfy control group obligations in all future mergers and will set a precedent that the Commission will not examine the economic underpinnings of these arrangements. As TeleCorp acknowledges, the tracking stock upon which its compliance with the control group equity requirements of TeleCorp Holdings, Inc. would be based is not a security of TeleCorp Holdings, Inc., or of its proposed limited liability company successor, but capital stock of the new TeleCorp PCS, Inc. ("TPI") – the proposed merged entity. Thus, it differs fundamentally from a direct interest in a Designated Entity.

Because the tracking stock is capital stock of TPI, the holders of the shares are exposed to the economic risks of TPI insolvency and bankruptcy, regardless of what the financial performance of TeleCorp Holdings, Inc. or its intended successor-in-interest might be. This is a significant difference: the status of a DE control group in a liquidation affecting any DE entity was one of the touchstones of the Commission's analysis of DE qualifications, out of concern that parties not

[12] TeleCorp PCS FCC Supplemental Exhibit (June 2000) at 9.

achieve facial DE compliance while effectively siphoning away the economic interest of the DE control group. In addition, the performance of the new consolidated company as a whole will affect whether dividends can be paid on the tracking stock, regardless of the economic performance of TeleCorp Holdings, Inc. or that of its limited liability company successor.[13] Furthermore, control of TeleCorp Holding, Inc. will rest with the consolidated corporation and the obligations of its officers and directors (even if they were the same individuals), will be to the consolidated entity as a whole and not to the Designated Entity. The requirement that the DE control group have a minimum 15 percent equity interest is a fundamental requirement for those advantages to be warranted, and the recipient cannot be permitted to bargain them away for other economic advantages. If that is the case here, TeleCorp's compliance with its DE obligations should be evaluated.[14]

---

[13] As the Amended and Restated Certificate of Incorporation of Telecorp PCS, Inc. states:

> Dividends on the Class C Common Stock and the Class D Common Stock (the "TeleCorp Tracking Stock") may be declared and paid only out of the ***lesser*** of (A) the funds of the Corporation legally available therefore and (b) the TeleCorp Tracked Business Available Dividend Amount.

Amended and Restated Certificate of Incorporation of Telecorp PCS, Inc., at Section 4.12(b)(ii).

[14] Under the Amended and Restated Certificate of Incorporation of Telecorp PCS, Inc., for example, the board of directors of the consolidated company has specific freedom to discriminate in dividends between the tracked and non-tracked company stock, regardless of the relative performance of the constituent parts of the consolidated entity:

> The Board of Directors may at any time, subject to the provisions of Sections 4.12(b)(i),(ii) and (iii) and Section 4.13, declare and pay dividends exclusively on the Non-Tracked Common Stock, exclusively on the TeleCorp Tracking Stock, exclusively on the Tritel Tracking Stock or on each of such category of Common Stock in equal or unequal amounts, notwithstanding the relative amounts of the Non-Tracked Business Available Dividend Amount, the TeleCorp Tracked Business Available Dividend Amount or the Tritel Tracked Business Dividend Amount.

Amended and Restated Certificate of Incorporation of Telecorp PCS, Inc., Section 4.12(b)(iv).

III. NUMEROUS ADDITIONAL DISCREPANCIES EXIST BETWEEN THE APPLICATIONS, THE MERGER AGREEMENT AND SEC FILINGS.

Even if TeleCorp can satisfy the Commission that it is not presently in violation of the control group rules, other discrepancies in the applications that bear upon the merger entity's DE status that must be resolved before the instant license assignments and transfers and thus the subject merger can be approved.

A. The Applications, Even as Supplemented, Neither Adequately Explain the Proposed Transaction nor Demonstrate that the New Entity Qualifies as a DE

As a preliminary matter, the descriptions of the proposed merger in both the original April applications and in the supplemental June filing do not comport with the parties' merger agreement. In the applications, TeleCorp/Tritel describe a transaction under which TeleCorp's control group and shareholders will control the post-merger entity.[15] Accordingly, the applications portray a situation where control of the licenses now held by TeleCorp will be assigned under *pro forma* procedures to the new merger entity, while a transfer of control of the Tritel licenses will occur.

The merger agreement, however, reveals a different structure.[16] Under the terms of the merger agreement, TeleCorp and Tritel will form a holding company, with each holding 50 percent negative control. This new holding company will then form two subsidiaries into which the existing TeleCorp and Tritel entities will be merged. The current TeleCorp and Tritel shares will cancel, and TeleCorp shareholders will receive the majority of the shares in the new holding company and thus control. This is the path by which C and F Block licenses will be transferred to a new entity.

---

[15] *See* TeleCorp PCS, Inc. FCC Form 603 (April 2000) at 1-2.

[16] *See* Agreement and Plan of Reorganization and Contribution by and among TeleCorp PCS, Inc., Tritel, Inc. and AT&T Wireless Services, Inc. Dated as of February 28, 2000 ("Merger Agreement") attached as an exhibit to Aircom PCS, Inc. FCC Form 603 (June 2000), FCC File No. 0000123402.

The applicants make no attempt, either in the original April applications or in the June supplemental filing to show that this new entity qualifies to hold Designated Entity licenses under the Commission's rules in its own right.[17] It appears that by omitting a description in the applications of the relevant steps to the merger, the parties give a misleading impression that the merger entity is at all times merely "TeleCorp restructured." From a corporate perspective and from the perspective of Commission rules on control, this is not the case. To be able to assess compliance with Commission requirements regarding transfers of Designated Entity licenses, applications must accurately and completely describe all the steps of a transaction and demonstrate that the merger entity is a qualified DE.

B. An Unjust Enrichment Payment Is Owed As a Pre-Condition to Merger Approval.

TeleCorp/Tritel claim that no unjust enrichment payment should be required as a pre-condition to merger approval.[18] As discussed above, however, the applicants have not established that the transfer of the TeleCorp licenses to the new holding company qualifies for *pro forma* treatment. Accordingly, once this issue is resolved, the question of unjust enrichment may have to be raised in connection with the transfer of control of the TeleCorp licenses from a "very small" business to one that merely qualifies as "small."[19]

---

[17] *See* 47 C.F.R. § 24.839(a)(2). C and F Block licenses can be transferred within the five-year holding period to an entity if that entity either qualifies as a Designated Entity in its own right under 47 C.F.R. § 24.709 or if the proposed assignee currently holds other C or F Block licenses. Neither showing has been made in the merger applications as to the new holding company that is originally to be 50/50 owned by TeleCorp and Tritel.

[18] Under Commission rules, if a Designated Entity license is transferred from an entity to an entity that does not qualify for similar levels of benefits, unjust enrichment payments will be assessed. 47 C.F.R. § 1.2111.

[19] TeleCorp PCS, Inc. FCC Form 603 (April 2000) at 18. Nextel will not raise here the obvious issue of whether an entity with almost $1 billion in reported assets should be considered "small."

The Tritel licenses pose similar issues. Here, there is no question that licenses acquired by Tritel as a "very small" business are being transferred to a new entity that, by the parties' own admission, now at best only qualifies as "small." Citing the Commission's general statements supporting Designated Entity growth in the normal course of business, TeleCorp/Tritel claim that no unjust enrichment payment for the Tritel license transfer should be required.[20]

The parties completely ignore, however, the most recent Commission decision denying a request for waiver of the unjust enrichment rules in connection with a transfer of C Block licenses into a new joint venture.[21] In the *D&E Decision*, D&E Communications asked for waiver of the unjust enrichment rules claiming that it had grown slightly beyond the "small business" size standards, and that its growth had occurred in the normal course of business.[22] D&E still qualified as an "entrepreneur," but asked for waiver so that the transfer could be effectuated without an unjust enrichment payment to the Commission. D&E's request was denied on the basis that a waiver would undermine the purpose of the rule:

> D&E has not outlined a situation where adherence to the Commission's small business size and bidding credit eligibility rules would undermine their underlying purpose or where deviating from the rules would be in the public interest. Our denial of the waiver request would not prohibit the transfer of licenses to the Joint Venture. Rather, it would ensure that bidding credits are used only by entities eligible for them. Application of the rules in this case would achieve the precise goal envisioned by the Commission, and would serve the public interest.[23]

TeleCorp/Tritel fail to acknowledge the *D&E Decision* in their arguments that unjust enrichment payments should not be required. Unless TeleCorp/Tritel can show otherwise, the rules and the

---

[20] TeleCorp PCS, Inc. FCC Form 603 (April 2000) at 20-22.

[21] D&E Communications, Inc. Request for Waiver of Sections 24.712, 24.720(b)(1), 1.2111(d), and 24.893(a) of the Commission's Rules Regarding Eligibility to Acquire Licenses as a Small Business, *Order*, DA 99-3016 (rel. Dec. 29, 1999) ("*D & E Decision*").

[22] *Id.* at ¶ 10.

[23] *Id.* at ¶ 11 (citation omitted).

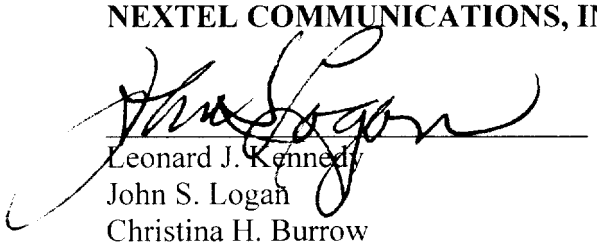
D&E Decision require an unjust enrichment payment, at least as to the Tritel licenses, as a pre-condition of merger approval.

IV. CONCLUSION

A review of the information contained in the merger applications shows either that TeleCorp and/or Tritel have failed to submit an application of sufficient clarity as to the structure, details and merits of their proposed transaction, or to present the facts that permit Commission staff and the public to review what is happening in the merger and determine whether Designated Entity or other rules are being violated.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.



Leonard J. Kennedy
John S. Logan
Christina H. Burrow

NEXTEL COMMUNICATIONS, INC.
Robert S. Foosaner
Senior Vice President
and Chief Regulatory Officer
2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4000

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036-6802
(202) 776-2000

Its Attorneys

August 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments on or, in the Alternative, Petition to Deny of Nextel Communications, Inc." was sent by hand delivery this 16th day of August, 2000, or via U.S. mail where indicated, to the following:

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
(Original plus 4)

Robert Pepper, Chief
Office of Plans and Policy
Federal Communications Commission
445 12th Street, SW, Room 7-C450
Washington, D.C. 20554

International Transcription Services, Inc.
445 – 12th St., SW
Room CY-B402
Washington, D.C. 20554

Christopher Wright
Office of General Counsel
Federal Communications Commission
445 12th Street, SW, Room 3-C252
Washington, D.C. 20554

Thomas Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C252
Washington, D.C. 20554

Bryan Tramont
Legal Advisor to Commissioner
Furchtgott-Roth
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

Kathleen O'Brien Ham
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 3-C255
Washington, D.C. 20554

Adam Krinsky
Legal Advisor to
Commissioner Tristani
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

Clint Odom
Legal Advisor to Chairman Kennard
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Lauren Kravetz
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-A13
Washington, D.C. 20554

Peter Tenhula
Senior Legal Advisor
to Commissioner Powell
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

Jamison Prime
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-A734
Washington, D.C. 20554

Thomas Gutierrez
Lukas, Nace, Gutierrez & Sachs, Chartered
1111 – 19th Street, NW
Suite 1200
Washington, D.C. 20036

Eric W. DeSilva
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006

Mark Schneider
Senior Legal Advisor to
Commissioner Ness
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

Polycell Communications Inc. *
27W281 Geneva Rd Ste K 2
Winfield, IL 60190

David Hu
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-B511
Washington, D.C. 20554

Terry O'Reilly *
Indus, Inc.
633 East Mason Street
Milwaukee, WI 53202

Office of Media Relations
Reference Operations Division
Federal Communications Commission
445 12th St., SW
Room CY-A257
Washington, D.C.

ABC Wireless, L.L.C. *
1010 North Glebe Road
Suite 800
Arlington, VA 22201

John Branscome
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW, Room 4-A234
Washington, D.C. 20554

Douglas I. Brandon *
AT&T Wireless PCS, LLC
1150 Connecticut Ave., NW, 4th Floor
Washington, D.C. 20036

Cynthia S. Shaw

* Via U.S. Mail