

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In re

Applications of Poka Lambro Ventures, Inc.,)	
Poka Lambro PCS, Inc., and)	File Nos.
Poka Lambro/PVT Wireless L.P. for)	0000177844
Consent to Assign C and F Block Personal)	0000178897
Communications Services Licenses to)	0000179413
Southwest Wireless, L.L.C.)	

To: Chief, Wireless Telecommunications Bureau

PETITION TO DENY

**LEACO RURAL TELEPHONE
COOPERATIVE, INC.**

**COMANCHE COUNTY TELEPHONE
COMPANY, INC.**

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Dated: August 4, 2000

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SUMMARY

By the filing of the above-referenced Assignment Applications, the parties seek consent to assign certain C and F block PCS licenses within five years of the grant of such licenses. The proposed transaction, however, is not permitted pursuant to §§ 1.948 and 24.839 of the FCC's rules. The proposed assignee does not meet the eligibility criteria of § 24.709 as of the time of the filing of the Assignment Applications, nor does the proposed assignee hold other C and F block licenses. Because the proposed assignee does not hold other C or F block licenses and has never qualified as an entrepreneur pursuant to § 24.709, the proposed assignee does not fall within the grandfather provision of § 24.839 (a) (2). Accordingly, the proposed assignment does not satisfy the restrictions of § 24.839, and the Commission must deny the Assignment Applications. Moreover, the underlying assignment agreement between the parties contains a provision giving the proposed assignor a prohibited reversionary interest, providing yet another basis for denial of the requested assignment.

Approval of the proposed assignments would undermine both the competitive bidding process and the functioning of the secondary market for C and F block spectrum. Accordingly, grant of the Assignment Applications is inconsistent with the public interest.

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To: Chief, Wireless Telecommunications Bureau

PETITION TO DENY

Leaco Rural Telephone Cooperative, Inc. (“Leaco”) and Comanche County Telephone Company, Inc. (“Comanche”) (collectively “Petitioners”), by their attorneys and pursuant to ? 1.939 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), hereby petition the Commission to deny the above-referenced applications (“Assignment Applications”) by which Poka Lambro Ventures, Inc. (“PLV”), Poka Lambro PCS, Inc. (“PLPCS”), and Poka Lambro/PVT Wireless L.P. (“PLPVT”) (collectively “Poka Lambro”) seek FCC consent to assign various C and F block Personal Communication Services (“PCS”) licenses (the “Licenses”) to Southwest Wireless, L.L.C. (“Southwest”).¹ As demonstrated below, Southwest is not eligible to acquire the Licenses from Poka Lambro pursuant to ?? 24.709 and 24.839 (a) (2) of the FCC’s rules and accordingly, the Commission must deny the Assignment Applications. In addition, the Asset Purchase Agreement (“Purchase Agreement”) between the parties affords Southwest a prohibited reversionary interest and accordingly, the Commission must deny the Assignment Applications.

¹ PLV, PLPCS and PLPVT are subsidiaries of Poka Lambro Telephone Cooperative, Inc. (“PLTC”) (collectively “Poka Lambro”), and the proposed assignments are the subject of a single transaction between the parties. Accordingly, the Assignment Applications are virtually identical but for the name of the licensee. Unless otherwise noted, a reference to “Assignment Application” or “FCC Form 603” refers to all three of the above-referenced applications.

I. BACKGROUND AND STATEMENT OF INTEREST

Section 309 (j) (3) (B) & (4) (D) of the Communications Act of 1934, as amended (the “Act”), requires the Commission to, among other things, disseminate licenses among a wide variety of applicants and ensure that small businesses and rural telephone companies are given the opportunity to participate in the provision of spectrum-based services.² Recognizing that small entities stood “little chance of acquiring licenses in...broadband auctions if required to bid against existing large companies,”³ the Commission set aside the C and F blocks for “entrepreneurs,” and imposed certain holding requirements and transfer restrictions to meet its 309 (j) obligations and to ensure the integrity of the auction process.⁴

Currently, the Commission is actively exploring methods of fostering the creation and functioning of a secondary market for spectrum and increasingly relying on market forces to meet its 309 (j) obligations such as disseminating licenses to rural telephone companies.⁵ Small entities, however, such as Leaco and Comanche, have no more chance of acquiring licenses in the secondary market than they do in an FCC auction if they are forced to compete against extremely large companies such as Southwest who do not qualify to acquire C and F block licenses under the Commission’s rules.

Petitioners are parties in interest to this proceeding pursuant to 1.939 because Petitioners, on their own and/or through a consortium of other rural telephone companies, sought to obtain several of the Licenses from Poka Lambro. Petitioners qualify as “entrepreneurs” and designated entities under the Commission’s Rules, and are eligible to acquire the Licenses from

² See 47 U.S.C. 309 (j) (3) (B) & (4) (D).

³ *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, FCC 94-178, 75 RR 2d 859, 9 FCC Rcd 5532 121 (1994) (“*Competitive Bidding Fifth Report and Order*”).

⁴ See, e.g., *id.* 128-129 (adopting five year holding period).

Poka Lambro.⁶ As discussed below, Southwest is not eligible to acquire the Licenses from Poka Lambro.⁷ Petitioners are harmed by Southwest's disruption of the market for designated entity licenses, and the Commission can redress this harm by denying the Assignment Applications.

This Petition raises substantial questions regarding Southwest's eligibility to acquire the Licenses and its compliance with the Rules regarding the assignment of C and F block licenses. Grant of the Assignment Applications would undermine the integrity of the Commission's competitive bidding process and negatively affect the functioning of the secondary market for spectrum set aside for entrepreneurs. Accordingly, grant of the Assignment Applications is inconsistent with the public interest.

II. ARGUMENT

A. SOUTHWEST IS NOT ELIGIBLE TO ACQUIRE C AND F BLOCK LICENSES FROM POKA LAMBRO

PLV, PLPCS and PLPVT acquired C block licenses in Auction No. 5. At that time, the Poka Lambro companies qualified for installment payments and bidding credits as "small businesses." PLPCS acquired F block licenses in Auction No. 11 and also qualified for installment payments and a bidding credit as a "very small business." PLV, PLPCS and PLPVT now seek to assign their C and F block licenses to Southwest, a newly formed Delaware limited liability company ultimately owned by Gerald Vento and Thomas Sullivan. FCC Form 603, Exhibit I, p. 2.

⁵ The Commission essentially relies on geographic partitioning between private parties as the exclusive means of disseminating licenses to rural telephone companies and other entities interested in providing spectrum-based services to rural areas.

⁶ Petitioners satisfy the financial eligibility criteria of ? 24.709 and are rural telephone companies pursuant to ? 1.2110 (b) (3). Leaco's wholly-owned subsidiary, New Mexico RSA 6-III Partnership, also recently acquired C block licenses in Auction No. 22. *See, Wireless Telecommunications Bureau Grants 159 C, E, & F Block Broadband PCS Licenses*, Public Notice, DA 99-1288, Attachment A (released June 30, 1999) ("Auction 22 License Grant PN").

⁷ Petitioners have no quarrel with Poka Lambro. Petitioner's objections pertain to Southwest's failure to comply with the restrictions regarding the acquisition of C and F block licenses.

Rule Section 1.948 (b) (4) requires applicants seeking consent to assign wireless licenses to comply with any applicable limitations contained in the specific service rules for such wireless service. Accordingly, Poka Lambro and Southwest must comply with the applicable restrictions contained in Part 24 of the Rules for the proposed assignment of the Licenses.

Rule Section 24.839 (a) prohibits the assignment of C and F block licenses unless the applicant meets certain specified conditions. Specifically, ? 24.839 (a) (2) allows the assignment of C and F block licenses during the five-year holding period only where:

The proposed assignee or transferee meets the eligibility criteria set forth in §24.709 of this part at the time the application for assignment or transfer of control is filed, or the proposed assignee or transferee holds other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in §24.709 of this part....

Southwest however, fails to satisfy either clause of this rule section.

1. Southwest Does Not Meet the Eligibility Criteria of § 24.709 as of the Filing of the Assignment Applications

Pursuant to ? 24.709, no application is acceptable for filing and no license may be granted unless the applicant, together with all its affiliates, its attributable interest holders and their affiliates, has gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. As indicated above, in order to satisfy ? 24.839 (a) (2)'s first criteria for a permissible assignment or transfer of control, an applicant must meet the eligibility criteria as of the time of filing an assignment application.

Southwest states that it “qualifies as an eligible designated entity under Section 24.709....” FCC Form 603, Exhibit I, p. 2. Southwest’s statements regarding its qualification pursuant to ? 24.709, however, are contradictory and misleading. Southwest has not calculated its total assets as of the time of filing the Assignment Applications and accordingly cannot legitimately represent that it qualifies pursuant to ? 24.709. More importantly, as demonstrated

below, Southwest's total assets exceed the \$500 million cap and accordingly, Southwest does not qualify as an eligible entrepreneur under ? 24.709.

Southwest admits that it has not calculated the total assets of all its attributable interest holders and their affiliates as of the time of filing the Assignment Applications.⁸ Southwest indicates that the total asset figure reported in Item 2 of Schedule A to the Assignment Applications, \$495,776,440, was calculated in connection with the filing of a short-form application for Auction No. 22. Short-form applications for Auction No. 22, however, were due on February 12, 1999.⁹ Southwest admits that "in all likelihood, this [total asset] figure is no longer correct, as several TeleCorp entities have since closed transactions affecting the total assets." FCC Form 603, Ex. I, n. 2. An increase in total assets of only \$4.3 million above the reported figure would cause Southwest/TeleCorp to exceed the applicable \$500 million cap. Absent performing an actual calculation of the total assets as required by the rules (which Southwest concedes it has not done), Southwest cannot legitimately represent that it qualifies as an entrepreneur pursuant to ? 24.709.

Moreover, Southwest cannot qualify pursuant to ? 24.709 because its attributable total assets exceed the \$500 million cap. One of the affiliates of Southwest, and the parent company of many of the "TeleCorp entities" referenced above, is TeleCorp PCS, Inc. ("TeleCorp"). *See* FCC Form 603, Ex. I, Attachment A, p. 2. TeleCorp is a publicly traded company with a market capitalization on the order of \$3.5 billion.¹⁰ In its annual Form 10-K report filed with the Securities and Exchange Commission ("SEC") on March 30, 2000, TeleCorp reported total

⁸ *See* FCC Form 603, Exhibit I, n.2. Footnote 2 to Exhibit I actually references "Lone Star" instead of Southwest. Lone Star is an affiliate of Southwest that is also in the process of acquiring PCS licenses. Petitioners presume that the reference to "Lone Star" is a typographical error.

⁹ *See, Auction of C, D, E and F Block Broadband PCS Licenses*, Public Notice, DA 98-2604 (released December 23, 1998).

¹⁰ TeleCorp trades on the NASDAQ under the symbol TLCP.

assets of \$952,202,000 as of December 31, 1999.¹¹ The total assets of TeleCorp and its subsidiaries are fully attributable to Southwest.¹² Accordingly, Southwest's total assets far exceed the \$500 million cap.

Although Southwest admits that "TeleCorp entities" have completed several transactions that in all likelihood increase total assets above that disclosed in the Assignment Applications, Southwest asserts that any increase in total assets would be due to the acquisition of other designated entity licenses or assets from non-attributable sources and should therefore not disqualify it from holding C and F block licenses. FCC Form 603, Exhibit I, n. 2. Southwest, however, cannot support this assertion. As noted above, Southwest has not performed the actual calculation to determine its total assets or to identify which assets are or are not attributable at this time.

Moreover, not all of the increases in Southwest's total assets are "non-attributable" as Southwest alleges. TeleCorp is affiliated with AT&T Wireless as part of the AT&T Wireless Network.¹³ TeleCorp PCS, L.L.C. ("TPL"), which is indirectly controlled by Messrs. Sullivan and Vento through TeleCorp, holds A, B and D block PCS licenses which were acquired from AT&T.¹⁴ TeleCorp has constructed many of these systems and placed them in operation since the last time that Messrs. Sullivan and Vento calculated the total assets of all their affiliates.¹⁵ These licenses are not designated entity licenses, and any increases in total assets or gross revenues related to these systems would be fully attributable to Southwest.

¹¹ See TeleCorp PCS, Inc. Form 10-K, "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934," F-2, SEC File No. 000-27901 ("SEC Form 10-K").

¹² See 47 C.F.R. ?? 1.2110 (b) (4) and 24.709 (a) (2).

¹³ See, e.g., SEC Form 10-K, Part I, Item 1. p. 2. ("We are the largest AT&T Wireless affiliate in the United States."); see also <http://www.suncom1.com/portal/default.htm>.

¹⁴ See FCC Form 603, Ex. I, Attachment A, p. 3; see, also, SEC Form 10-K, Part I, Item 1. p. 2.

¹⁵ For example, TeleCorp launched service in 1999 in Little Rock, AR; Baton Rouge, LA; Lafayette, LA; New Orleans, LA and Memphis, TN. SEC Form 10-K, p. 6.

In addition, two other Southwest affiliates, Atlantis Wireless, L.L.C. and Zephyr Wireless, L.L.C., were high bidders for 39 GHz licenses in Auction No. 30 and are now in the licensing process. The book value of these 39 GHz licenses (based on the net high bid amounts) exceeds \$34,171,350.¹⁶ These assets are also fully attributable to Southwest.

Finally, TeleCorp is in the process of merging with Tritel, Inc. (“Tritel”).¹⁷ Tritel through various subsidiaries also holds non-entrepreneur block PCS licenses, and increased total assets and gross revenues from the acquisition of these systems are also fully attributable.

As demonstrated above, Southwest has utterly failed to demonstrate that it qualifies as an entrepreneur pursuant to ? 24.709 as of the filing of the Assignment Applications. Southwest’s representation that it qualifies pursuant to ? 24.709 is incorrect. Southwest’s attributable total assets far exceed the \$500 million cap, and accordingly, Southwest is not eligible to acquire the licenses pursuant to ? 24.709 or the first clause of ? 24.839 (a) (2).

2. Southwest Does Not Hold Other C or F Block Licenses and Does Not Fall Within the Grandfather Provision of ? 24.839 (a) (2)

Southwest argues that its total assets are not relevant because its eligibility to acquire the Licenses is “premised on ownership of other C and F block licenses....” FCC Form 603, Exhibit I, n. 2. Southwest argues that it is eligible for assignment of the Licenses pursuant to the second clause of ? 24.839 (a) (2). This grandfather provision allows the assignment of C and F block licenses where “the proposed assignee or transferee holds other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in §24.709 of this part....” 47 C.F.R. ? 24.839 (a) (2).

¹⁶ See, *39 GHz Auction Closes*, Public Notice, DA-00-1035, Attachment B (released May 10, 2000).

¹⁷ See, *TeleCorp PCS, Inc. Tritel, Inc., and Indus, Inc. Seek FCC Consent to Transfer Control of, or Assign, Broadband PCS and LMDS Licenses*, Public Notice, DA 00-1589 (released July 17, 2000).

Southwest, however, admits that it does not hold any other C or F block licenses. Instead, Southwest argues that it falls within the grandfather exception because other “commonly-controlled” affiliates of Southwest hold C and F block licenses. Neither the rule nor series of Commission orders adopting and amending the rule provide for the assignment of C and F block licenses based on licenses held by commonly-controlled companies. This provision is only intended to allow a company that previously met the requirements of § 24.709 – either at the time of an auction or at the time of an assignment – to acquire additional C and F block licenses.

The text of § 24.839 (a) (2) specifically requires that the “proposed assignee” hold other C or F block licenses. There is no reference to “affiliates” or “commonly-controlled” entities. When the Commission wishes to include “affiliates” or “commonly-controlled” entities it will do so, *see, e.g.*, 47 C.F.R. § 24.709 (a), but it has not done so here.

The history of the adoption of the rule confirms that the Commission intended the grandfather provision to cover only proposed assignees and not “commonly-controlled” entities. In the *Competitive Bidding Fifth Report and Order*, the Commission imposed a five-year holding period on C and F block licenses. Specifically, the Commission prohibited licensees from assigning or transferring control of a C or F block license within three years of the license grant.¹⁸ The FCC permitted licensees to transfer or assign their licenses in years four and five “only to an entity that satisfies the entrepreneurs’ blocks entry criteria.”¹⁹

In the *Competitive Bidding Fifth MO&O*,²⁰ the Commission clarified that:

[B]etween years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs’ block licenses (and thus at the time of auction

¹⁸ *See Competitive Bidding Fifth Report and Order* § 128.

¹⁹ *Id.* (footnote omitted).

²⁰ *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Fifth Memorandum Opinion and Order, FCC 94-285, 76 RR 2d 945, 10 FCC Rcd 403 (1994) (“*Competitive Bidding Fifth MO&O*”).

satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer.

Competitive Bidding Fifth MO&O ? 126. The parenthetical reference in the *Competitive Bidding Fifth MO&O* indicates that the Commission intended to allow an entrepreneur to assign its license only to another entrepreneur that had already established its eligibility in the auction. The Commission went on to clarify that in cases where the entity to whom the license is being transferred did not win a license in the original entrepreneurs' block auction, the Commission would use the most recently available audited financial statements for the purpose of determining size eligibility for transfers or assignments that occur between the fourth and fifth years.²¹

Finally, in the *DE&F Report and Order*,²² the Commission amended ? 24.839 to eliminate the three-year holding requirement to:

permit the transfer of entrepreneurs' block licenses in the first five years to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer.

DE&F Report and Order ? 85. Although the Commission eliminated the three-year holding period, the Commission retained the parenthetical reference to a grandfathered entity having qualified at the time of an auction. The clear reading of the rule and the Commission's orders reveals that in order to be eligible to acquire C and F block licenses pursuant to the grandfather clause of ? 24.839 (a) (2), an entity must have satisfied the eligibility requirements of ? 24.709 at some time in the past (either at the time of auction or the time of an assignment).

Southwest, however, has never met the criteria of ? 24.709 and does not hold other C or F block licenses. Accordingly, Southwest must demonstrate that it qualifies as an entrepreneur pursuant to ? 24.709 as of the time of filing the Assignment Applications. As discussed above,

²¹ See *id.* ? 126.

²² *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendments of the*

however, Southwest does not qualify as an entrepreneur pursuant to ? 24.709 at this time and accordingly, is not eligible to acquire the Licenses from Poka Lambro.

B. THE ASSIGNMENT AGREEMENT AFFORDS POKA LAMBRO A PROHIBITED REVERSIONARY INTEREST IN THE LICENSE

The Asset Purchase Agreement contains a “Buy-Back Option” which gives Poka Lambro a reversionary interest in the licenses in contravention of Commission law and policy. Section 10.1(a) of the Purchase Agreement provides that Poka Lambro has an option to purchase all unbuilt²³ PCS licenses after two years (extendable once by an additional two years at the option of Southwest).²⁴ This Buy-Back Option violates the FCC’s longstanding prohibition on retention of reversionary interests in licenses by a seller of a license. The prohibition on retention of reversionary interests stems from ? 301 of the Act, which provides that radio licenses shall not “be construed to create any right, beyond the terms, conditions and period of the license.” 47 U.S.C. ? 301.²⁵ By giving Poka Lambro a unilateral right to reclaim any unbuilt licenses at a certain point in time, the Buy-Back Option creates a right beyond the terms, conditions and period of Poka Lambro’s license.

Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, FCC 96-278, 3 CR 433, 11 FCC Rcd 7824 (1996) (“*DE&F Report and Order*”).

²³ The option applies to licenses for which Southwest or its designee has not erected or otherwise caused the placement or positioning of cell sites capable of covering at least 30% of the POPs in the territory covered by the license.

²⁴ See FCC Form 603, Exhibit 2.

²⁵ See *Investment in the Broadcast Industry*, 57 Fed. Reg. 14684 (1992); see also 47 U.S.C. ? 309(h) (requiring station licenses to contain the following condition: “The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated by the license beyond the term thereof. . .”); 47 C.F.R. ? 21.38 (“The assignor of a station licensed under this part may retain no right of reversion or reassignment of the license and may not reserve the right to use the facilities of the station for any period whatsoever. No assignment of license will be granted or authorized if there is a contract or understanding, express or implied, pursuant to which a right of reversion or reassignment of the license or right to use the facilities are retained as partial or full consideration for the assignment or transfer.”); 47 C.F.R. ? 73.1150.

Moreover, the reversionary interest raises an issue of control. How can Southwest control the station licenses if it lacks the power to determine whether to retain ownership of them?²⁶ As the Commission has previously noted, a right of reverter may “deprive[] the licensee of its power and duty to exercise full and complete control of its station, and accordingly render[] it incapable of discharging in the public interest the responsibilities imposed by the Act of 1934.” *Churchill Tabernacle v. FCC*, 160 F.2d 244, 246 (D.C. Cir. 1947). Based on the Agreement’s provision for the retention of a prohibited reversionary interest, the subject applications may not be granted.

III. CONCLUSION

The proposed assignment from Poka Lambro to Southwest is not permitted by the Commission’s rules. Southwest does not meet the eligibility criteria of ? 24.709 as of the time of the filing of the Assignment Applications, nor does Southwest hold other C and F block licenses. Accordingly, the proposed assignment from Poka Lambro to Southwest does not satisfy the restrictions of ? 24.839, and the Commission must deny the Assignment Applications. Moreover, the underlying assignment agreement contains a provision giving Southwest a prohibited reversionary interest, providing yet another basis for denial of the requested assignment. Approval of the proposed assignments would undermine both the competitive bidding process and the functioning of the secondary market. Accordingly, grant of the Assignment Applications is inconsistent with the public interest.

²⁶ Moreover, pursuant to Section 10.4 of the Purchase Agreement, the parties have agreed that Poka Lambro will manage the station licenses. Accordingly, Poka Lambro may also have the ability to determine whether the 30% buildout condition is met. As such, it is *Poka Lambro* rather than Southwest, the licensee, which effectively controls the fate of the subject licenses.

For the reasons discussed above, Petitioners respectfully request that the Commission deny the Assignment Applications.

Respectfully Submitted

**LEACO RURAL TELEPHONE
COOPERATIVE, INC.**

**COMANCHE COUNTY TELEPHONE
COMPANY, INC.**

By: Gregory W. Whiteaker

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Their Attorneys

Dated: August 4, 2000

Declaration of John Smith

I, John Smith, do hereby declare under penalty of perjury the following:

1. I am the General Manager and an authorized representative of Leaco Rural Telephone Cooperative, Inc.
2. I have read the foregoing Petition to Deny.
3. I have personal knowledge of the facts set forth therein and believe them to be true and correct.

Executed on this 4th day of August, 2000.

_____/s/_____
John Smith

I, La Shawn Berger, an employee in the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing Petition to Deny was served on the following parties by hand delivery or U.S. Mail on this 4th day of August 2000:

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