

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

In re

Applications of Zuma PCS, LLC)	
For Consent to Transfer Control of)	File Nos.
Zuma/Odessa, Inc. and)	0000163408
Zuma/Lubbock, Inc. to)	0000163410
Royal 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 Transfer Applications, the parties seek consent to transfer control of certain C 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 transferee does not meet the eligibility criteria of § 24.709 as of the time of the filing of the Transfer Applications, nor does the proposed transferee hold other C or F block licenses. Because the proposed transferee does not hold other C or F block licenses and has never qualified as an entrepreneur pursuant to § 24.709, the proposed transferee does not fall within the grandfather provision of § 24.839 (a) (2). Accordingly, the proposed transfer does not satisfy the restrictions of § 24.839, and the Commission must deny the Transfer Applications. In addition, the Transfer Applications do not comply with the transfer disclosure requirements of § 1.2111 (a) and accordingly, are not eligible for grant.

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

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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 (“Transfer Applications”) by which Zuma PCS, LLC (“Zuma”) seeks FCC consent to transfer control of Zuma/Odessa, Inc. and Zuma/Lubbock, Inc. (collectively the “Zuma Licensees”) to Royal Wireless, L.L.C. (“Royal”).¹ The Zuma Licensees are the FCC licensees of certain C block Personal Communication Services (“PCS”) licenses (the “Licenses”). As demonstrated below, Royal is not eligible to acquire control of the Licenses from Zuma pursuant to ?? 24.709 and 24.839 (a) (2) and accordingly, the Commission must deny the Transfer Applications. In addition, the Transfer Applications are incomplete and accordingly are not eligible for grant.

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 Royal 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 Zuma. Petitioners qualify as “entrepreneurs” and designated entities under the Commission’s Rules, and are eligible to acquire the Licenses from Zuma.⁶ As discussed below, Royal is not eligible to acquire the Licenses from Zuma.⁷

¹ The Transfer Applications are virtually identical but for the name of the licensee. Accordingly, unless otherwise noted, a reference to “Transfer Application” or “FCC Form 603” refers to both of the above-referenced applications of Zuma.

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).

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-

Petitioners are harmed by Royal's disruption of the market for designated entity licenses, and the Commission can redress this harm by denying the Transfer Applications.

This Petition raises substantial questions regarding Royal's eligibility to acquire the Licenses and its compliance with the Rules regarding the transfer of C block licenses. Grant of the Transfer 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 Transfer Applications is inconsistent with the public interest.

II. ARGUMENT

A. ROYAL IS NOT ELIGIBLE TO ACQUIRE C BLOCK LICENSES FROM ZUMA

Zuma acquired the Licenses in the C, D, E and F Block Reauction, Auction No. 22. Zuma now seeks FCC consent to assign all of the outstanding stock of the Zuma Licensees to Royal, thereby transferring control of the Licenses to Royal. Royal is a newly formed Delaware limited liability company ultimately owned by Gerald Vento and Thomas Sullivan. See, FCC Form 603, Exhibit I, p. 1.

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

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 Zuma. Petitioner's objections pertain to Royal's failure to comply with the restrictions regarding the acquisition of C and F block licenses.

Rule Section 24.839 (a) prohibits the transfer or assignment of C and F block licenses unless the applicant meets certain specified conditions. Specifically, ? 24.839 (a) (2) allows the transfer of control 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....

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

1. Royal Does Not Meet the Eligibility Criteria of § 24.709 as of the Filing of the Transfer 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 transfer of control, an applicant must meet the eligibility criteria as of the time of filing a transfer application.

Royal states that it “qualifies as an eligible designated entity under Section 24.709....” FCC Form 603, Exhibit I, p. 2. Royal’s statements regarding its qualification pursuant to ? 24.709, however, are contradictory and misleading. Royal has not calculated its total assets as of the time of filing the Transfer Applications and accordingly cannot legitimately represent that it qualifies pursuant to ? 24.709. More importantly, as demonstrated below, Royal’s total assets exceed the \$500 million cap and accordingly, Royal does not qualify as an eligible entrepreneur under ? 24.709.

Royal 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 Transfer Applications.⁸ Royal indicates that the total asset figure reported in the Transfer 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 Royal 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 Royal/TeleCorp to exceed the applicable \$500 million cap. Absent performing an actual calculation of the total assets as required by the rules (which Royal concedes it has not done), Royal cannot legitimately represent that it qualifies as an entrepreneur pursuant to ? 24.709.

Moreover, Royal cannot qualify pursuant to ? 24.709 because its attributable total assets exceed the \$500 million cap. One of the affiliates of Royal, 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 assets of \$952,202,000 as of December 31, 1999.¹¹ The total assets of TeleCorp and its subsidiaries are fully attributable to Royal.¹² Accordingly, Royal’s total assets far exceed the \$500 million cap.

⁸ *See* FCC Form 603, Exhibit I, n.2.

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.

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).

Although Royal admits that “TeleCorp entities” have completed several transactions that in all likelihood increase total assets above that disclosed in the Transfer Applications, Royal 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. Royal, however, cannot support this assertion. As noted above, Royal 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 Royal’s total assets are “non-attributable” as Royal 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 Royal.

In addition, two other Royal 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 Royal.

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.

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

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

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

Royal 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. Royal argues that it is eligible for transfer of the Licenses pursuant to the second clause of ? 24.839 (a) (2). This grandfather provision allows the transfer or 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).

Royal, however, admits that it does not hold any other C or F block licenses. Instead, Royal argues that it falls within the grandfather exception because other “commonly-controlled” affiliates of Royal hold C and F block licenses. Neither the rule nor series of Commission orders adopting and amending the rule provide for the transfer or assignment of C and F block licenses based on licenses held by commonly-controlled companies. This provision is only intended to

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).

allow a company that previously met the requirements of ? 24.709 – either at the time of an auction or at the time of a transfer or assignment – to acquire additional C and F block licenses.

The text of ? 24.839 (a) (2) specifically requires that the “proposed assignee or transferee” 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 or transferees 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 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 transfer 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

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

¹⁹ *Id.* (footnote omitted).

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).

Royal, however, has never met the criteria of ? 24.709 and does not hold other C or F block licenses. Accordingly, Royal must demonstrate that it qualifies as an entrepreneur pursuant to ? 24.709 as of the time of filing the Transfer Applications. As discussed above, however, Royal does not qualify as an entrepreneur pursuant to ? 24.709 at this time and accordingly, is not eligible to acquire the Licenses from Zuma.

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*").

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*

B. THE TRANSFER APPLICATIONS FAIL TO SATISFY THE TRANSFER DISCLOSURE REQUIREMENTS OF ? 1.2111 (a)

Rule Section 1.2111 (a) requires an applicant seeking to transfer control of or assign a license within three years of having received such license through a competitive bidding procedure to disclose among other things the consideration to be paid for such license.

Specifically, the applicant must file the

associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license (see §1.948 of this chapter). This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

47 C.F.R ? 1.2111 (a).

The Commission imposed these transfer disclosure requirements in the *Competitive Bidding Second Report and Order*²³ to gather data to address Congressional concerns regarding the auction process and to “evaluate our auction designs and judge whether ‘licenses [have been] issued for bids that fall short of the true market value of the license.’”²⁴ The Commission was especially concerned with scrutinizing auction winners who have not yet commenced service and who seek to assign or transfer their licenses within three years of the initial grant.²⁵

Although Zuma/Royal attached the “Stock Purchase Agreement” as Exhibit I, Attachment C to the Transfer Applications, Zuma/Royal redacted the consideration to be paid,²⁶ and accordingly,

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 *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Second Report and Order, FCC 94-61, 9 FCC Rcd 2348, 75 RR 2d 1 (1994) (“*Competitive Bidding Second Report and Order*”).

²⁴ *Id.* ? 214 (quoting H.R. Rep. No. 103-111 at 257).

²⁵ *See id.*

²⁶ There is no evidence in the public record to indicate that the parties have provided this information to the Commission.

failed to comply with ? 1.2111 (a).²⁷ Zuma acquired the Licenses in Auction No. 22 less than three years ago.²⁸ Zuma has not yet initiated commercial service in the license areas.

Accordingly, the Commission should deny the Transfer Applications, or at a minimum require Zuma/Royal to amend the Transfer Applications to disclose the required information.

III. CONCLUSION

The proposed transfer from Zuma to Royal is not permitted by the Commission's rules. Royal does not meet the eligibility criteria of ? 24.709 as of the time of the filing of the Transfer Applications, nor does Royal hold other C and F block licenses. Accordingly, the proposed transfer from Zuma to Royal does not satisfy the restrictions of ? 24.839, and the Commission must deny the Transfer Applications. Moreover, the parties failed to comply with the transfer disclosure requirements of ? 1.2111 (a). Approval of the proposed transfers would undermine both the competitive bidding process and the functioning of the secondary market. Accordingly, grant of the Transfer Applications is inconsistent with the public interest.

²⁷ There is no indication in the public record that Zuma/Royal provided this information to the Commission.

²⁸ *See, Auction 22 License Grant PN*, Attachment A.

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

Respectfully Submitted

**LEACO RURAL TELEPHONE
COOPERATIVE, INC.**

**COMANCHE COUNTY TELEPHONE
COMPANY, INC.**

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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

