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Wiley, Rein & Fielding

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October 5, 2000

BY HAND

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW; Room TW-B204F
Washington, D.C. 20554

Re: Notification of Ex Parte Contact and Supplemental Submission in
WT Docket No. 00-130

Dear Ms. Roman Salas:

This letter is being filed to notify the Commission of an *ex parte* contact in the above-referenced docket, to submit additional information in that docket to further elaborate upon concepts discussed with the FCC's staff, and, in light of recent conditional grants of 39 GHz auction licenses to a subsidiary of TeleCorp PCS, Inc. ("TeleCorp"), to request that the Commission's order in this matter provide regulatory approval for the transfer of control of after-acquired licenses. On October 2, 2000, Thomas Sullivan of TeleCorp, Robert Pettit and Eric DeSilva of Wiley, Rein & Fielding, counsel to TeleCorp, and Thomas Gutierrez of Lukas, Nace, Gutierrez & Sachs counsel to Tritel, Inc. ("Tritel") met with Lauren Kravetz and other staff of the Wireless Telecommunications Bureau to discuss tracking stock and equity ownership of the pre- and post-merger TeleCorp.

As discussed below, TeleCorp's tracking stock is not a mere contractual right "similar to" equity—it *is* equity as defined by law. TeleCorp is the parent of TeleCorp Holding Corp., Inc. ("THC") and has issued series of common stock intended to "track" the value of the THC subsidiary.¹ Nextel has disputed the applicants' assertion that tracking stock is equity in the tracked subsidiaries, raising issues related to control, priorities in bankruptcy, and other factors. As discussed below, the TeleCorp tracking stock displays all of the characteristics of equity devices, including having the right to distributions and residual rights in the event of liquidation.

¹ This tracking stock is similarly used within Tritel, Inc. ("Tritel") with respect to its designated entity licensee holding company, and tracking stock will also be used by the post-merger parent to track both THC and the Tritel designated entity licensee holding company. Although this letter makes reference to the TeleCorp/THC tracking stock for simplicity, the other tracking stock classes implicated by the merger do not differ in any material respect from the TeleCorp/THC tracking stock.

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The TeleCorp tracking stock is, for all intents and purposes cognizable by law, equity shares or common stock of THC. The FCC, in previously considering what constituted “equity securities,” approvingly cited Fletcher’s Cyclopedia statement that:

Equity securities represent ownership rights which, in varying degrees, depending on the type of equity security, entitle the holder to a right to participate in surplus profits, and, upon dissolution, to share in those assets that remain after all debts have been paid.²

Similarly, Black’s Law Dictionary defines “equity shares” as “[s]hares of any class of stock, whether or not preferred as to dividends or assets, having unlimited dividend rights” and defines “common stock” as a:

Class of corporate stock which represents the residual ownership of the corporation. Holders of common stock have voting powers (to, for example, select directors of corporation) and to participate in the profits of the corporation by way of dividends (but only after preferred stockholders have been paid their dividends). Such stock is last to share in property of the corporation on dissolution (after demands of creditors and senior security holders are satisfied).³

Thus, the *indicia* of what constitutes “equity” are: (i) rights to dividends, or profits, of the company, and (ii) rights to net assets upon liquidation. Notably, in these definitions, these rights are explicitly contemplated to potentially be subsidiary to the rights of certain other parties, including preferred shareholders and creditors. In addition, none of these definitions contemplates that, in order to be considered “equity,” a security must be issued by the legal entity in which the equity is granted.

Importantly, these definitions are also consistent with the FCC’s stated requirements for equity held control groups. Section 24.720(k), which defines the attributes a control group in a non-traditional, non-corporate applicant must have, states, in pertinent part:

² See *Algreg Cellular Engineering*, 12 FCC Rcd 8148 (1997) (citing 6A W. Fletcher, *Cyclopedia of the Law of Private Corporations* Sec. 2635 (rev. perm. ed. 1989) (footnotes omitted)).

³ Black’s Law Dictionary (6th Ed. 1992).

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[T]he [control group] entity and/or its members have the right to receive dividends, profits, and regular and liquidating distributions from the business in proportion to the amount of equity held in the business.

The Commission's Fifth Report and Order also restates the *indicia* of equity ownership by designated entities as including:

(a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise pro rata in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interests of the designated entity (through capital calls or otherwise) in the venture."⁴

Again, these discussions both reiterate the right to profit and liquidating distributions as the core characteristics of an equity device. TeleCorp's issuance of tracking stock for THC is fully consistent with these principals.

Like any other class of stock, the rights of a class of tracking stock are defined by the corporate law of the state of incorporation and the governance documents of the issuing corporation, in this case TeleCorp. With respect to rights to distributions or profits, the TeleCorp Certificate of Incorporation explicitly states that "[d]ividends on the Tracked Common Stock may be declared and paid only out of . . . the Tracked Business Available Dividend Amount."⁵ The Tracked Common Stock is defined as the "Class C Common Stock and the Class D Common Stock."⁶ The "Tracked Business Available Dividend Amount" is defined as:

⁴ Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5605 (1994) ("Fifth R&O").

⁵ Fifth Amended and Restated Certificate of Incorporation of TeleCorp PCS, Inc. ("TeleCorp Certificate"), 4.9(b)(ii). This clause in unredacted form restricts on payment of dividends to "the lesser of (A) the funds of the Corporation legally available therefor and (B) Tracked Business Available Dividend Amount." *Id.* The restriction contained in subsection (A) the of this provision is common for corporations and merely prevents TeleCorp from payment of dividends that would cause it to become insolvent. Notably, the same restriction applies to the payment of dividends on non-tracked common stock. *Id.*, 4.9(b)(i).

⁶ *Id.*, 4.9(a). There are two classes of common stock representing the equity of THC, Class C and Class D. The Class C shares were issued to investors in the "control group" and Class D shares were non-control group shares. For this reason, the dividends provision of Section 4.9(b)(ii) restricts TeleCorp from taking actions that inure to the benefit of Class C over Class D (or vice-versa). Specifically, Section 4.9(b)(ii) provides that TeleCorp "shall not declare or pay cash dividends on, or redeem, purchase or otherwise acquire for consideration, any shares of Tracked Common Stock unless concurrently therewith [TeleCorp] shall declare or pay cash dividends on, or redeem, purchase or otherwise

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[O]n any date, the excess (if any) of (i) the fair market value of the total assets of [THC] (including, without limitation, investments held by [THC]), less the total amount of the liabilities of [THC], in each case as of such date determined in accordance with generally accepted accounting principles, over (ii) the aggregate par value of, or any greater amount determined in accordance with GCL to be capital in respect of, all outstanding shares of the Tracked Common Stock.⁷

Thus, available net assets of THC can be used to declare a dividend to the holders of the tracked shares, without any restrictions other than those business and legal conditions (*e.g.*, availability of funds) typical of any other corporate entity. As with other corporations, the power to declare a dividend resides with the board of directors, which is ultimately controlled by Messrs. Vento and Sullivan.

Section 4.9(b)(iii) also gives TeleCorp the right to “declare and pay dividends exclusively on the Non-Tracked Stock, exclusively on the Tracked Common Stock or on both such categories of Common Stock in equal or unequal amounts.”⁸ Because the issue of whether to pay dividends is under the control of Messrs. Vento and Sullivan, the merger prospectus contains the following discussion under a risk factor disclosure captioned “*Holding Company’s tracking stockholders may receive a greater value upon the payment of dividends*”:

Holding Company’s [tracking stock classes] are tracking stock and the ability to pay dividends . . . is based on the value of specific subsidiaries. . . . The management of Holding Company and the initial investors of TeleCorp and Tritel own all of the Holding Company tracking stock. Management can cause payment of any future dividends on the Holding Company tracking stock. The value received by the Holding Company tracking stockholders is not available to other Holding Company stockholders.⁹

(...Continued)

acquire for consideration, as the case may be, on the same terms, all shares of Tracked Common Stock ratably in accordance with the number of shares of each class of Tracked Common Stock then outstanding.” Id., 4.9(b)(ii).

⁷ Id., 4.13 (“Tracked Subsidiary” replaced by its definition “THC,” *see id.*, 4.13 for definition of “Tracked Subsidiary”).

⁸ Id., 4.9(b)(iii).

⁹ TeleCorp Tritel Merger Joint Proxy Statement—Prospectus at 26.

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Thus, the risk that TeleCorp's tracking stockholders might receive disproportionately high returns was sufficiently great as to warrant a draconian warning to the public shareholders.

The TeleCorp Certificate also provides substantial rights to tracking stockholders in the event of liquidation. Specifically, Section 4.9(d) provides that:

Upon the dissolution, liquidation or winding up of [TeleCorp], after any preferential amounts to be distributed to the holders of the Preferred Stock . . . then outstanding have been paid or declared and funds sufficient for the payment thereof in full set apart for payment, (i) the holders of the Tracked Common Stock shall be entitled to receive pro rata the Tracked Business Available Liquidation Amount. . . .¹⁰

For such purposes, the "Tracked Business Available Liquidation Amount" is defined as:

[O]n any date, the fair market value of the total assets of [THC] (including, without limitation, investments held by [THC]), less the total amount of the liabilities of [THC], in each case as of such date determined in accordance with generally accepted accounting principles.¹¹

Thus, upon liquidation, THC would, like any other corporation, settle its debts, redeem its preferred shareholders,¹² and distribute the remaining proceeds, if any, to its shareholders (the tracking stock

¹⁰ TeleCorp Certificate at 4.9(d) (text providing a preference to "and any other class or series of stock having a preference over the Common Stock" omitted inasmuch as no such classes of stock presently exist).

¹¹ *Id.*, 4.9(d).

¹² Notably, the designated entity policies consider "preferred" stock with certain characteristics to be a debt (non-equity) device. Specifically, the policies do not consider preferred to be equity in cases where if the preferred interests: (i) carry no voting rights or other control attributes; (ii) contain the right to a fixed liquidation preference limited to a return on contributed capital; (iii) contain a fixed percentage *per annum* return; and, (iii) will not entitle the holder to share in profits above and beyond the fixed percentage *per annum* return. See *Broadband Personal Communications Services – C Block Auction (Questions & Answers)*, 78 Rad. Reg. 2d (P&F) 727 (Wireless Tel. Bur. 1995). Although irrelevant, TeleCorp's preferred stock classes, with limited exemption (TeleCorp's Preferred Series A is convertible and therefore may theoretically carry some right to profits of the non-tracked interests) are consistent with these requirements and, accordingly, should be considered debt. In any event, preferred, by its very name, implies a priority upon liquidation, and hence the existence of a priority to the preferred shareholders, who have bargained away their right to profits, is generally consistent with the rules.

owners). As with the declaration of dividends, the potential for disparate treatment in favor of tracking shareholders was sufficient to warrant the draconian warning in the merger proxy that “the value received upon the liquidation of the Holding Company tracking stock is not available to the other stockholders of Holding Company.”¹³

As a final matter, it is also noteworthy that, although the tracking stock may be converted to Class A Common Stock under certain circumstances, a conversion cannot be forced on the tracking shareholders. If legally permitted to convert their tracked interests, “each share of [tracking stock] . . . may *at the option of the holder thereof*, be converted into one fully paid and non-assessable share of Class A Common Stock.”¹⁴

Thus, contrary to Nextel’s assertions, tracking stock does not increase the exposure of tracking shareholders “to the risks of TPI insolvency and bankruptcy.”¹⁵ Because TeleCorp is a holding company which has assets that include only its interests in its subsidiaries, and because the tracking shareholders are guaranteed the right to any net assets remaining in THC after satisfaction of debt obligations, the bankruptcy of a non-THC subsidiary does not adversely affect tracking shareholders if THC performs financially. While tracking stockholders must stand in line in liquidation behind THC’s creditors and the creditors of TeleCorp, any designated entity that uses any debt financing bears some risk that their equity will be impaired in the event of liquidation.

Nextel’s argument that “control of [THC] will rest with the consolidated corporation and the obligations of its officers and directors . . . will be to the consolidated entity as a whole and not to the Designated Entity” is also misleading.¹⁶ As a technical matter, the tracking stock is issued by TeleCorp and THC has, in fact, issued its own stock, all of which is owned by TeleCorp. Thus, there are no “voting” rights implicated by the tracking stock. Voting control over THC is governed by the stock issued by THC, which is held by TeleCorp. TeleCorp, therefore, directs the voting of all of THC’s stock and the controlling principals of TeleCorp, Messrs. Vento and Sullivan,¹⁷ therefore control THC. While Messrs. Vento and Sullivan may owe fiduciary obligations to their shareholders,

¹³ Merger Proxy at 26.

¹⁴ *Id.*, 4.9(c)(iii) (emphasis added).

¹⁵ Nextel Petition at 4.

¹⁶ Nextel Petition at 5.

¹⁷ Messrs. Sullivan and Vento jointly hold all but an insignificant proportion of the TeleCorp voting preference stock, which gives them voting control over more than 50 percent of the TeleCorp voting shares.

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including *both* TeleCorp *and* tracking shareholders, these obligations are fundamentally no different than the obligations owed by any other control group to the designated entity's non-attributable investors. Moreover, the implication that somehow THC's interests will diverge from TeleCorp's interests ignores the *raison d'être* for combining the interests under a common holding company—the synergies that can be obtained in creation of a network.

Thus, the TeleCorp tracking stock is, by any rational accounting, equity in THC. The TeleCorp/THC tracking stock was previously reviewed by the FCC (as well as the Tritel tracking stock) and approved over two years ago.¹⁸ Accordingly, the FCC should grant the subject applications forthwith.

As a final matter, TeleCorp also wishes to bring to the attention of the Commission the Wireless Telecommunications Bureau's recent public notice conditionally granting licenses following the 39 GHz auction. As disclosed in the original application, Zephyr Wireless, L.L.C. ("Zephyr"), a designated entity subsidiary wholly-owned by THC, has been conditionally granted a number of 39 GHz licenses. The actual grant of these authorizations, however, is conditioned upon Zephyr making its final payments to the FCC on October 17, 2000. Because of the timing of the 39 GHz license grants, action on the contemplated merger, and consummation of the contemplated merger, TeleCorp hereby requests that the Commission grant its consent to: (i) the *pro forma* transfer of control of licenses acquired after action on the merger applications by Zephyr from THC to TeleCorp Holding Corp. II, L.L.C.; and (ii) the *pro forma* transfer of control of licenses acquired after action on the merger applications by Zephyr from TeleCorp Wireless, Inc. (currently TeleCorp PCS, Inc.) to TeleCorp PCS, Inc. pursuant to the merger.

¹⁸ See Application File Nos. 00867-CW-L-97 through 00873-CW-L-97; Application File No. 0000003274.

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Should any questions arise concerning this filing, please do not hesitate to contact the undersigned at (202) 719-3182.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric DeSilva", written in a cursive style.

Eric DeSilva

cc: Ms. Lauren Kravetz, Wireless Telecommunications Bureau
Mr. John Branscome, Wireless Telecommunications Bureau
Ms. Margaret Wiener, Wireless Telecommunications Bureau
Mr. Leonard Kennedy, counsel to Nextel Communications, Inc.