

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

In re Application of	)	
	)	
ClearComm, L.P.	)	
	)	FCC File No. 0000003752
For Consent to Pro Forma Assignment to	)	DA No. 01-2421
NewComm Wireless Services, Inc., of C	)	
Block Broadband PCS licenses for BTAs	)	
B488 and B489	)	
	)	

**Memorandum Opinion and Order**

**Adopted: October 17, 2001**

**Released: October 17, 2001**

By the Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau:

**I. Introduction**

1. The Auctions and Industry Analysis Division (“Division”) has before it a Petition for Reconsideration<sup>1</sup> filed by Centennial Communications Corp. (“Centennial”). The Petition seeks reconsideration of a Public Notice,<sup>2</sup> by which the Wireless Telecommunications Bureau (“Bureau”), *inter alia*, consented to ClearComm L.P.’s (“ClearComm”) <sup>3</sup> *pro forma* assignment application<sup>4</sup> of two C block Personal Communications Service (“PCS”) licenses.<sup>5</sup> In its Petition,

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<sup>1</sup> In re Application of ClearComm, L.P., for Authority to Assign Two C Block Broadband PCS Licenses to NewComm Wireless Services, Inc. in BTA Markets B488 and B489, Petition for Reconsideration filed by Centennial Communications Corp., dated March 22, 1999 (“Centennial Petition”).

<sup>2</sup> Wireless Telecommunications Bureau Grants Consent to Assign Two C Block Broadband PCS Licenses, *Public Notice*, DA 99-359, 14 FCC Rcd. 3013 (rel. Feb. 18, 1999) (“*Granting PN*”).

<sup>3</sup> ClearComm is a limited partnership composed of one general partner, SuperTel Communications Corp. (“SuperTel”) and 1600 individual limited partners. Letter from Messrs. Robert Pettit, Tyrone Brown and Eric DeSilva, Wiley, Rein & Fielding, to Ms. Andrea Kelly, Attorney, Auctions and Industry Analysis, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 10, 1999, Response to Question 5 (“ClearComm/NewComm December 10, 1999 letter”). Thus, the control group for ClearComm is SuperTel. *Id.*

<sup>4</sup> Assignment Application, submitted by ClearComm L.P. on February 4, 1999 at 05:32PM, File Number 0000003752 (“Pro Forma Application” or “ClearComm’s Application”).

<sup>5</sup> License Nos. KNLF746 and KNLF736 (“the C block licenses”). These licenses cover the island of Puerto Rico.

Centennial challenges whether NewComm Wireless Services, Inc. (“NewComm”), a wholly owned subsidiary of ClearComm, and the assignee of ClearComm’s licenses, qualifies under Section 24.709<sup>6</sup> of the Commission’s rules as an “entrepreneur” eligible to hold C block PCS licenses.<sup>7</sup> For the reasons stated below, we grant Centennial’s Petition in part, and otherwise deny the Petition.

## II. Background

### A. Pro Forma Assignment Application.

2. On February 4, 1999, ClearComm submitted a *pro forma* application for the assignment of its C block PCS licenses to NewComm.<sup>8</sup> In the application, ClearComm specifically indicated that the assignment does not “alter the economic ownership of the licenses but rather places the licenses in a subsidiary to comply with the terms of a loan agreement ClearComm has concluded with” Telephonica Larga Distancia de Puerto Rico, Inc. (“TLD”).<sup>9</sup> As part of the application, NewComm certified that it was eligible to obtain the licenses. Thus, NewComm certified that it met the eligibility rules for the C block PCS licenses,<sup>10</sup> in effect at the time ClearComm filed the *pro forma* assignment application, which required an applicant to demonstrate that it, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues for each of the past two years of less than \$125 million and total assets of less than \$500 million.<sup>11</sup>

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<sup>6</sup> 47 C.F. R. § 24.709 (1999).

<sup>7</sup> Centennial Petition at 6-9.

<sup>8</sup> Pro Forma Application.

<sup>9</sup> The Pro Forma Application describes the transaction as follows: “This transaction does not alter the economic ownership of the licenses but rather places the licenses in a subsidiary to comply with the terms of a loan agreement ClearComm has concluded with TLD. ClearComm anticipates that, in the future, TLD will obtain an equity interest in ClearComm [sic], and the subject licenses, and will file subsequent applications as necessary.” Pro Forma Application, Exhibit I. All subsequent documents make it clear that TLD’s anticipated equity interest is in NewComm and not ClearComm. Letter from Tyrone Brown, Esq. to Mr. Steve Weingarten, Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated February 26, 1999 (letter confirming that the assignor is current in installment payments and forwarding a copy of the joint Venture Agreement); Letter from Robert L. Pettit, Esq., Wiley, Rein & Fielding to Andrea Kelly, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 31, 2001.

<sup>10</sup> Entities that qualified under these rules are generally known as Designated Entities or Entrepreneurs. The Commission’s rules define “Designated Entities” as “small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.” 47 C.F.R. § 1.2110(a); *see* 47 U.S.C. §§ 309(j)(4)(C), (D). However, the term is generally used in a more limited context to refer to those entities qualifying for benefits available to small businesses.

<sup>11</sup> 47 C.F.R. § 24.709(a)(1) (1999).

3. On February 18, 1999, the Bureau granted ClearComm's *pro forma* assignment application for the two C block licenses.<sup>12</sup> On March 3, 1999, ClearComm and NewComm consummated the assignment.<sup>13</sup>

B. Petition for Reconsideration.

4. On March 22, 1999, Centennial filed its petition for reconsideration, arguing that because TLD, which has assets and revenues that exceed the limits permitted for C block licensees, exercises *de facto* or *de jure* control over NewComm it is not eligible to hold C block licenses.<sup>14</sup> Centennial alleges that it first became aware of TLD's control over NewComm from news reports of a TLD press conference.<sup>15</sup> Specifically, Centennial contends that TLD announced that it was involved in a "50-50 joint venture arrangement" with ClearComm/NewComm<sup>16</sup> and that TLD announced that a new digital wireless service would be marketed in Puerto Rico under the TLD name.<sup>17</sup>

C. Subsequent Proceedings and Filings.

5. After the filing of Centennial's petition, the parties engaged in an extensive pleading cycle.<sup>18</sup> As part of the pleading cycle, ClearComm and NewComm filed a number of documents

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<sup>12</sup> *Granting PN*, 14 FCC Rcd. 3013.

<sup>13</sup> As shown in Commission's Universal Licensing System database ("ULS").

<sup>14</sup> Centennial originally contended that TLD had both *de jure* and *de facto* control. However, Centennial's briefing focused on *de facto* control issues. Centennial Reply, at 2 ("While it appears that ClearComm does hold *de jure* control over NewComm . . ."). Centennial also sought to stay the effectiveness of the Public Notice. Petition at 2. In re Application of ClearComm, L.P., for Authority to Assign Two C Block Broadband PCS Licenses to NewComm Wireless Services, Inc. in BTA Markets B488 and B489, Supplement To Request To Stay and Request for Expedited Ruling, filed by Centennial Communications Corp., dated October 1, 1999 ("Stay Request"). However, the original request to stay, contained in one sentence of Centennial's Petition, fails to satisfy the requirements of Section 1.44(e) of the Commission's rules. 47 C.F.R. § 1.44(e) ("Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission."). Further, the Stay Request filed in October of 1999 fails to satisfy the requirements of Section 1.106(f), as it is untimely. 47 C.F. R. § 1.106(f). Accordingly, we dismiss the request for stay.

<sup>15</sup> Centennial Petition at 2 (citing Exhibit 1, Wireless Today "PCS Licensee Aligns with Telefonica on Puerto Rico Rollout," Communications Today, March 4, 1999).

<sup>16</sup> Centennial Petition at 4 (citing Exhibit 2).

<sup>17</sup> Centennial Petition at 4 (citing Exhibit 2).

<sup>18</sup> In addition to Centennial's original Petition, the parties filed the following briefs: (1) Opposition to Petition for Reconsideration, filed by ClearComm and NewComm, dated April 6, 1999 ("ClearComm/NewComm Opposition"); (2) Opposition of Telefonica Larga Distancia de Puerto Rico, Inc to petition for Reconsideration, dated April 6, 1999 ("TLD Opposition"); (3) Consolidated Reply to Oppositions to Petition For Reconsideration, filed by Centennial, dated April 16, 1999 ("Centennial Reply"); (4) Further Opposition of Telefonica Larga Distancia de Pureto Rico, Inc., filed by TLD, dated April 26, 1999 ("TLD Further Opposition"); (5) Surreply of (continued....)

that provided detail concerning the precise nature of the relationship between ClearComm/NewComm and TLD.<sup>19</sup> Of particular significance is the Joint Venture Agreement (“JVA”) entered into on February 4, 1999, between ClearComm and TLD. The JVA is structured in three phases. In the first phase, ClearComm creates a wholly owned subsidiary, NewComm, to hold ClearComm’s two C block PCS licenses.<sup>20</sup> At the same time, TLD loans working capital to NewComm and the parties execute a number of ancillary agreements, including a Management Agreement and a Technology Transfer Agreement.<sup>21</sup> In the second phase, subject to approval by the Commission,<sup>22</sup> TLD would convert its debt into slightly less than 49.9 percent of the equity – and 25 percent of the voting rights – of NewComm.<sup>23</sup> The JVA contemplates that, during the third phase, one of two potential scenarios would occur. Either ClearComm could exercise an option to acquire TLD’s interests in NewComm or TLD would have the right, after the designated entity restrictions expired, to acquire a controlling interest in NewComm.<sup>24</sup>

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ClearComm, L.P. and NewComm Wireless Services, Inc., dated April 26, 1999 (“ClearComm/NewComm Surreply”); (6) Consolidated Response to Surreplies, filed by Centennial, dated May 6, 1999 (“Centennial Surreply”); and (7) Joint Reply of ClearComm, NewComm and TLD, filed by ClearComm, NewComm and TLD, dated May 13, 1999 (“CC/NC/TLD Joint Reply”).

<sup>19</sup> The Joint Venture Agreement was attached to the ClearComm/NewComm Opposition. In addition, as part of the pleading cycle, NewComm and ClearComm also provided copies of a number of documents that were executed on March 3, 1999, the date of consummation, including the following: (1) Secured Convertible Promissory Note issued by NewComm to TLD, which evidences the 19.6 million dollar loan the principle amount of which is convertible into shares of Class A (voting) and Class B (non-voting) common stock; (2) Guarantee Agreement between ClearComm and TLD, which guarantees the Secured Convertible Promissory Note issued by NewComm to TLD; (3) a Pledge Agreement between ClearComm and TLD, which provides TLD a security interest in its shares of Class A (voting) NewComm stock while ClearComm retains voting rights to the stock; (4) a Management Agreement between NewComm and TLD, which details the management services TLD will provide to NewComm (“Management Agreement”); (5) a Technology Transfer Agreement between NewComm and Telefonica Internacional, S.A. (“TISA”) which grants NewComm the right to use TISA’s intellectual and industrial property; and (6) an Assignment Agreement, between ClearComm and NewComm, which transfers the Licenses and other assets to NewComm from ClearComm and in exchange NewComm provides ClearComm with 750 shares of Class A common stock. ClearComm/NewComm Surreply.

<sup>20</sup> JVA, Article I, “Joint Venture.”

<sup>21</sup> JVA, Article I, “Joint Venture.”

<sup>22</sup> The Commission approval envisioned by the parties here appears to relate to the Foreign Ownership restrictions, rather than the Commission’s Designated Entity Rules. Secured Convertible Promissory Note, dated March 3, 1999 (“After approval by the Federal Communications Commission of an application filed by Creditor and Debtor under the Communications Act of 1934, and the rules and regulations promulgated thereunder, requesting authorization for the Creditor (as a foreign owned corporation) to hold more than a 25 % equity interest in the Debtor . . .”)

<sup>23</sup> JVA, Article I, “Joint Venture,” Exhibit C.

<sup>24</sup> JVA, Article V, “Buy Out.” The JVA provided TLD with the right to increase its 49.9 percent interest to a 50.1 percent interest (“TLD’s option”). JVA, Article V, Section 5.02.

6. NewComm and TLD also entered into a Management Agreement (“MA”) whereby TLD, subject to oversight of NewComm’s Board of Directors, would provide NewComm with certain management services relating to human resources, administration, operations, financing, marketing, business planning, and business development.<sup>25</sup>

7. In order to resolve Centennial’s allegations regarding NewComm’s qualifications to be a C block PCS licensee, the Division, pursuant to Section 308(b)<sup>26</sup> of the Communications Act of 1934, as amended, subsequently issued a letter that propounded questions concerning NewComm’s financial and organizational structure and requested the production of documents.<sup>27</sup> ClearComm and NewComm filed written responses and produced responsive documents.<sup>28</sup> Following a review of the record, the Division raised further questions regarding whether certain provisions of the JVA and related documents implemented ClearComm’s intent to retain *de facto* and *de jure* control over NewComm. While maintaining that ClearComm retained both *de facto* and *de jure* control over NewComm and that NewComm met the Commission’s C block eligibility requirements, ClearComm, NewComm and TLD filed various proposed amendments to the JVA and related documents to explicitly address the control concerns. On June 27, 2001, ClearComm/NewComm and TLD filed various executed amendments to the JVA and related documents.<sup>29</sup> Although Centennial participated in the meetings and conference calls held with respect to the petition for reconsideration, Centennial did not file any subsequent documents after the pleading cycle closed in 1999.

8. The June 27, 2001 filing amended the JVA in various ways. First, the JVA now

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<sup>25</sup> Management Agreement, Section 3.1, “Basic Management Services.”

<sup>26</sup> 47 U.S.C. § 308(b).

<sup>27</sup> Letter from Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Messrs. Tyrone Brown and Eric W. DeSilva, dated November 3, 1999 (“308(b) letter”).

<sup>28</sup> ClearComm/NewComm December 10, 1999 letter; Letter from Robert L. Pettit, Esq., Wiley, Rein & Fielding, to Andrea Kelly, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated July 26, 2000; Letter from Robert L. Pettit, Esq., Wiley, Rein & Fielding, to Andrea Kelly, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated July 27, 2000; Letter from Robert L. Pettit, Esq., Wiley, Rein & Fielding, to Andrea Kelly, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated October 23, 2000; Letter from Robert L. Pettit, Esq., Wiley, Rein & Fielding, to Andrea Kelly, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 4, 2000 (“ClearComm/NewComm December 4, 2000 letter”). During the course of the proceedings, ClearComm/NewComm also advised the Division of the investment by Syndicated Communications Venture Partners IV, L.P. (“SYNCOM”) in NewComm. Although not material with respect to resolution of Centennial’s Petition, we note that the licensee must make any filing necessary to appropriately acknowledge SYNCOM’s ownership interest as required under the Commission’s rules and that the various responses to the Division’s 308(b) letter are not a substitute for such filings.

<sup>29</sup> Letter from Robert L. Pettit, Esq., Wiley, Rein and Fielding, to Magalie Salas, Secretary, Federal Communications Commission, dated June 27, 2001 (“June 27, 2001 Modifications”).

provides for higher monetary caps on NewComm's ability to incur certain types of indebtedness, to grant rights in assets of the corporation, or to make a capital expenditure.<sup>30</sup> Second, the JVA no longer includes an option for TLD to acquire a controlling interest in NewComm after the designated entity restrictions expire.<sup>31</sup> Third, the JVA precludes TLD's interests, on a fully diluted basis, from exceeding 25 percent of NewComm's voting equity and 49.9 percent of NewComm's total equity for the duration of the C block holding period.<sup>32</sup> In the event of the issuance of any additional convertible instruments to TLD by NewComm, or modifications to existing instruments, the cumulative total number of shares into which any such instruments are convertible will not exceed the caps included in the JVA. Finally, the JVA clarifies that NewComm is in no way limited to obtaining financing through the services of TLD.<sup>33</sup>

9. The Management Agreement was also modified to ensure that it would not undermine or conflict with ClearComm's intent to retain both *de facto* and *de jure* control of NewComm. For example, it clarifies that the manager is subject to the direct supervision of NewComm and that NewComm at all times determines the nature and type of services offered, the terms upon which those services are offered, and the prices charged.<sup>34</sup> One way in which the direct supervision is expressed is the fact that the Manager is subject to the day-to-day supervision of the NewComm's President or other officer designated by the Board of Directors.<sup>35</sup> Additionally, the Management Agreement expressly provides that NewComm's Board has unfettered authority with respect to the preparation, modification, and approval of the Annual Strategic Business Plan ("Annual Plan").<sup>36</sup> It also expressly provides that NewComm's Board has unfettered discretion in its selection and hiring of candidates for key positions.<sup>37</sup> Similarly, it clarifies that NewComm's Board has unfettered discretion when making modifications to NewComm's organizational chart.<sup>38</sup> Finally, the modified Management Agreement includes a provision clarifying that NewComm's Board possesses authority and control over the determination and implementation of the Company's policies and business plan, including the budget, the filing of documents with the Commission, employment supervision, and dismissal of all personnel hired under the Management

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<sup>30</sup> June 27, 2001 Modifications, Exhibit 1 (modifying Section 4.01, "Restricted Actions" of the JVA).

<sup>31</sup> *Id.* (modifying Article V, Buy Out, of the JVA to delete TLD's Option).

<sup>32</sup> *Id.* (adding Section 14.12, "Secured Convertible Promissory Notes" to the JVA).

<sup>33</sup> *Id.* (modifying Section 1.05(a), "Additional Contributions" of the JVA).

<sup>34</sup> *Id.* (modifying Section 3.3, "Annual Strategic Business Plan" of the Management Agreement).

<sup>35</sup> *Id.* (modifying Section 3.2, "Specific Responsibilities" of the Management Agreement). NewComm's Board of Directors is composed of five members. Four of whom are designated by ClearComm and one designated by TLD. JVA, Article III, "Corporate Governance."

<sup>36</sup> *Id.* (modifying Section 3.3, "Annual Strategic Business Plan" of the Management Agreement).

<sup>37</sup> *Id.* (modifying Section 3.3, "Annual Strategic Business Plan" of the Management Agreement).

<sup>38</sup> *Id.* (modifying Section 3.4, "The Company's Organizational Structure and Personnel" of the Management Agreement).

Agreement and the payment of all financial obligations and operating expenses.<sup>39</sup>

### III. Discussion

10. In its petition, Centennial argues that Sections 24.839(d)(2)<sup>40</sup> and 24.709(a)(3)<sup>41</sup> of the Commission's rules, in effect at the time of the application, prevent grant of the assignment application because NewComm did not qualify as a designated entity at the time it was filed.<sup>42</sup> Although Centennial's initial petition inquired into both *de jure* and *de facto* control, in its subsequent filings, Centennial concedes the issue of *de jure* control.<sup>43</sup>

11. As indicated in ClearComm's assignment application, ClearComm specifically intended to retain both *de facto* and *de jure* control of its subsidiary, NewComm.<sup>44</sup> Based upon our review of the record before us, we determine that ClearComm has maintained *de facto* control of NewComm. Under the applicable C block eligibility rules, however, and as discussed more fully below, TLD's original option in the JVA created a conflict with respect to *de jure* control of NewComm. Nonetheless, as we explain below, in the limited circumstances here, we deem it appropriate to allow the parties to modify the JVA and related documents to ensure that their agreements accomplish ClearComm's intent to implement a *pro forma* assignment of its licenses and to retain both *de facto* and *de jure* control of NewComm. Thus, we hold that NewComm is qualified to hold C block PCS licenses. To ensure that NewComm remains eligible to retain the licenses, we condition the grant on ClearComm/NewComm retaining the executed amendments to the JVA and related documents. Such conditions are fully consistent with ClearComm and NewComm's assurances, from the time that the assignment application was filed and onward, that NewComm was not controlled by TLD. The conditions serve to forestall any question that the licensee will be able to effect its assurances. Thus, we believe that granting the licenses subject to these conditions best serves the public interest. Accordingly, we grant the petition for reconsideration in part, to the extent that we condition the grant of the licenses upon ClearComm/NewComm retaining the amended documents, and deny the petition for reconsideration in all other respects.

#### A. C Block Eligibility Rules.

12. The general eligibility rules for C block PCS licenses, in effect at the time ClearComm filed its *pro forma* assignment application, required an applicant to demonstrate that

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<sup>39</sup> *Id.* (modifying Section 3.8, "Board of Directors Ultimate Control" of the Management Agreement).

<sup>40</sup> 47 C.F.R. § 24.839(d)(2) (1999).

<sup>41</sup> 47 C.F.R. § 24.709(a)(1) (1999).

<sup>42</sup> Centennial Petition at 6.

<sup>43</sup> Centennial Reply, at 2 ("While it appears that ClearComm does hold *de jure* control over NewComm . . .").

<sup>44</sup> Pro Forma Application.

it, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues for each of the past two years of less than \$125 million and total assets of less than \$500 million.<sup>45</sup> To determine whether an applicant meets the standards, the Commission attributes to the applicant not only its own assets and revenues, but also those of its “affiliates,” and the assets and revenues of entities that hold interests in the applicant and their affiliates.<sup>46</sup> An “affiliate” is an individual or entity that “(i) directly or indirectly controls or has the power to control the applicant, or (ii) is directly or indirectly controlled by the applicant, or (iii) is directly or indirectly controlled by a third person or parties who are also controlled or have the power to control the applicant, or (iv) has an ‘identity of interest’ with the applicant.”<sup>47</sup> Based upon this definition, it is clear that the determination of affiliation includes the concept of both *de facto* and *de jure* control.<sup>48</sup> Accordingly, if an entity has *de facto* or *de jure* control of an applicant, it is an affiliate of the applicant and its assets and revenues will be attributed to the applicant for the purposes of determining eligibility to hold a license.<sup>49</sup>

### 1. De Facto Control.

13. Whether an entity or individual has *de facto* control of an applicant depends upon the totality of the circumstances.<sup>50</sup> At a minimum, the control group<sup>51</sup> must: (1) appoint more than

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<sup>45</sup> 47 C.F.R. § 24.709(a)(1) (1999).

<sup>46</sup> “Affiliate” is defined in Sections 1.2110(b)(4) and 24.720(l)(1) of the Commission’s rules. 47 C.F.R. §§ 1.2110(b)(4) and 24.720(l) (1999).

<sup>47</sup> 47 C.F.R. § 24.720(l) (1999). We note that although the Commission has moved from a “control group” test to a “controlling interests test” the definition of affiliate has remained the same. *Compare* 47 C.F.R. § 24.720(l) (1999) *with* 47 C.F.R. § 1.2110(b)(4) (2001).

<sup>48</sup> Application of Baker Creek Communications, L.P., for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd. 18709, 18712 ¶ 6 (1998 PSPWD) (“*Baker Creek*”) (citing Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band to Reallocate the 29.5-30.0 GHz Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd. 12545, 12691-92(1997)). Although, a different affiliation rule was at issue in *Baker Creek*, 47 C.F.R. § 101.1112(h)(1), the wording of the rules is the same, thus our interpretation here should be the same. *Compare* 47 C.F.R. § 24.720(l) *with* 47 C.F.R. § 101.1112(h)(1).

<sup>49</sup> We note that under the new “controlling interest” standard, individuals or entities that have either *de facto* or *de jure* control will be attributed to the applicant. Amendment of Part 1 of the Commission’s Rules - Competitive Bidding Procedures, WT Docket No. 97-82, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making, FCC 00-274, 15 FCC Rcd 15,293, 15323-15326 ¶¶ 58-67 (2000) (“*Part 1 Fifth Report and Order*”).

<sup>50</sup> Implementation Of Section 309(j) Of The Communications Act--Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 447 ¶ 80 (1994) (“*Competitive Bidding Fifth MO&O*”); Ellis Thompson Corporation, *Memorandum Opinion and Order and Hearing Designation Order*, 9 FCC Rcd. 7138, 7139, ¶ 10 (1994) (“*Ellis Thompson HDO*”); Applications Of La Star Cellular Telephone Company, 9 FCC Rcd. 7108, 7109, ¶ 13 (1994).

50 percent of the board; (2) have authority to appoint, promote, demote, and fire senior executives; and (3) play an integral role in major management decisions.<sup>52</sup> In addition, where, as here, a management agreement<sup>53</sup> has been entered into by the licensee, the licensee must demonstrate that it retains exclusive responsibility for the operation and control of the licensee's facilities, as determined by the following six factors: (1) who determines and carries out the policy decisions, including preparing and filing applications with the Commission; (2) who is in charge of the payment of financing obligations, including operating expenses; (3) who controls daily operations; (4) who is in charge of employment, supervision, and dismissal of personnel; (5) does the licensee have unfettered use of all facilities and equipment; and (6) who receives monies and profits from the operation of the facilities.<sup>54</sup> Although a designated entity may employ a passive investor as a manager, in those circumstances the cumulative effect of the various protections and rights provided to the passive investor together with its authority as a manager may result in a shift of control to the passive investor.<sup>55</sup> We note that the fifth factor (unfettered use of all facilities and equipment) and the sixth factor (receipt of monies and profits from the operation of the facilities) are not at issue here. With respect to the remaining factors, we address Centennial's arguments below.

14. After a review of the entire record before us, we hold that ClearComm has demonstrated that it retained *de facto* control of NewComm. Although, certain provisions of the governing documents initially caused us to question whether ClearComm had implemented its expressed intent to retain control, the June 27, 2001 modifications to the JVA and related documents obviate such concerns as the amendments explicitly clarify ClearComm's express

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<sup>51</sup> A control group is an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee. 47 C.F. R. § 24.720(k) (1999).

<sup>52</sup> *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 447 ¶ 80.

<sup>53</sup> Although not directly applicable in this instance because it was adopted after the filing of the assignment application, in the *Part 1 Fifth Report and Order*, the Commission adopted a provision that delineates areas over which exercise of authority by a manager will trigger attribution of the manager's assets for purposes of determining eligibility for designated entity provisions. *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15325 ¶ 64 ("We will adopt provisions that make attributable the gross revenues of those that have management or marketing agreements with the applicant or licensee where such agreements grant authority over key aspects of the applicant's or licensee's business."). Specifically, the provision provides that "[a]ny person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decision or otherwise engage in practices or activities that determine, or significantly influence: (1) The nature or types of services offered by such an applicant or licensee; (2) The terms upon which such services are offered; or (3) The prices charged for such services." 47 C.F.R. § 1.2110(c)(2)(ii)(I) (2000) (emphasis added).

<sup>54</sup> *Competitive Bidding Fifth MO&O*, 10 FCC Rcd. at 449-451 ¶¶ 83-86 (citing *Intermountain Microwave, Inc.*, 24 Rad. Reg. 983 (1963)).

<sup>55</sup> *C/F Block Sixth Report and Order*, 15 FCC Rcd at 16290 n. 150 ("Agreements between [entrepreneurs] and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the [entrepreneurs] into a sale (or major refinancing) will constitute a transfer of control under our rules.") (citing *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 454-56 ¶ 93-96).

retention of *de jure* and *de facto* control of NewComm. Significant safeguards in the revised agreements are those provisions that clearly delineate the mechanisms by which the Board exercises its unfettered discretion over core issues. Similarly, language that channels and limits the manager's discretion and authority with respect to implementing the Board's decisions is equally important in *de facto* control cases.<sup>56</sup> Thus, we condition the licenses upon ClearComm and NewComm retaining the June 27, 2001 modifications to the JVA and related documents for the duration of the C block holding period<sup>57</sup> and making any further modifications that may be required to ensure that the parties relationship comports with this Order.

15. Control of Policy Decisions. Centennial alleges that the constraints on NewComm's authority with respect to modification of the company's Annual Plan vests control of a crucial function in TLD and limits NewComm's Board role to that of a "rubberstamp."<sup>58</sup> Specifically, the Management Agreement provided that TLD would prepare NewComm's Annual Plan and submit it to NewComm's Board for approval. NewComm's Board had the responsibility to review, modify and approve the recommendations. However, NewComm's ability to modify the Annual Plan was limited to "commercially reasonable reasons."<sup>59</sup> TLD contends that such a

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<sup>56</sup> Such procedures that channel and limit a manager's discretion are significant in a *de facto* control review. For example, in *Ellis Thompson*, the licensee exerted its control over the manager with respect to policy decisions by reviewing the operation and capital budgets and retaining authority to object to the budgets on a line-by-line basis. Additionally, the licensee required the manager to submit every contract for the licensee's review and approval. *Ellis Thompson Corp., Summary Decision of Administrative Law Judge Joseph Chachkin*, 10 FCC Rcd. 12554, 12559-12560 ¶¶ 35-36 (1994) ("*Ellis Thompson*"). In contrast, in *Baker Creek*, the manager was charged with managing a designated entity in accordance with a business plan that the manager itself authorized. *Baker Creek*, 13 FCC Rcd. at 18719 ¶ 17.

<sup>57</sup> The Commission created a five-year holding period and limited transfer period to prevent winning bidders in closed set aside auctions from being unjustly enriched by early license transfer to entities that did not qualify for the designated entity provisions ("C block holding period"). *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5588-89, ¶ 128-29; 47 C.F.R. § 24.839. We note that the Commission subsequently determined that it will allow a licensee to assign or transfer a license won in closed bidding to any qualified entity, entrepreneur or not, as soon as the licensee has satisfied its first construction benchmark. However, the Commission stressed that the decision to transfer a restricted license to a non-entrepreneur before the end of the five-year holding period in this manner must be made affirmatively by those in control of the entrepreneur. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order*, FCC 00-313, 15 FCC Rcd 16,266, 16290 ¶ 49 (2000) ("*C/F Block Sixth Report and Order*") (citing *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 454-56, ¶¶ 93-96, and *In re Applications of AirGate Wireless, L.L. C. Assignor, and Cricket Holdings, Inc., Assignee for Consent to Assign Broadband PCS F Block Licenses KNL882, KNLG279, KNLG280 and KNLG281 and Application of Leap Wireless International, Inc. for Authorization to Construct and Operate 36 Broadband PCS C Block Licenses*, 14 FCC Rcd 11827, 11836 ¶ 20 (1999) ("*Leap*"), *aff'd*, FCC 00-269, 15 FCC Rcd 13557 (2000)). The June 27, 2001 Modifications ensure that ClearComm retains both *de facto* and *de jure* control of NewComm. Accordingly, they would remain in place until the Commission approves an application for assignment or transfer of control of the licenses. This ensures that any determination to transfer or assign the licenses, as allowed by the *C/F Block Sixth Report and Order*, is affirmatively made by ClearComm/NewComm and not a third party.

<sup>58</sup> Centennial Reply at 9.

<sup>59</sup> Management Agreement, Section 3.3, "Annual Strategic Business Plan."

limitation is routine,<sup>60</sup> while ClearComm/NewComm contend that the limitation only applies to a previously approved plan.<sup>61</sup> ClearComm also argues that NewComm's officers and directors exercise ultimate control over the company's policy decisions. For example, NewComm's president has been responsible for negotiating with the financial community for significant funding to finance various payments to equipment vendors.<sup>62</sup>

16. That ClearComm, through NewComm's Board, to date has asserted *de facto* control with respect to policy decisions is not a guarantee of future conduct. Moreover, the potential constraints on NewComm's authority to modify the Annual Plan once approved (*i.e.*, the commercial reasonableness provisions) lend uncertainty to ClearComm's ability to accomplish its express intent to retain ultimate control over NewComm. However, the representations contained in the record as to the actual authority exercised by NewComm's officers and directors vitiate much of this uncertainty.<sup>63</sup> Additionally, the June 27, 2001 revisions to the Management Agreement and related documents directly address this issue and ensure ClearComm's intent to retain *de facto* control will be accomplished. Specifically, the Management Agreement, as amended, provides that the Board of NewComm has unfettered authority with respect to the preparation, modification, and approval of the Annual Plan.<sup>64</sup> Further, the Manager has no authority to change the Annual Plan once approved by the Board and must carry out the plan with no exceptions absent the express written approval of the Board.<sup>65</sup> Accordingly, we condition the grant of the licenses on the retention in the Management Agreement of the various provisions included in the June 27, 2001 submission for the duration of the C block holding period.

17. Control of Daily Operations. Centennial also argues that the terms of the Management Agreement between NewComm and TLD effectively divests NewComm of authority over daily operations.<sup>66</sup> Specifically, Centennial points to the absence of a clause that explicitly states that the NewComm's Board retains ultimate control over key management,

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<sup>60</sup> TLD Surreply at 7.

<sup>61</sup> ClearComm/NewComm Surreply at 13.

<sup>62</sup> ClearComm/NewComm's December 10, 1999 letter, Response 5. The record contains other examples of the active role taken by the President of NewComm in its financial affairs. ClearComm July 27, 2000 308 (b) letter, response to Question 30.

<sup>63</sup> ClearComm/NewComm's December 10, 1999 letter at 7. ClearComm/NewComm Surreply at 6 (The business plan in effect at that time was drafted by Javier Lamosa, President of NewComm and a principal of ClearComm).

<sup>64</sup> June 27, 2001 Modifications, Exhibit 1 (modifying Section 3.3, "Annual Strategic Business Plan" of the Management Agreement).

<sup>65</sup> *Id.* (modifying Section 3.3, "Annual Strategic Business Plan") ("Absent prior written consent of the Company's Board of Directors, by majority vote, the Manager shall not take any actions inconsistent with or otherwise modify an Annual Strategic Business Plan . . .").

<sup>66</sup> Centennial Reply at 9.

personnel, and policy decisions.<sup>67</sup> Centennial further contends that TLD might delegate its authority to subsidiaries or affiliates, or engage third party contractors to perform key functions for NewComm all without the knowledge or consent of NewComm's Board.<sup>68</sup> In response, ClearComm asserts that TLD's management duties are expressly subject to the ultimate authority of NewComm's Board because TLD's actions cannot be inconsistent with NewComm's corporate By-Laws, which vest ultimate authority for the management of NewComm in the Board.<sup>69</sup> In addition, ClearComm asserts that the Board retains specific power to oversee the daily operations of the company (e.g. responsibility for approving, disapproving, or modifying the Annual Strategic Business Plan prepared by TLD).<sup>70</sup> Finally, ClearComm/NewComm point to the fact that NewComm's Board can terminate the Management Agreement if TLD breaches its management obligations.<sup>71</sup>

18. We agree with ClearComm/NewComm that TLD, acting in its capacity as a manager, is limited by the corporate governance documents. As a general matter, however, such limitations may insufficiently constrain and channel a manager's authority. As suggested by Centennial, the presence of a clause explicitly stating that NewComm's Board retains control over key management, personnel, and policy decisions might have been helpful to clarify the parties' intent. However, the presence of such a clause is only one factor in any control analysis and would not override competing clauses that clearly vest authority over core issues in a manager. Of greater significance in the review of a management agreement are those provisions that channel and limit the manager's authority and clearly delineate the mechanisms by which the Board exercises its unfettered discretion over core issues. In this instance, we are persuaded that the actual conduct of NewComm supports the proposition that ClearComm/NewComm retained *de facto* control of daily operations.<sup>72</sup> Through the budget process, the regular meetings, and various other contacts, NewComm's board and the President in particular, are involved in setting the parameters for TLD's performance as manager and in reviewing TLD's achievement of goals set by NewComm.<sup>73</sup> Further, the revisions to the Management Agreement ensure that the Manager must implement the Annual Plan without deviation. Such explicit constraints upon the Manager ensure that NewComm retains control over daily operations. Therefore, we condition the grant of the license on ClearComm/NewComm retaining the modifications made to the JVA, Management Agreement and related documents for the duration of the duration of the C block holding period.

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 6.

<sup>69</sup> ClearComm/NewComm Surreply at 7.

<sup>70</sup> *Id.* at 6.

<sup>71</sup> TLD Further Opposition at 6.

<sup>72</sup> ClearComm/NewComm December 10, 1999 letter at 7-8 (citing NewComm Board meeting minutes).

<sup>73</sup> *Id.*

19. Control of Employment Decisions. In its petition, Centennial asserts that TLD's responsibility for the preparation of an organizational chart identifying staff and management positions to be filled (including senior executive officers), designating the responsibilities assigned to the various positions, and proposing qualified individuals for these positions amounts to an impermissible delegation of authority. Centennial further contends that the actual employment decisions that have been made are clearly indicative of the fact that TLD controls NewComm.<sup>74</sup> In its responsive pleadings, ClearComm argues that TLD's authority over employment decisions is subject to the company's By-Laws, which give NewComm's Board ultimate authority over the hiring, removal, compensation, and defining of responsibilities of officers and other management positions.<sup>75</sup> Further, ClearComm asserts that TLD's amendments to the organizational chart must be approved by NewComm's Board. Finally, ClearComm asserts that the active role played by NewComm's Board belies Centennial's allegation that TLD vests an improper degree of control.<sup>76</sup>

20. Commission precedent provides that "non-majority shareholders should not have the power to select or replace members of the control group or key employees of the corporation."<sup>77</sup> Although the record establishes that ClearComm, through NewComm's Board, ultimately asserts control over employment decisions,<sup>78</sup> certain provisions of the Management Agreement raised a potential conflict between the Board's authority and TLD's rights as a manager. However, the June 27, 2001, modifications to the Management Agreement remove any implied conflicts, and instead expressly provide that NewComm's Board retains authority over personnel decisions.<sup>79</sup> Thus, we condition the grant of the licenses on NewComm retaining the various modifications made to the JVA and related documents for the duration of the C block holding period.

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<sup>74</sup> Specifically, until March 30, 1999, TLD's General Manager in Puerto Rico, Mr. Jose Luis Fernandez, was the president of NewComm. Although Mr. Fernandez was removed, two other NewComm officers are also TLD employees (Migdalia Morales, Vice President and Treasurer of NewComm, is also the Director of Finance, Human Resources and General Services of TLD, and Encarnita Catalan, Secretary of NewComm is the Vice President and General Counsel of TLD). Centennial Surreply at 3.

<sup>75</sup> The By-Laws provide that "the Officers of the corporation shall be a President, a Vice President, a Secretary, and a Treasurer, each of who shall be elected by the Directors. Such other Officers and Assistant Officers as may be deemed necessary may be elected or appointed by the Directors." By-Laws, Article 4, para. a, "Number." Significantly, the By-Laws also provide that, "any Officer or Agent elected or appointed by the Directors may be removed by the Directors whenever in their judgment the best interests of the corporations would be served . . ." By-Laws, Article 4, para. c, "Removal."

<sup>76</sup> ClearComm/NewComm December 10, 1999 letter at 8-9. For example, TLD asserts that although it was not improper for Mr. Fernandez to serve as both TLD's general manager and President of NewComm, NewComm's Board replaced Mr. Fernandez, over his objection, with Mr. Javier Lamoso, thereby demonstrating its independence. TLD Further Opposition at 9.

<sup>77</sup> *Competitive Bidding Fifth MO&O*, 10 FCC Rcd. at 449 ¶ 82.

<sup>78</sup> ClearComm/NewComm December 10, 1999 letter at 8-9 (citing board meeting minutes).

<sup>79</sup> June 27, 2001 Modifications, Exhibit 1 (modifying Section 3.4, "The Company's Organizational Structure and Personnel" of the Management Agreement).

Additionally, we also condition the licenses on requiring NewComm to ensure that individuals who are now, or were previously, officers or directors of TLD do not comprise a majority of NewComm's officers, for the duration of the C block holding period.

21. Responsibility for Financial Obligations. Centennial contends that although the JVA does not specifically state which party is responsible for preparation of NewComm's budget, the Board's lack of ultimate control over personnel decisions, coupled with its inability to exert complete control over NewComm's strategic plan, constitutes evidence that the Board does not have absolute control over NewComm's financial obligations. In its response, ClearComm asserts that NewComm, not TLD, is responsible for its liabilities, all significant financial decisions, and contracts, loans and other indebtedness of NewComm.<sup>80</sup> We find that the record does not establish that TLD exercised *de facto* control over financial obligations.<sup>81</sup> Further, we find that the modifications of the agreements, specifically, the Board's unfettered authority over the Annual Plan, which includes the budget, sufficiently addresses any concerns raised.<sup>82</sup> Additionally, we note that the increased monetary caps in the revised JVA provide further authority for NewComm to manage its financial obligations in the future.<sup>83</sup> Accordingly, we condition the grant of the licenses on the retention in the JVA, Management Agreement and related documents of the various provisions included in the June 27, 2001 submission for the duration of the C block holding period.

## 2. De Jure Control.

22. The attribution rule for C block PCS licenses, in effect at the time ClearComm filed its *pro forma* assignment application, contained two exceptions to the general eligibility requirement under which an applicant could exclude from its gross revenue and asset totals the gross revenues and total assets of passive investors.<sup>84</sup> One of these exceptions, (hereinafter, the "49.9 percent equity exception")<sup>85</sup> at issue here, required the applicant to form a control group<sup>86</sup> within which "qualifying investors"<sup>87</sup> owned at least 50.1 percent of the applicant's voting

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<sup>80</sup> ClearComm/NewComm Surreply at 11-12.

<sup>81</sup> ClearComm/NewComm December 10, 1999 letter at 9-10 and responses to questions 15 and 19.

<sup>82</sup> June 27, 2001 Modifications, Exhibit 1 (modifying Section 3.3, "Annual Strategic Business Plan" of the Management Agreement).

<sup>83</sup> June 27, 2001 Modifications, Exhibit 1 (amending Section 4.01, "Restricted Actions" of the JVA).

<sup>84</sup> 47 C.F.R. § 24.709(b) (1999).

<sup>85</sup> 47 C.F. R. § 24.709(b)(2) (1999).

<sup>86</sup> 47 C.F. R. § 24.720(k) (1999).

<sup>87</sup> A qualifying investor is a person who is (or holds an interest in) a member of the applicant's control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the entrepreneurs' block gross revenues and total assets limits. 47 C.F.R. § 24.720(n) (1999).

interests.<sup>88</sup> Under the 49.9 percent equity exception, the applicant's control group was required to own at least 50.1 percent of the applicant's total equity.<sup>89</sup> If these and certain other requirements were met, only the gross revenues and total assets of the applicant and its affiliates are considered for the purposes of determining eligibility under Section 24.709(a)<sup>90</sup> of the Commission's rules. The Commission's rules require full dilution of interests to qualify under the 49.9 percent equity exception.

23. Specifically, Section 1.2110(b)(4)(v)<sup>91</sup> of the Commission's rules requires full dilution of future equity interests. Dilution is required to ensure that such future interests "do not threaten the composition of designated entities" and, where "[a]t the end of the five-year [designated entity holding] period, it will still be the designated entity's decision as to whether to sell the business, which ensures that the designated entity controls the decision whether to sell."<sup>92</sup> Thus, ownership interests, such as "warrants" and "options," and "calls" are calculated on a fully diluted basis because they can be used to force a designated entity to sell its ownership interests. Significantly, even provisions that ostensibly, in isolation, allow the designated entity to retain control over the decision whether to sell may also be treated as fully diluted when, in combination with other provisions that limit the designated entity's rights, they divest the designated entity of control.<sup>93</sup>

24. As previously noted, ClearComm intended to retain *de jure* control of NewComm.<sup>94</sup> To this end, the parties structured NewComm with the specific purpose of falling within the 49.9 percent equity exception.<sup>95</sup> However, as noted above, the JVA originally provided that, after expiration of the designated entity restrictions, TLD had the option to increase its 49.9 percent

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<sup>88</sup> *Part 1 Fifth Report and Order*, ¶¶ 58-67; 47 C.F.R. § 24.709(b).

<sup>89</sup> *Id.*

<sup>90</sup> 47 C.F.R. § 24.709(a) (1999).

<sup>91</sup> 47 C.F.R. § 1.2110(b)(4)(v) ("Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally considered to have a present effect on the power to control the concern. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.") (emphasis added).

<sup>92</sup> *Competitive Bidding Fifth MO&O*, 10 FCC Rcd. at 445, ¶ 94.

<sup>93</sup> *Competitive Bidding Fifth MO&O*, 10 FCC Rcd at 454-456 ¶ 93-96 ("Agreements between [entrepreneurs] and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the [entrepreneurs] into a sale (or major refinancing) will constitute a transfer of control under our rules."); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Sixth Report and Order on Reconsideration, 11 FCC Rcd 16266, 16290 n. 150 ("*C/F Block Sixth Report and Order*").

<sup>94</sup> Although Centennial conceded *de jure* control in an early pleading, this issue was again raised during the course of staff review of the record.

<sup>95</sup> Pro Forma Application.

interest to 50.1 percent.<sup>96</sup> The JVA nonetheless provided that ClearComm could prevent TLD's exercise of this option by exercising its own option to acquire TLD's interest in NewComm.<sup>97</sup> ClearComm/NewComm therefore maintained that TLD's option was not relevant to the calculation of *de jure* control.<sup>98</sup> We disagree.<sup>99</sup> Although TLD's option could only be exercised if ClearComm failed to exercise its option, the requirement that a designated entity take affirmative action is not sufficient to avoid the attribution of the interest. Accordingly, the dilution of TLD's option contradicts ClearComm's expressed intention to retain control of NewComm.<sup>100</sup>

25. As noted above, however, on June 27, 2001, NewComm provided the Commission with modifications to the JVA and related documents. Significantly, with regard to the 49.9 percent equity exception, the modified JVA omits TLD's option.<sup>101</sup> Additionally, the JVA includes a clause that ensures, for the duration of the C block holding period, that in the event of the issuance of any additional convertible instruments to TLD, or modifications to existing instruments, the cumulative total of shares into which any and all such instruments are

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<sup>96</sup> Both buy-out provisions contain detailed procedures calling for the fair market value of the NewComm stock to be determined by a reputable internationally recognized investment banking firm.

<sup>97</sup> Specifically, ClearComm had the option to purchase the Secured Convertible Promissory Note or TLD's shares of NewComm common stock into which it is convertible, as applicable. JVA, Section 5.

<sup>98</sup> Letter from Robert L. Pettit, Esq., Wiley, Rein, and Fielding, to Andrea Kelly, Deputy Branch Chief, Legal Branch, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated January 31, 2001, 1 ("... none of the specific instruments created in connection with the ClearComm-TLD joint venture changes the fact that ClearComm has an absolute right to acquire all of TLD's interests in NewComm, whether in the form of notes or equity, prior to the expiration of the Commission's designated entity restrictions and before TLD is allowed to exercise any right to control NewComm. As such, TLD's conversion rights that implicate possible control of NewComm are not properly treated as immediately exercised")

<sup>99</sup> In the course of resolving this issue, it became clear that ClearComm and TLD, relying on DiGiPH, erroneously believed that ClearComm's option was mutually exclusive with TLD's option and cancelled it out for purposes of analyzing ownership under the full dilution rule. Such a conclusion is inconsistent with the rule and applicable precedent. In *DiGiPH*, the investor's options were evaluated in the manner in which they could actually be exercised. Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau to Cheryl A. Tritt, Esq., Michael K. Kurtis, Esq, counsel for DiGiPH PCS, Inc., DA 98-1888, 13 FCC Rcd 17950 (1998) ("*DiGiPH*").

<sup>100</sup> This issue arose during the course of meetings and was not substantively briefed by the parties. Under well established Commission precedent, the filing of a motion for reconsideration allows the Commission to consider all issues, even issue that were not raised in the petition for reconsideration. See *Central Florida Enterprises, Inc. v. Federal Communications Commission*, 598 F 2d 37, 48 n. 51 (D.C. Cir. 1978); Rules And Policies On Foreign Participation In The U.S. Telecommunications Market, FCC 00-339, *Order on Reconsideration*, 15 FCC Rcd. 18,158, 18170-18171 n. 79 (2000) (citing *Central Florida* and noting that the Commission may *sua sponte* reconsider a prior decision in a rulemaking, so long as a petition for reconsideration of the prior decision is pending, even though the pending petition concerns a different aspect of the case).

<sup>101</sup> June 27, 2001 Modifications, Exhibit 1 (Amending Article 5, "Buy-Out," to delete TLD's option.)

convertible will not exceed 25 percent of NewComm's voting equity and 49.9 percent of NewComm's total issued and outstanding shares of common stock.<sup>102</sup> Taken together, we find that these provisions accomplish ClearComm's intent to retain *de jure* control of NewComm.

26. In this instance, we believe that allowing NewComm to modify its JVA and related documents serves the public interest. From the time of the filing of the *pro forma* application and up until this date, no challenge has been raised regarding ClearComm's qualifications under the designated entity rules. Further, in this instance we do not find that there is any evidence that ClearComm, NewComm, or TLD devised NewComm's capital structure in bad faith to circumvent the ownership restrictions.<sup>103</sup> Rather, ClearComm, NewComm, and TLD cooperated in the proceedings and produced facts and information the Division deemed necessary to resolve its concerns.

27. Our decision is premised on the specific and unique facts before us. Specifically, in this instance there is no evidence that is contrary to the conclusion that the assignor, ClearComm, at all times in the process was qualified as a designated entity and intended to control NewComm. Further, the evidence shows that it was the clear intent of the parties to structure the assignee, NewComm, as a drop-down wholly owned subsidiary of the assignor and to retain the existing control group, SuperTel. Finally, there is no evidence that the assignee's structure interfered with another entity's ability to obtain the license.<sup>104</sup> Accordingly, we approve the modifications to the JVA and related documents and exercise our discretion to grant the assignment application in the manner that best serves the public interest.

#### IV. Conclusion

28. For the foregoing reasons, we grant the petition in part, deny the petition in part, and condition the grant of the assignment application upon NewComm retaining the modifications to the JVA and other documents contained in the June 27, 2001 submission. Further, we find that NewComm qualifies to hold C Block licenses under the 49.9 percent equity exception.

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<sup>102</sup> *Id.* (Adding Section 14.12, "Secured Convertible Promissory Notes").

<sup>103</sup> In fact, we note that ClearComm has consistently informed the Commission that TLD might assume an ownership role in NewComm pending Commission approval. Document entitled "ClearComm/NewComm Telefonica Larga Distancia PCS C Block Joint Venture," dated April 13, 1999, submitted by ClearComm to Commission staff at a meeting on April 13, 1999 ("ClearComm April 13, 1999 Briefing Sheet").

<sup>104</sup> The result here might not apply where, for example, an auction applicant compromised the integrity of an auction. Applications of NextWave Personal Communications, Inc., for Various C Block BroadBand PCS Licenses, *Order*, DA 97-328, 12 FCC Rcd. 2030, 2071 ¶ 88 (1997) (WTB) (allowing NextWave to restructure to comply with statutory foreign ownership benchmark, but noting "if in the future we are presented with facts that an applicant compromised the integrity of the auction and violated Commission rules, we will take all actions we deem appropriate."). Further, this decision in no way limits our ability to determine that auction applicants do not meet the eligibility criteria for benefits afforded to designated entities. *Baker Creek*, 13 FCC Rcd at 18727 ¶ 32 (disallowing the use of a bidding credit because the auction applicant did not meet the eligibility criteria).

## V. Ordering Clauses

29. IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309, and sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Petition for Reconsideration and supporting pleadings filed by Centennial Communications Corp. on March 22, 1999 IS GRANTED IN PART AND DENIED IN PART to the extent set forth above.

30. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), grant of the Assignment Application filed by ClearComm on February 4, 1999, in the above-captioned proceeding, is subject to the further condition that NewComm, ClearComm, and TLD retain the modifications to the agreements provided to the Commission on June 27, 2001 in substantially the same terms and conditions until after the expiration of the C block holding period.

31. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), grant of the Assignment Application filed by ClearComm on February 4, 1999, in the above-captioned proceeding, is subject to the further condition that NewComm notify the Commission within 10 days if, despite the provisions of the revised JVA, TLD obtains a fully diluted equity interest in NewComm of greater than 49.9 percent before the expiration of the C block holding period.

32. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), grant of the Assignment Application filed by ClearComm on February 4, 1999, in the above-captioned proceeding, is subject to the further condition that NewComm ensure that individuals who are now, or were previously, officers or directors of TLD do not comprise a majority of NewComm's officers, for the duration of the C block holding period.

33. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), grant of the Assignment Application filed by ClearComm on February 4, 1999, in the above-captioned proceeding, is subject to the further condition that the JVA, the Management Agreement, and ancillary documents be amended in all respects necessary for the agreements to comport with this Order.

34. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309(d), and Sections 0.331, 24.830, and 24.839 of the Commission's rules, 47 C.F.R. § 0.331, 24.830, and 24.839, that the grant of the Assignment Application filed by ClearComm on February 4, 1999, in the above-captioned proceeding IS FURTHER CONDITIONED on the above conditions.

35. IT IS FURTHER ORDERED, pursuant to Section 1.106, 47 C.F.R. § 1.106, and Section 1.44, 47 C.F.R. § 1.44, that the original request to stay, contained in Centennial's Petition and the Supplemental to Request for Stay and Request for Expedited Ruling, dated October 1, 1999 are DISMISSED.

36. IT IS FURTHER ORDERED, pursuant to Section 1.106, 47 C.F.R. § 1.106, that Wireless Telecommunications Bureau Grants Consent to Assign Two C Block Broadband PCS Licenses, *Public Notice*, DA 99-359, 14 FCC Rcd. 3013 (rel. Feb. 18, 1999), IS VACATED only to the extent indicated herein and AFFIRMED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Margaret Wiener, Chief  
Auction and Industry Analysis Division  
Wireless Telecommunications Bureau