



PUBLIC NOTICE

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**WIRELESS TELECOMMUNICATIONS BUREAU AND INTERNATIONAL BUREAU
GRANT CONSENT FOR THE TRANSFER OF CONTROL OF LICENSES AND
AUTHORIZATIONS HELD BY NEWCOMM WIRELESS SERVICES, INC. FROM
CLEARCOMM, L.P. TO TEM PUERTO RICO, INC.**

WT Docket No. 02-366

Pursuant to sections 4(i), 214(a) and 310(d) of the Communications Act of 1934, as amended (“Act”),¹ and sections 0.331 and 0.261 of the Commission’s rules,² the Wireless Telecommunications Bureau and International Bureau approve the applications listed below requesting Commission consent to transfer control of broadband Personal Communications Services (“PCS”) and Fixed Microwave Services licenses and an international section 214 authorization held by NewComm Wireless Services, Inc. (“NewComm”) from ClearComm, L.P. to TEM Puerto Rico, Inc. (“TEM PR”). No comments or petitions to deny were received in response to the Public Notice announcing that the applications had been accepted for filing.³ On March 25, 2004, the Department of Homeland Security (“DHS”), Department of Justice (“DOJ”), and Federal Bureau of Investigation (“FBI”) submitted a Petition to Adopt Conditions to Authorizations and Licenses⁴ (“Petition”) advising the Commission they have no objection to grant of the applications and petition for declaratory ruling filed in this proceeding provided the Commission conditions grant on compliance with the provisions of the Network Security Agreement, dated May 14, 2004 (“Network Security Agreement”), entered into between NewComm, TEM PR, and Telefonica Moviles, S.A. (“Moviles”), on the one hand, and the DHS, DOJ, and FBI, on the other. The Petition further states that NewComm, TEM PR and Moviles do not object to the grant of the Petition. The Network Security Agreement is attached to this Public Notice as Appendix A.

¹ 47 U.S.C. §§ 154(i), 214(a), 310(d).

² 47 C.F.R. §§ 0.331, 0.261.

³ See NewComm Wireless Services, Inc., ClearComm, L.P., and TEM Puerto Rico, Inc., *Public Notice*, WT Docket No. 02-366, 17 FCC Rcd 23,738 (2002). The parties filed an application seeking consent to transfer control of microwave authorizations on July 23, 2004, File No. 0001817003. This application was placed on public notice on July 28, 2004. See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and De Facto Transfer Lease Applications Accepted for Filing, *Public Notice*, Report No. 1895 (rel. July 28, 2004). This recently filed application will be addressed in a subsequent public notice.

⁴ Department of Homeland Security, Department of Justice, and Federal Bureau of Investigation, Petition to Adopt Conditions to Authorization and Licenses, WT Docket No. 02-366 (dated May 25, 2004).

The Wireless Telecommunications Bureau and International Bureau find, upon consideration of the record, that the proposed transfers of control will serve the public interest, convenience, and necessity.⁵ Consistent with Commission precedent, the Bureaus accord the appropriate level of deference to the Executive Branch's expertise on national security and law enforcement issues. The Network Security Agreement addresses the Executive Branch agencies' stated concerns regarding national security, law enforcement, and public safety. Accordingly, we grant the Petition and grant the applications listed below subject to compliance by NewComm, TEM PR, and Moviles with the terms of the Network Security Agreement.

Pursuant to sections 4(i) and 310(b)(4) of the Act and section 0.261 of the Commission's rules, the International Bureau finds that it would not serve the public interest to deny the common carrier radio license applications on the basis of proposed indirect foreign ownership of NewComm in excess of the 25 percent benchmark of section 310(b)(4). Upon consummation of the proposed transaction, NewComm, a U.S. corporation, will be 50.1 percent owned and controlled by TEM PR, also a U.S. corporation. In a petition for declaratory ruling filed pursuant to section 310(b)(4), TEM PR states that it is a direct wholly-owned subsidiary of Moviles, a publicly-traded Spanish corporation that is controlled by Telefonica, S.A. ("Telefonica"), also a publicly-traded Spanish corporation. According to the petition, Telefonica owns 92.75 percent of Moviles (71.25 percent directly and 21.50 percent indirectly through Telefonica's wholly-owned subsidiary, Telefonica Internacional, S.A. ("TISA")), with the remaining 7.3 percent traded on the Spanish continuous market and the Madrid, Barcelona, Bilbao and Valencia stock exchanges, as well as the New York Stock Exchange. TEM PR states that Telefonica's shares are also publicly traded in Spain on the Madrid, Barcelona, Bilbao and Valencia stock exchanges, as well as on the stock exchanges in London, Paris, Frankfurt, Tokyo, New York, Lima, Buenos Aires, Sao Paulo, and the SEAQ International Exchange in London. TEM PR asserts that Moviles and Telefonica each has its principal place of business in Spain, which is a World Trade Organization Member.

Pursuant to section 310(b)(4) of the Act and the Commission's "open entry" standard for investment by WTO Members in U.S. common carrier radio licensees,⁶ and upon consideration of the record, the International Bureau finds that TEM PR is entitled to a presumption that its 50.1 percent controlling investment in NewComm does not raise competition concerns, and there is no evidence in the record that would rebut this presumption. We also determine that the agreement between the parties, the DHS, DOJ, and FBI addresses and resolves other factors relevant to our public interest analysis under section 310(b)(4).

Accordingly, we grant the petition for declaratory ruling filed by TEM PR to permit indirect foreign ownership of NewComm in excess of the 25 percent benchmark of section 310(b)(4). Specifically, this ruling permits the indirect foreign ownership of NewComm by Moviles and its Spanish shareholders, including Telefonica and its Spanish shareholders, in an amount up to and including a controlling 50.1 percent equity and voting interest. NewComm may acquire up to and including an additional, aggregate 25 percent indirect equity and/or voting interest from other foreign individuals and entities without seeking further Commission approval under section 310(b)(4) subject to the following two conditions: (1) non-Spanish foreign ownership of Moviles and Telefonica shall be included in the total indirect foreign ownership of NewComm, and (2) no single foreign individual or entity, with the exception of Moviles and Telefonica, may acquire indirect ownership of NewComm in excess of 25 percent without further Commission approval. We emphasize that the specific ruling we issue to

⁵ See 47 U.S.C. §§ 214(a), 310(d).

⁶ See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23,891 (1997); Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, *Order on Reconsideration*, 15 FCC Rcd 18,158 (2000).

NewComm will require that the licensee and its publicly-traded parent companies, Moviles and Telefonica, continue to monitor NewComm's attributable foreign equity and voting interests, and calculate these interests consistent with the attribution principles enunciated by the Commission.⁷ This ruling is conditioned on compliance with the provisions of the Network Security Agreement, which is attached to this Public Notice as Appendix A.

I. APPLICATIONS

A. SECTION 310(d) APPLICATIONS

The Wireless Telecommunications Bureau consents to the following applications to transfer control of PCS and Fixed Microwave Services licenses.

<u>File Number</u>	<u>Licensee</u>	<u>Lead Call Sign</u>
0001049003	NewComm Wireless Services, Inc.	KNLF736
0001048972	NewComm Wireless Services, Inc.	WPQN608

Consent to application file no. 0001049003 is conditioned upon full payment of the required unjust enrichment payments on or before the consummation date.⁸

B. INTERNATIONAL SECTION 214 APPLICATION

The International Bureau consents to the following application to transfer control of an international section 214 authorization held by NewComm from ClearComm to TEM PR. The international section 214 authorization held by NewComm is modified to exclude authority to provide service between the United States and Cuba, effective upon the date of consummation of the proposed transfer of control.⁹

<u>Authorization Holder</u>	<u>Authorization Number</u>	<u>File Number</u>
NewComm Wireless Services, Inc.	ITC-214-19990615-00426	ITC-T/C-20021015-00512

II. PETITION FOR DECLARATORY RULING

The petition for declaratory ruling under section 310(b)(4) of the Act, File No. ISP-PDR-20021015-00035, is granted to the extent specified in this Public Notice.

Pursuant to section 1.103 of the Commission's rules,¹⁰ the consent granted herein is effective upon release of this Public Notice. By this approval, the parties are authorized to consummate the

⁷ See Vodafone Americas Asia Inc. (Transferor) and Globalstar Corporation (Transferee), *Order and Authorization*, 17 FCC Rcd. 12,849, 12,857-858, ¶¶ 23-26 (IB 2002) (citing Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1932, as amended, *Declaratory Ruling*, FCC 85-295, 103 F.C.C.2d 511 (1985), *recon. in part*, 1 FCC Rcd. 12 (1986); BBC License Subsidiary L.P., *Memorandum Opinion and Order*, 10 FCC Rcd 10968 (1995)).

⁸ See 47 C.F.R. § 1.2111(c).

⁹ See Application for Consent to Transfer Control, File No. ITC-T/C-20021015-00512, at p. 11 ("Cuba ... is not a destination country for purposes of this Application..."); see also Letter from Heidi Anderson, Counsel to TEM Puerto Rico, Inc., to Ms. Cynthia Bryant, Policy Division, International Bureau, FCC, dated April 30, 2002 (stating that calls to Cuba can and would be blocked at the NewComm system switch).

¹⁰ 47 C.F.R. § 1.103.

transaction described in their applications.¹¹ Pursuant to sections 1.106(f) and 1.115(a) of the Commission's rules,¹² petitions for reconsideration and applications for review may be filed within thirty days of the release of this Public Notice. Additionally, we remind parties that a transfer shall not be considered complete until the underlying transaction closes and all conditions set forth in the grant documents, including this Public Notice and the application, are met. Upon receipt of the notification required by section 1.948(d) of the Commission's rules,¹³ and satisfaction of all requisite conditions, the Commission will consider the transfer complete. Failure of the parties to comply with section 1.948(d) of the Commission's rules, or any specific condition described above, will result in automatic cancellation of the Commission's approval, and dismissal of the underlying application(s).

For further information, contact Erin McGrath, Mobility Division, Wireless Telecommunications Bureau, at (202) 418-7240, or Rita Cookmeyer, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, at (202) 418-0660 (Part 24 only); Linda Ray, Broadband Division, Wireless Telecommunications Bureau, at (202) 418-2487 (Part 101 only); or Francis Gutierrez or Susan O'Connell, Policy Division, International Bureau, at (202) 418- 1460 (international section 214 authorization and petition for declaratory ruling only).

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¹¹ Section 1.948(d) of the Commission's rules provides that "the transaction must be consummated and notification provided to the Commission within 180 days of public notice of approval, and notification of consummation must occur no later than 30 days after actual consummation." 47 C.F.R. § 1.948(d). Section 63.24(e) of the Commission's rules requires that the "transferee shall notify the Commission no later than 30 days after either consummation of the proposed ...transfer of control, or a decision not to consummate...." 47 C.F.R. § 63.24(e)(4).

¹² 47 C.F.R. §§ 1.106(f), 1.115(a).

¹³ 47 C.F.R. § 1.948.

Appendix A