

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

In the Matter of )
Leap Wireless International, Inc. and its )
subsidiaries, Debtors-In-Possession, ) WT Docket No. 03- 263
and )
Leap Wireless International, Inc. and its )
subsidiaries ) File No. 0001546977, et. al.
Applications for Consent to the Assignment of )
Licenses Pursuant to Section 310(d) of the )
Communications Act )

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 2004

Released: August 5, 2004

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us twenty related applications filed by Leap Wireless International, Inc, Debtor-in-Possession, and certain of its subsidiaries (collectively, "Leap DIP") and the newly-formed Leap Wireless International, Inc. and its subsidiaries (collectively, "New Leap" and, together with Leap DIP, the "Applicants") seeking approval for the assignment of broadband Personal Communication Services ("PCS") licenses from Leap DIP to New Leap (the "Assignment Applications").

2. As discussed below, we conclude, pursuant to our review under Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), that approval of the Assignment

1 See ULS File Nos. 0001546977, 0001526967, 0001527061, 0001527176, 0001527268, 0001527331, 0001527351, 0001527457, 0001527482, 0001527512, 0001527533, 0001527547, 0001527566, 0001527585, 0001527595, 0001527604, 0001536572, 0001536587, 0001707824, and, 0001728878. ULS File No. 0001546977 was designated as the lead application.

2 See ULS File No. 0001546977, Exhibit A – Description of Transaction and Public Interest Statement ("Application Statement") at 7-17.

Applications will serve the public interest, convenience, and necessity.<sup>3</sup> With regard to the issue of the Commission's designated entity and entrepreneur rules, however, we deny the Applicants' request to waive the Commission's rules regarding attribution, find that a general waiver of the Commission's designated entity and entrepreneur eligibility rules is not justified, and conclude that New Leap does not meet the criteria for designated entity or entrepreneur status. Therefore, the licenses in this transaction that were acquired using installment payment financing or bidding credits are subject to the Commission's unjust enrichment rules.<sup>4</sup> For the reasons discussed fully below, we nonetheless grant the Applicants a limited waiver of the timing requirements of section 1.2111(c) of the Commission's rules which will facilitate Leap's bankruptcy settlement with the United States and the Commission, and, thereby, the implementation of the Applicants' Joint Plan of Reorganization.<sup>5</sup>

## II. BACKGROUND

3. Since its inception in 1998, Leap Wireless International, Inc. and certain of its subsidiaries (collectively, "Leap") acquired broadband PCS licenses through Commission auction and on the secondary market. According to the Applicants, although Leap's "Cricket" service "met with tremendous success," the company was unable to restructure its debt after several years of operation as required by its business plan.<sup>6</sup> As a result, in April 2003, Leap sought protection under Chapter 11 of the United States Bankruptcy Code in the Southern District of California ("Bankruptcy Court").<sup>7</sup> Subsequent to filing for bankruptcy, Leap filed applications for Commission approval of the involuntary assignment of its licenses to Leap DIP.<sup>8</sup>

4. In July 2003, Leap DIP and its creditors proposed a Joint Plan of Reorganization ("Reorganization Plan"), which was confirmed by the Bankruptcy Court in October 2003.<sup>9</sup> The Reorganization Plan calls for the cancellation of Leap's common stock and the issuance, through a series

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<sup>3</sup> 47 U.S.C. § 310(d).

<sup>4</sup> See 47 C.F.R. § 1.2111(c), (d) (unjust enrichment penalties for assignment or transfer of control of licenses that have remaining installment debt or were acquired using bidding credits).

<sup>5</sup> 47 C.F.R. § 1.2111(c)(1). The Commission has previously clarified that the approval of an assignment or transfer that results in installment payment unjust enrichment is conditioned upon the full payment of the required unjust enrichment payment on or before the consummation date. See In Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15,239, 15,314 at ¶ 37 (2000).

<sup>6</sup> Application Statement at 1. Specifically, the downturn of financial markets in the late 1990s (particularly in the telecommunications sector) effectively prevented Leap from accomplishing the required restructuring. *Id.*

<sup>7</sup> *Id.* at 2.

<sup>8</sup> See ULS File Nos. 0001288952, 0001288949, 0001288938, 0001288919, 0001288915, 0001288909, 0001288894, 0001288888, 0001288884, 0001288873, 0001288866, 0001288853, 0001288855, 0001288849, 0001288845, 0001288841, 0001288793, 0001288834, 0001469522, 0001469511, 0001469533, and 0001720826.

<sup>9</sup> See ULS File No. 0001546977, Exhibit B – Plan of Reorganization ("Reorganization Plan"). The parties agreed upon the Reorganization Plan on July 30, 2003, and the Bankruptcy Court confirmed the Reorganization Plan on October 22, 2003, pending Commission approval of the assignment of licenses.

of transactions, of common stock in New Leap, which, according to the Applicants, will be widely dispersed among well over 100 shareholders.<sup>10</sup> The Applicants state that this “new body of shareholders” will be comprised of Leap’s debt holders and will include three entities that have a greater than ten percent equity interest in the new corporation.<sup>11</sup> Moreover, all but one member of New Leap’s board of directors will be different from the existing board members.<sup>12</sup> As for New Leap’s officers, the Reorganization Plan states that Leap’s existing executive officers and senior management will continue to serve in their current capacity until New Leap’s board of directors decides otherwise.<sup>13</sup> Already, however, it has been announced that Leap/Leap DIP’s current chief executive officer (“CEO”) will not serve as New Leap’s CEO.<sup>14</sup> Thus, when the bankruptcy proceeding closes, New Leap will essentially have a completely different body of shareholders, board of directors, and at least CEO from those of Leap or Leap DIP.<sup>15</sup>

5. After the Reorganization Plan was approved by the Bankruptcy Court, Leap DIP filed the Assignment Applications seeking the Commission’s consent to assign all but nine of the licenses it acquired from Leap (“Licenses”) to New Leap.<sup>16</sup> The Assignment Applications were placed on public notice by the Wireless Telecommunications Bureau on December 24, 2003.<sup>17</sup> No petitions to deny or comments were filed.

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<sup>10</sup> See Reorganization Plan at 2-3; Application Statement at 4.

<sup>11</sup> Application Statement at 4. The three entities, along with their percentage interest in New Leap as of the filings, are Mark H. Rachesky (18.2 %), The Capital Group Companies (13.2 %), and Highland Capital (10.8 %). *Id.*

<sup>12</sup> In the Application Statement, the Applicants identify six individuals who have been designated as New Leap’s board directors and indicate that the seventh and final director should be designated prior to consummation of the Reorganization Plan. Application Statement at 9 & n.23. On June 3, 2004, the seventh board member designee for New Leap was announced. See “Leap Appoints William Freeman as Chief Executive Officer of Cricket Communications, Inc.,” dated June 3, 2004, <http://www.leapwireless.com/dindex.html> (July 28, 2004) (Leap June 3rd Press Release). Comparing this information to that Leap has provided to the Securities and Exchange Commission, only one Leap/Leap DIP director (Michael B. Targoff) will be a member of New Leap’s board. See Leap Wireless International, Inc. Annual Report Filed Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934, Form 10-K/A, for the year ended December 31, 2002, at 104.

<sup>13</sup> Reorganization Plan at 63.

<sup>14</sup> See Leap June 3rd Press Release. See also “Leap Wireless Names New CEO,” TR DAILY, dated June 3, 2004.

<sup>15</sup> The Reorganization Plan also states that New Leap’s board of directors will select the board of directors and senior management for each of New Leap’s various subsidiaries. Reorganization Plan at 62-63.

<sup>16</sup> The remaining nine licenses held by Leap DIP are to be assigned, pursuant to the Reorganization Plan, from Leap DIP to a trust for the benefit of Leap DIP’s general unsecured creditors (“Creditor Trust”). *Id.* at n.3. Leap DIP and the Creditor Trust sought the Commission’s consent for the assignment of these nine licenses in a separate application. See ULS File No. 0001590535. Concurrent with this Memorandum Opinion and Order, the Commission grants its consent to those assignments.

<sup>17</sup> Leap Wireless International, Inc., Debtor-in-Possession, Seeks FCC Consent for the Assignment of Broadband Personal Communications Services Licenses to Leap Wireless International, Inc., *Public Notice*, 18 FCC Red. 26763 (2003). After this initial public notice, the Applicants filed an additional assignment application to add (continued....)

6. Several of the licenses in the proposed transaction are subject to the Commission's designated entity rules, including twelve licenses that are in the Commission's broadband PCS installment financing program and seven licenses that were acquired using bidding credits in a Commission auction. The proposed transaction also includes licenses, known as "set-aside licenses," that the Commission reserved for only those entities that qualify as "entrepreneurs" for the first five years of the license term (*i.e.*, the "holding period") or until the licenses' construction requirements have been met.<sup>18</sup> Under the Commission's rules, for an assignee to acquire set-aside licenses that are within the five-year holding period and have not met the relevant construction requirements, it must meet the eligibility criteria for an entrepreneur when the assignment application was filed.<sup>19</sup> To qualify as an entrepreneur, an entity and its attributable interests may not have gross revenues of more than \$125 million in each of the previous two years and total assets of more than \$500 million.<sup>20</sup> If an entity was not in existence for all or part of the relevant period, the Commission looks to the finances of the entity's predecessor-in-interest.<sup>21</sup> In the Assignment Applications, the Applicants maintain that the Commission should either find New Leap eligible to be an entrepreneur or waive its rules to allow the New Leap to acquire the set-aside licenses. Since the Assignment Applications were filed, however, either the Applicants have notified the Commission that the construction requirements have been met for the set-aside licenses included in the proposed transaction or the licenses automatically cancelled for failure to meet the construction requirements set forth in section 24.203 of the Commission's rules.<sup>22</sup> Therefore, Leap DIP may now assign, upon Commission consent, the active and constructed set-aside licenses to New Leap without a finding that New Leap is an entrepreneur or a waiver of section 24.839 of the Commission's rules.<sup>23</sup>

7. The Assignment Applications also include twelve licenses acquired by Leap that remain in the Commission's installment financing program. These licenses were eligible to be paid for in installments because the bidders who won them at auction qualified as either a small or very small

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seven licenses to the transaction. ULS File No. 0001728878. The application was placed on public notice as accepted for filing on May 12, 2004.

<sup>18</sup> See 47 C.F.R. § 24.839(a). See also 47 C.F.R. § 24.203 (construction requirements for broadband PCS licenses).

<sup>19</sup> See 47 C.F.R. § 24.839(a)(2) ("at the time the application for assignment or transfer of control is filed"). See also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd. 15743, 15768, ¶ 47 (1998) (*C Block Fourth R&O*); TeleCorp PCS, Inc., Tritel, Inc. and Indus, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 3716, 3736, ¶ 48 (WTB, 2000) (*TeleCorp-Tritel Order*).

<sup>20</sup> See 47 C.F.R. § 24.709(a)(1). An entity must maintain its entrepreneur eligibility for the first five years of the initial license term to continue to hold the set-aside licenses. See 47 C.F.R. § 24.709(a)(2). The eligibility calculation, however, will not include increased gross revenues or total assets of the licensee and its attributable entities if the increase was the result of "nonattributable equity investments, . . . debt financing, revenues from operations or other investments, business development, or expanded service." *Id.* Increased revenues or assets from these sources are referred to as "permissible growth."

<sup>21</sup> See 47 C.F.R. § 1.2110(n)

<sup>22</sup> 47 C.F.R. § 24.203.

<sup>23</sup> 47 C.F.R. § 24.839.

business.<sup>24</sup> With respect to broadband PCS licenses, an entity will be considered a small business or very small business if it, together with its affiliates, has less than \$40 million or \$15 million, respectively, in average annual gross revenues for the preceding three years.<sup>25</sup> Pursuant to section 1.2111(c), if an assignee does not meet the eligibility standards for installment payments, the assignor must make full payment of the remaining unpaid principal, interest and late fees accrued through the date of assignment before the assignment to a non-eligible entity can be consummated.<sup>26</sup> The Applicants state that Leap's gross revenues for 2000 were \$50.3 million, for 2001 were \$255.2 million, and for 2002 were \$618.5 million.<sup>27</sup> The average of these gross revenues is \$308 million. The Applicants nonetheless contend that the Commission should find New Leap to be eligible for participation in the installment payment plan or, in the alternative, the Applicants seek a waiver of the Commission's rules.

8. The Assignment Applications also contain 7 licenses that were acquired using bidding credits in a Commission auction. If an entity wishes to assign a license acquired with a bidding credit to another entity during the first five years of the initial license term, either the assignee must meet the same designated entity status or the assignor must reimburse the federal government for the amount of the bidding credit before the assignment is consummated.<sup>28</sup> The amount of reimbursement for the bidding credit is reduced in the third, fourth and fifth years of the initial license term and completely eliminated starting in the sixth year.<sup>29</sup> The eligibility criteria to be deemed a small or very small business is the same as described above, *i.e.*, the entity and its affiliates must have less than \$40 million or \$15 million, respectively, in average gross revenues for the past three years.<sup>30</sup> As stated above, Leap's average gross revenues for the years 2000 to 2002, based on the information provided by the Applicants, is \$308 million.<sup>31</sup> Consistent with their position on installment payments, the Applicants offer an argument that the Commission should find New Leap to be eligible for bidding credits or, alternatively, the Applicants seek a waiver of the Commission's rules.

9. In addition to seeking relief via their Assignment Applications and associated waiver requests, Applicants had also sought similar results in negotiating with the government (including the Commission) over the terms of the debt reinstatement specified in the Reorganization Plan. Specifically,

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<sup>24</sup> See 47 C.F.R. § 24.711(c).

<sup>25</sup> See 47 C.F.R. § 24.720(b).

<sup>26</sup> 47 C.F.R. § 1.2111(c).

<sup>27</sup> See ULS File No. 0001546977, Letter from William S. Carnell, counsel for Leap, to Kathy Harris, Deputy Chief, Mobility Division, Wireless Telecommunication Bureau, Federal Communications Commission, dated March 16, 2004, at 1 ("Revenue and Asset Disclosure Letter").

<sup>28</sup> See 47 C.F.R. § 1.2111(d).

<sup>29</sup> The amount of reimbursement of the bidding credit is reduced over time in the following fashion: if the assignment occurs within the first two years of license term, 100 percent of the value of the bidding credit must be paid; if the assignment occurs in the third year of the license term, only 75 percent must be paid; if the assignment occurs in the fourth year, only 50 percent; and in the fifth year, only 25 percent. 47 C.F.R. § 1.2111(d)(2). After five years into the license term, no reimbursement for a bidding credit is required. *Id.*

<sup>30</sup> See 47 C.F.R. § 24.720(b).

<sup>31</sup> See ¶ 7 *supra*.

the Reorganization Plan provided that the Commission's monetary claim would be "reinstated" under the Plan, but because the terms of the reinstatement were subject to the Commission's relevant regulatory approvals, including determinations of eligibility for the retention of federal benefits, the Bankruptcy Court left to the parties the power to negotiate details regarding the terms of such reinstatement. On August 3, 2004, the Applicants and the United States Department of Justice, acting as bankruptcy counsel on behalf of the Commission and the United States, entered into a Reinstatement Agreement ("Leap Reinstatement Agreement"), whereupon the parties agreed to the reinstatement of the debt to the Commission in a manner that fully satisfies the dollar amounts owed pursuant to the Commission's unjust enrichment provisions in section 1.2111, subject to the Commission's exercise of its regulatory authority with respect to the Applicants' pending requests for assignment and waiver.<sup>32</sup> Thus, the negotiations over the terms of the reinstatement of debt left for Commission resolution in this proceeding the issues raised in the Applicants' Assignment Applications, including key questions regarding eligibility, the application of all aspects of our payment rules, and the fundamental determination of whether the assignment of licenses will serve the public interest, convenience and necessity.

### III. DISCUSSION

#### A. Public Interest Considerations

10. In considering assignment applications, the Commission must determine, pursuant to Section 310(d) of the Communications Act, whether the Applicants have demonstrated that the proposed assignment of licenses will serve the public interest, convenience, and necessity.<sup>33</sup> The legal standards that govern our public interest analysis require that we weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.<sup>34</sup> In applying our public interest test, we must assess whether

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<sup>32</sup> Omnibus Agreement for Reinstatement of Debt and Modification of Installment Payment Plan Notes and Security Agreements for Broadband PCS Licenses, executed by Cricket Holdings Dayton, Inc., Cricket Licensee (Denver), Inc., Cricket Licensee (Lakeland), Inc., Cricket Licensee (North Carolina), Inc., Cricket Licensee XIV, Inc., Cricket Licensee XV, Inc., Cricket Licensee XVI, Inc., Cricket Licensee XVII, Inc., Cricket Licensee XVIII, Inc., Cricket Licensee XIX, Inc., and Cricket Licensee XX, Inc., and Cricket Communications, Inc., and the Federal Communications Commission, August 3, 2004.

<sup>33</sup> 47 U.S.C. § 310(d).

<sup>34</sup> See, e.g., Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd. 2570, 2580-81, ¶ 24 (2004) (*Cingular-NextWave Order*); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 483, ¶ 15 (2004) (*GM-News Corp. Order*); WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, WC Docket No. 02-215, *Memorandum Opinion and Order*, 18 FCC Rcd. 26484, 26492-93, ¶ 12 (2003) (*WorldCom Order*); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No. 02-70, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23255, ¶ 26 (2002); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd. 20559, 20574, ¶ 25 (2002) (*EchoStar-DirectTV HDO*); VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, (continued...)

the proposed transaction complies with the specific provisions of the Communications Act, the Commission's rules, and federal communications policy.<sup>35</sup> Our public interest analysis considers the likely competitive effects of the proposed transaction and whether such assignments raise significant anticompetitive concerns.<sup>36</sup> In addition, we consider the efficiencies and other public interest benefits that are likely to result from the proposed assignment of the licenses.<sup>37</sup>

11. As a threshold matter, the Commission must determine whether the Applicants meet the requisite qualifications to hold and assign licenses under Section 310(d) of the Act and the Commission's rules.<sup>38</sup> As a general rule, the Commission does not re-evaluate the qualifications of assignors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.<sup>39</sup> Because no petitions were filed regarding these applications, we find no reason to re-evaluate the qualifications of Leap DIP. Also, as a part of our public interest analysis, Section 310(d) requires the Commission to consider whether the

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IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9789, ¶ 17 (2001) (*Deutsche Telekom-VoiceStream Order*); Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14046, ¶ 22 (2000) (*Bell Atlantic-GTE Order*); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., WT Docket No. 03-203, *Memorandum Opinion and Order*, 19 FCC Rcd. 6232, 6241-42, ¶ 23 (WTB, MB 2004) (*Nextel-WorldCom Order*); Global Crossing LTD. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, IB Docket No. 02-286, *Order and Authorization*, 18 FCC Rcd. 20301, 20315-16, ¶ 17 (IB, WTB, WCB 2003) (*Global Crossing Order*).

<sup>35</sup> See, e.g., *Cingular-NextWave Order* at 2580-81, ¶ 24; *GM-News Corp. Order* at 483-84, ¶ 16; *EchoStar-DirectTV HDO* at 20574, ¶ 25; *Nextel-WorldCom Order* at 6241-42, ¶ 23; *TeleCorp-Tritel Order* at 3721-22, ¶ 12.

<sup>36</sup> See, e.g., *Cingular-NextWave Order* at 2580-81, ¶ 24; *WorldCom Order* at 26492-93, ¶ 12; *Global Crossing Order* at 20315-16, ¶ 17; *Nextel-WorldCom Order* at 6241-42, ¶ 23.

<sup>37</sup> See, e.g., *Cingular-NextWave Order* at 2580-81, ¶ 24; *WorldCom Order* at 26492-93, ¶ 12; *Global Crossing Order* at 20315-16, ¶ 17; *Nextel-WorldCom Order* at 6241-42, ¶ 23.

<sup>38</sup> 47 U.S.C. § 310(d). See 47 C.F.R. § 1.948. See also, e.g., *Cingular-NextWave Order* at 2581-82, ¶ 25; *GM-News Corp. Order* at 483, ¶ 15; *WorldCom Order* at 26493-94, ¶ 13; *Deutsche Telekom-VoiceStream Order* at 9790, ¶ 19; *Global Crossing Order* at 20316-17, ¶ 18; *Nextel-WorldCom Order* at 6242, ¶ 24; Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless, WT Docket No. 03-19, *Memorandum Opinion and Order*, 18 FCC Rcd. 6490, 6492 ¶ 5 (WTB-CWD 2003) (*Verizon-Northcoast Order*).

<sup>39</sup> See, e.g., *Cingular-NextWave Order* at 2581-82, ¶ 25; *GM-News Corp. Order* at 485, ¶ 18; *WorldCom Order* at 26493-94, ¶ 13; *Deutsche Telekom-VoiceStream Order* at 9790, ¶ 19; Applications of SBC Communications Inc. and BellSouth Corporation, WT Docket No. 00-81, *Memorandum Opinion and Order*, 15 FCC Rcd. 25459, 25465, ¶ 14 (2000) (*SBC-BellSouth Order*); Applications of Vodafone AirTouch, PLC and Bell Atlantic Corporation, WTB Rpt. No. 371, *Memorandum Opinion and Order*, 15 FCC Rcd. 16507, 16513, ¶ 14 (2000) (*Bell Atlantic-Vodafone AirTouch Order*); *Global Crossing Order* at 20316-17, ¶ 18; *Nextel-WorldCom Order* at 6242, ¶ 24; *Verizon-Northcoast Order* at 6492, ¶ 5; *TeleCorp-Tritel Order* at 3722, ¶ 13. See also Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See *id.*

proposed assignee or transferee is qualified to hold Commission licenses.<sup>40</sup> In this proceeding, no issues have been raised with respect to the basic qualifications of New Leap, and our review of the applications reveals no independent reason to examine further New Leap's qualifications. Based on our review of the Assignment Applications, we find that New Leap is qualified to acquire the Licenses.

12. Finally, when evaluating the likely competitive effects and public interest benefits of a proposed transaction, the Commission performs a case-by-case review of the transaction in order to fulfill the Commission's statutory mandate to preserve and enhance competition in relevant markets, ensure diversity of license holdings, accelerate private sector deployment of advanced services, and manage the spectrum in the public interest.<sup>41</sup> The Applicants allege that this transaction is in the public interest because it will allow New Leap to emerge from bankruptcy and ensure "the continued existence of a vigorous competitor in the wireless telecommunications market. . . ."<sup>42</sup> The Applicants also state that this transaction will enable New Leap "to provide Cricket services on an economically viable basis to the current Cricket markets and to new markets in the future."<sup>43</sup> Neither the Assignment Applications nor our own analysis leads to the conclusion that there is likely to be substantial competitive harm as a result of this transaction. Furthermore, no petitions were filed arguing that this transaction would result in competitive harm. Therefore, we find that the potential benefits outweigh any potential harm and that the proposed transaction is in the public interest.

#### **B. Request for Waiver of the Designated Entity and Entrepreneur Eligibility Rules**

13. The question of New Leap's eligibility for entrepreneur status has, since the Assignment Applications were filed, become a moot issue because the proposed transaction does not now include any licenses that cannot be held by non-entrepreneurs pursuant to section 24.839 of the Commission's rules.<sup>44</sup> In acquiring the licenses, however, New Leap also argues for its eligibility as a designated entity in order to obtain certain benefits available only to such entities – specifically, the right to avoid acceleration of installment debt for licenses administered under the installment financing program, and, for licenses whose auction price had been reduced by bidding credits, the right to avoid reimbursement for a prorated amount of the credit prior to consummation of the license assignment. In this regard, because the Applicants' arguments regarding eligibility for entrepreneur and designated entity status are interwoven, and because the Applicants did not withdraw their request for waiver of entrepreneur eligibility, we address the Applicants' arguments in their entirety. For the reasons set forth below, we conclude that

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<sup>40</sup> See, e.g., *Cingular-NextWave Order* at 2581-82, ¶ 25; *GM-News Corp. Order* at 486-87, ¶ 23; *WorldCom Order* at 26493-94, ¶ 13; *EchoStar-DirecTV HDO* at 20574, 20576, ¶¶ 25, 28; *SBC-BellSouth Order* at 25465, ¶ 14; *Bell Atlantic-GTE Order* at 14227, ¶ 429; *Bell Atlantic-Vodafone AirTouch Order* at 16513, ¶ 14; *Nextel-WorldCom Order* at 6242, ¶ 24.

<sup>41</sup> See *GM-News Corp Order* at 483-84, ¶ 16; *EchoStar Direct TV HDO* at 20574, ¶ 26. See also 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd. 22668, 22696, ¶ 55 (2001), citing 47 U.S.C. §§ 301, 303, 309(j), 310(d).

<sup>42</sup> Application Statement at 5.

<sup>43</sup> *Id.* Additionally, the Applicants assert that, if the Assignment Applications are not approved by the Commission, "there is a very real risk that Leap will not be able to continue as a going concern and that its assets will instead be sold piecemeal to satisfy its financial obligations." *Id.*

<sup>44</sup> 47 C.F.R. § 24.839.



New Leap does not meet our criteria to be eligible for designated entity or entrepreneur status. We also deny the Applicants' specific request to waive the Commission's rules regarding attribution as well as their general request to waive the designated entity eligibility rules because we do not find that the Applicants have met the Commission's standard for waiver. Thus, the approval of the Applications is subject to the unjust enrichment provisions of Part 1 of the Commission's rules.

### 1. "Permissible Growth" Does Not Apply to New Leap's Eligibility

14. The Applicants first suggest that New Leap should be eligible to acquire set-aside licenses and be eligible for designated entity benefits without the need for a waiver of the Commission's rules.<sup>45</sup> The Applicants offer this position despite their acknowledgement that New Leap's gross revenues and total assets exceed the financial eligibility caps set forth in both sections 24.709(a) and 24.720(b).<sup>46</sup> In support of this theory, the Applicants contend that all of New Leap's assets and revenues are "the product of 'revenues from operations,' 'business development or expanded service,' or 'the normal projected growth' of Leap's gross revenues and assets," and should therefore be excluded under the "permissible growth" exception of section 24.709(a)(2).<sup>47</sup> The Applicants apparently maintain that the permissible growth of the assignor should be transferable to the assignee, which would then be eligible under section 24.709 to acquire set-aside licenses pursuant to section 24.839(a)(2).<sup>48</sup> Further, the Applicants' apparently seek to extend this interpretation of "permissible growth" to argue that, in addition to the entrepreneur benefits, New Leap should retain the designated entity benefits formerly afforded to Leap.

15. Precedent does not support the Applicants' theory and we are not persuaded by their filing to expand the principle of "permissible growth." The Applicants' argument hinges on the Commission accepting the premise that the assignment of the Licenses is nothing more than a "nominal transfer of control" and is a "consequence of its bankruptcy."<sup>49</sup> In this regard, the Applicants attempt to distinguish their transaction from "other 'real' transfers of control to which the Commission's rules are addressed" and they argue that denial of eligibility "would effectively penalize Leap for taking advantage of the protections afforded by bankruptcy."<sup>50</sup> The "permissible growth" exception of section 24.709(a)(2), however, does not apply to the present circumstances because the exception was created for those entities that continue to hold the set-aside licenses but grow in a manner that is consistent with the statutory intent to promote small businesses.<sup>51</sup> Thus, an essential component underlying the policy of

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<sup>45</sup> Application Statement at 7-12.

<sup>46</sup> 47 C.F.R. §§ 24.709(a), 24.720(b). *See also* 47 C.F.R. § 1.2110.

<sup>47</sup> 47 C.F.R. § 24.709(a)(2). Application Statement at 8. *See also* Revenue and Asset Disclosure Letter at 2, 4.

<sup>48</sup> 47 C.F.R. §§ 24.709(a)(2), 24.839(a)(2).

<sup>49</sup> Application Statement at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd. 5532, 5605, ¶ 167 (*Competitive Bidding Fifth R&O*). The Commission intended the permissible growth exception to prevent an effective penalty for the successful growth of designated entities. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403, 468, ¶ 125 (*Competitive Bidding Fifth MO&O*).

“permissible growth” is that the entity holding the licenses maintains control of them. In this case, Leap DIP wishes to assign the Licenses to an entity that has a different body of shareholders, board of directors and, at least partially, senior management (including the CEO), all of which also have different affiliates than Leap DIP. These changes fundamentally alter the entity that will be holding the Licenses. To accept the Applicants’ argument that the proposed transaction is only a “nominal transfer of control” would create a sliding scale of control that directly conflicts with the policies upon which the Commission’s entrepreneur rules are founded. Thus, we conclude that any permissible growth which occurred under Leap/Leap DIP is not transferable to New Leap because New Leap is a fundamentally different entity than Leap/Leap DIP.

16. Moreover, the Commission has routinely held that it evaluates the attributable interests of an applicant at the time of application filing to determine the applicant’s eligibility.<sup>52</sup> This practice ensures that eligibility for designated entity and entrepreneur provisions is limited to those entities that the statute intended to benefit.<sup>53</sup> In sum, the Applicants seek to have us ignore the fact that the Applicants propose to assign the Licenses to a new and different entity as well as waive the rules that we apply in evaluating eligibility, all in an effort to avail New Leap of benefits that it admittedly is not otherwise permitted to obtain. Accepting these arguments would be in direct conflict with our statutory mandate to prevent unjust enrichment.<sup>54</sup>

17. Furthermore, we are not persuaded by the Applicants’ equitable arguments to the contrary nor are we inclined to view the “permissible growth” exception through a lens colored solely for bankruptcy. Although the Commission has long stated a preference towards facilitating the emergence of companies from bankruptcy,<sup>55</sup> this preference does not justify an undue departure from existing Commission policy. As noted above, the Commission intended the “permissible growth” exception to allow entrepreneurs to grow while maintaining eligibility for set-aside licenses they already hold.<sup>56</sup> In this case, the entities that control New Leap, their affiliates, and their controlling interests are not the same as those of Leap, which was the entity that experienced the permissible growth. Thus, New Leap’s

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<sup>52</sup> See 47 C.F.R. § 24.839(a)(2) (“at the time the application for assignment or transfer of control is filed”). See also Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd. 15743, 15768, ¶ 47 (1998) (*C Block Fourth R&O*); *TeleCorp-Tritel Order*, 16 FCC Rcd. at 3736, ¶ 48.

<sup>53</sup> See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licenses, WT Docket No. 97-82, *Memorandum Opinion and Order*, 14 FCC Rcd. 20543, 20545-46, ¶ 6 (1999) (*Omnipoint Order*). See also *TeleCorp-Tritel Order* at 3736, ¶ 48, citing D&E Communications, Inc. Request for Waiver of Sections 24.712, 24.720(b)(1), 1.2111(d), and 24.839(a) of the Commission’s Rules Regarding Eligibility to Acquire License as a Small Business, *Order*, 15 FCC Rcd. 61, 67, ¶ 12.

<sup>54</sup> 47 U.S.C. § 309(j)(4)(E) (the Commission is required to prevent unjust enrichment with respect to licenses issued pursuant to its authority to use competitive bidding for mutually exclusive applications).

<sup>55</sup> See, e.g., *WorldCom Order*, 18 FCC Rcd. at 26502, ¶ 29 (“we find that facilitating a telecommunications service provider’s successful emergence from bankruptcy advances the public interest by providing economic and social benefits, especially including the compensation of innocent creditors”).

<sup>56</sup> See ¶ 15 *supra*. See also *Competitive Bidding Fifth R&O*, 9 FCC Rcd. 5532, 5605, ¶ 167; *Competitive Bidding Fifth MO&O*, 10 FCC Rcd. 403, 468, ¶ 125.

ineligibility is a result of it being a fundamentally different entity than the one that was eligible for entrepreneur and designated entity status and not a consequence of Leap utilizing Chapter 11 bankruptcy protection. Moreover, the requested application of the “permissible growth” exception is incompatible with and would undermine the principles of previous Commission actions declining to apply the exception to the determination of an entity’s ability to retain designated entity benefits, such as bidding credits,<sup>57</sup> or an entity’s designated entity eligibility in future auctions.<sup>58</sup> We see no reason to reevaluate those decisions here or to expand the exception so as to permit a new entity to receive benefits that have been expressly limited to existing license holders.

18. Because we are not persuaded by the Applicants’ interpretation of the “permissible growth” exception, we find that the gross revenues and total assets of New Leap disqualify it from designated entity and entrepreneur eligibility. Therefore, absent a waiver, New Leap may acquire those Licenses that remain part of the Commission’s installment payment program only upon full payment of the remaining unpaid principal, interest and any late fees accrued through the date of assignment.<sup>59</sup> Likewise, New Leap may acquire the Licenses that were acquired using bidding credits and are within five years of the initial license grant only upon the pro-rated reimbursement of the bidding credit.<sup>60</sup>

## 2. Request for Waiver of Attribution Rule and Eligibility Standard

19. In seeking additional waivers of the Commission’s rules, the Applicants appear to acknowledge that, even if the Commission accepted their interpretation of the “permissible growth” exception, New Leap could still be considered ineligible for entrepreneur and designated entity status because of certain attributable interests of three individuals designated to be members of New Leap’s board of directors.<sup>61</sup> Specifically, the Applicants state that these three individuals hold certain controlling interests in entities which have revenues and assets that, pursuant to the Commission’s rules, would be attributed to New Leap (“Attributable Entities”), causing New Leap to exceed the financial caps to be considered an entrepreneur or a designated entity.<sup>62</sup> To avoid including the revenues and assets of the Attributable Entities, the Applicants request a waiver of that part of the Commission’s attribution rules

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<sup>57</sup> *Omnipoint Order*, 14 FCC Rcd. at 20545-46, ¶ 6.

<sup>58</sup> Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16266, 16283, ¶ 32 (2000) (*C Block Sixth R&O*) (Commission rejects the extension of permissible growth in determining eligibility to participate in future C and F block auctions).

<sup>59</sup> See 47 C.F.R. § 1.2111(c).

<sup>60</sup> See 47 C.F.R. § 1.2111(d).

<sup>61</sup> At one point, the Applicants state that the directors’ attributable interests “might be construed to disqualify Leap from its entrepreneur status,” and therefore, seek a waiver of the attribution rule. Application Statement at 12. The Applicants, however, appear to fully acknowledge that, without a waiver, the “assets and revenues of [New Leap’s] director designees would render [New Leap] ineligible for designated entity status.” See ULS File No. 0001546977, Letter from Henry Goldberg, counsel for the Informal Vendor Debt Committee of Cricket Communications Holdings, Inc. and Cricket Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, dated December 3, 2003 (“Confidentiality Request”) at 3.

<sup>62</sup> Application Statement at 10, 12; Confidentiality Request at 3.

that requires the attribution of affiliates of the officers and directors of New Leap.<sup>63</sup> Moreover, the Applicants also appear to request that the Commission waive the controlling interest standard set forth in section 1.2110 and instead apply a previous standard for determining entrepreneur and designated entity eligibility, the publicly traded corporation exception, to New Leap.<sup>64</sup>

20. Pursuant to section 1.925 of the Commission's rules, the Commission may grant a request for a rule waiver if the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant would be in the public interest.<sup>65</sup> Alternatively, the Commission may grant a request for waiver if, in view of the unique or unusual factual circumstances of the specific situation, application of the rule would be inequitable, unduly burdensome or contrary to the public interest or the entity requesting the waiver has no reasonable alternative.<sup>66</sup> For the following reasons, we find that the Applicants do not meet either prong of the waiver standard for both of their requests.

21. *Director Attribution Rule.* Based on the reasons set forth below, we conclude that the Applicants do not meet the standard for waiving the requirement set forth in section 1.2110(c)(2)(ii)(F) that the gross revenues of any entities in which the applicants' officers and directors have a controlling interest be attributed to the applicant (the "director attribution rule").<sup>67</sup> Therefore, we deny the Applicants' request for waiver of section 1.2110(c)(2)(ii)(F) of the Commission's rules and attribute the gross revenues of all entities in which New Leap's directors have a controlling interest as New Leap's affiliates.

22. As an initial matter, the Applicants' assessment of the underlying purpose of the director attribution rule is misguided. The Applicants assert that the rule was created to avoid "excessive concentration of licenses" and ensure that licenses are disseminated "among a wide variety of applicants, including small businesses."<sup>68</sup> The Commission is required, pursuant to Section 309(j)(3)(B) of the Act, to take steps to make licenses available to a wide variety of entities, including small businesses,<sup>69</sup> but the Commission's eligibility and attribution rules primarily originate from the mandate in Section 309(j)(4)(E) of the Act that the Commission adopt rules to prevent unjust enrichment and other abuse of

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<sup>63</sup> Application Statement at 12.

<sup>64</sup> 47 C.F.R. § 1.2110. The Applicants state at different points that New Leap will be a "publicly-held, board-controlled company" and a "publicly-traded corporation." Application Statement at 6-7. The Applicants also specifically mention the Commission's "publicly-traded company" exception. *Id.* at 8. We conclude that the Applicants, by making these statements, may be seeking to avoid including the revenues and assets of the Attributable Entities in the alternative by suggesting that New Leap should fit within the "publicly-traded corporation" exception to the attribution rule that was used prior to the current rule. We thus interpret this position as a request for waiver of the current eligibility standard.

<sup>65</sup> 47 C.F.R. § 1.925(a)(3).

<sup>66</sup> *Id.* Additionally, section 1.3 of the Commission's rules provides authority for a rule waiver upon a showing of good cause. 47 C.F.R. § 1.3

<sup>67</sup> 47 C.F.R. § 1.2110(c)(2)(ii)(F).

<sup>68</sup> Application Statement at 12, citing 47 U.S.C. § 309(j)(3)(B).

<sup>69</sup> 47 U.S.C. § 309(j)(3)(B).

the measures taken to promote the opportunities for small businesses and others to acquire licenses.<sup>70</sup> As the Commission has stated, the eligibility rules are intended “to ensure that only those entities truly meriting small business status qualify for [the Commission’s] small business provisions,”<sup>71</sup> and the attribution rules are to “eliminate incentives for entities to create small business ‘fronts’ that would enable large firms to secure a benefit to which they are not entitled.”<sup>72</sup> Moreover, the current attribution rule, which is applicable to all services and is based on the “controlling interest” standard,<sup>73</sup> includes the specific provision that an applicant’s officers and directors should be automatically deemed to have a controlling interest in the applicant and that any entities in which they have a controlling interest should be attributed to the applicant for purposes of eligibility calculation.<sup>74</sup> According to the Commission, such attribution “reflects the corporate reality that business decisions and corporate policy are established by a corporation’s board of directors and officers,”<sup>75</sup> and thus, the Commission attributes to the applicant any gross revenues of entities in which the applicant’s directors have a controlling interest.

23. Given the underlying purpose of the attribution rules in general, and the director attribution rule specifically, we conclude that the Applicants have not demonstrated that the purpose of the rule would not be served or would be frustrated by application to the instant case. The Applicants argue that the underlying purpose of the rule is not implicated in their proposed assignment of licenses to New Leap because the Attributable Entities are: affiliated with New Leap only through one director each; have few, if any, other ties with New Leap; are not telecommunications businesses; and are “Institutional Investors.”<sup>76</sup> None of these factors, however, establishes a cause for waiver. The Commission determined that each director and all entities in which they have a controlling interest should be automatically attributed to the applicant. The Commission did not qualify that the entity had to be affiliated through more than one director. In fact, the Applicants acknowledge that the personal success of the three directors and their willingness to accept equity in New Leap will be a significant benefit to

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<sup>70</sup> 47 U.S.C. § 309(j)(4)(E). See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348, 2394, ¶ 258 (1994) (*Competitive Bidding Second R&O*).

<sup>71</sup> 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*, 15 FCC Rcd. 15293, 15323-24, ¶ 59 (2000) (*Part 1 Fifth R&O*).

<sup>72</sup> See also Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd. 10180, 10190-91, ¶ 15 (2003) (*Part 1 Fifth R&O Recon*), citing *Competitive Bidding Second R&O* at 2390, ¶ 237.

<sup>73</sup> See *Part 1 Fifth R&O* at 15323-27, ¶¶ 58-67. See also 47 C.F.R. § 1.2110. Previously, the attribution rules were adopted on a service-by-service basis. The broadband PCS attribution rule was based on a “control group” standard. See 47 C.F.R. §§ 24.709(b)(3), (b)(5) (1997). Under the controlling interest standard, the Commission attributes to the applicant the gross revenues of the applicant, its controlling interests, the applicant’s affiliates, and the affiliates of the applicant’s controlling interests, in assessing whether the applicant is eligible for the Commission’s small business provisions. See *Part 1 Fifth R&O* at 15323-24, ¶ 59.

<sup>74</sup> See *Part 1 Fifth R&O* at 15325, ¶ 63.

<sup>75</sup> *Part 1 Fifth R&O Recon* at 10194, ¶ 19.

<sup>76</sup> Application Statement at 13.

New Leap.<sup>77</sup> Moreover, the Applicants' assertion that the Attributable Entities are "Institutional investors" is irrelevant as the Commission has specifically stated that the controlling interest standard "will be applied to all investors in an applicant."<sup>78</sup> Nor are we persuaded by the claim that the Attributable Entities have few, if any, other ties with New Leap and are not in the telecommunications business. Neither factor is relevant to an applicant's access to capital. Thus, we find that, in this case, application of the director attribution rule will actually further, not frustrate, the purpose of the rule and that a waiver is unwarranted.

24. Similarly, the Applicants do not demonstrate that a waiver of the director attribution rule is in the public interest. The Applicants argue that counting the assets and revenues of the Attributable Entities towards New Leap's eligibility would harm the public interest because it would deny New Leap the benefit of the expertise and service of those directors.<sup>79</sup> They further assert that a denial would effectively be a denial of the Assignment Applications, requiring the Applicants to abandon the Reorganization Plan and force Leap DIP to "sell its assets piecemeal in order to satisfy its debts."<sup>80</sup> We find no bases for these conclusions. First, New Leap is not forced to forego the benefit of these individuals' experience and knowledge if a waiver is not granted. Rather, New Leap wishes for a waiver of the rule to avoid paying unjust enrichment penalties. To accept this argument for granting a waiver would effectively equate the public interest with the financial gain of a specific company, which, in this case, admittedly far exceeds the financial caps of the entities the Commission has been statutorily charged to assist. Second, a denial of the waiver request does not amount to a denial of the Assignment Applications. In fact, in this Order, we consent to the assignment of the Licenses, including the set-aside licenses, from Leap DIP to New Leap. Third, with the exception of the questions regarding the terms of reinstatement of the debt under the Reorganization Plan discussed above, and which have since been resolved, the Applicants do not provide any support, nor does our review of the Reorganization Plan indicate, that failure to obtain a waiver of the attribution rule affects the Reorganization Plan. In sum, the Applicants fail to demonstrate that a waiver of the director attribution rule would be in the public interest.

25. Finally, the Applicants do not assert or provide any evidence that the circumstances of this situation are unique or unusual, that they have no reasonable alternatives, or that application of the director attribution rule would be inequitable nor unduly burdensome. Thus, we deny the Applicant's request to waive the requirement set forth in section 1.2110(c)(2)(ii)(F) that the gross revenues of any entities in which the applicants' officers and directors have a controlling interest be attributed to the applicant.

26. *Use of Control Group and the PTC Exception.* In an alternative attempt to avoid attributing the revenues and assets of the Attributable Entities to New Leap, the Applicants appear to request a waiver of the current standard used to determine attribution for purposes of entrepreneur and designated entity eligibility. Specifically, the Applicants appear to advocate that New Leap falls within the "publicly-traded corporation" ("PTC") exception under the "control group" standard of attribution. Assuming that the Applicants are advocating this position, we interpret this request as a waiver of the

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<sup>77</sup> *Id.*

<sup>78</sup> *Part 1 Fifth R&O* at 15325, ¶ 63.

<sup>79</sup> Application Statement at 13.

<sup>80</sup> *Id.* at 14.

current eligibility standard. To that extent, we find that the Applicants have failed to meet the waiver standard and we deny the request.

27. Similar to our finding with respect to the Applicants' request to waive the director attribution rule, we conclude that the underlying purpose of the current eligibility standard (*i.e.*, the "controlling interest" standard) will be served, not frustrated, by its application to the proposed transaction and that the public interest would not be served by a grant of a waiver of the rule. As stated above, the Commission adopted the "controlling interest" standard as its general attribution rule to "ensure that only those entities truly meriting small business status [would] qualify for [the designated entity provisions]."<sup>81</sup> The Commission also found that the controlling interest standard to be "simpler and more flexible than the previously used control group approach, and thus will be more straightforward to implement."<sup>82</sup> Furthermore, the Commission has repeatedly stated that it will apply the attribution rules in effect at the time of the filing.<sup>83</sup> We find no reason to depart from these decisions. In the present case, the primary, and perhaps singular, motivation behind the Applicants' waiver request is to avoid the acceleration of the installment payments and reimbursement for the bidding credits. Moreover, as we found with the director attribution rule, application of the current eligibility standard will not prevent New Leap from acquiring the Licenses, force it to abandon the Reorganization Plan, or harm New Leap's customers or consumers in general. In fact, we believe that the public interest is best served by application of the current eligibility standard to ensure that entrepreneur and designated entity benefits would go only to small businesses, which do not have affiliates that have revenues and assets that far exceed those that the Commission has found appropriate for designated entities. Therefore, we conclude that application of the current eligibility standard does not frustrate or fail to serve its underlying purpose.

28. We further dismiss the Applicants' suggestion that the circumstances of the proposed transaction are unique or unusual and would thus support a waiver of the current attribution rule. The Applicants appear to argue that the proposed assignment of licenses is unique or unusual because it is only a result of Leap's bankruptcy.<sup>84</sup> We find this argument unpersuasive. Applications for assignment of licenses or transfers of control are far from being unique or unusual consequences of a bankruptcy proceeding involving a licensee.<sup>85</sup> The Applicants also appear to advocate that the PTC exemption should be applied to New Leap because it is essentially the same company as Leap, including the fact that both companies are "controlled by" their officers and board of directors.<sup>86</sup> We have previously rejected the Applicants' assertion that Leap/Leap DIP and New Leap are the same entities. Moreover, corporate control by the board and management is far from unique or unusual. Thus, we dismiss the Applicants' possible assertions that the current proposed transaction is unique or unusual and therefore would support

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<sup>81</sup> *Part 1 Fifth R&O* at 15323-24, ¶ 59.

<sup>82</sup> *Id.*

<sup>83</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd. 10180, 10198, ¶ 24 (2003).

<sup>84</sup> Application Statement at 8, 16.

<sup>85</sup> *See, e.g., Cingular-NextWave Order*, 19 FCC Rcd. at 2570, ¶ 1.

<sup>86</sup> Application Statement at 9, 16.

application of the “control group” PTC exception by waiving the current eligibility standard. Thus, to the extent that the Applicants assert that New Leap fits within the PTC exception, we conclude that the proposed transaction does not support a waiver of the current eligibility standard that would be required to avoid attributing the revenues and assets of the Attributable Entities towards New Leap’s designated entity eligibility.

### 3. Request for General Waiver of the Commission’s Rules

29. In addition to their specific waiver requests, the Applicants request a “waiver of any of the Commission’s rules to the extent required to allow Leap to retain its licenses without the imposition of any conditions, payment obligations or other requirements out of the ordinary course.”<sup>87</sup> Although this request could be interpreted rather broadly,<sup>88</sup> the Applicants appear to be requesting a waiver of any rule that would require unjust enrichment payments (*i.e.*, reimbursement of bidding credits and full payment of remaining installment payments) or that would otherwise prevent New Leap from acquiring the Licenses. The Applicants support their general request by asserting that the underlying purpose of any eligibility rule will not be frustrated by a waiver in this case, the present transaction provides unique circumstances that support a waiver, and the public interest would be harmed by failure to grant a waiver.

30. We find that these arguments do not support a grant of the Applicants’ above-described catch-all request for general waiver. We reject the Applicants’ assertion that “no new ‘third-party’” would undeservedly benefit from grant of the requested waiver. As a fundamentally different entity than Leap, New Leap (and its controlling interests) would profit from those benefits for which, as we have determined, it is not eligible. Thus, the underlying purpose of the rules at issue – *i.e.*, to prevent unjust enrichment that would undermine the incentives given to designated entities to participate in the communications industry – would in fact be frustrated by the requested general waiver.<sup>89</sup> Moreover, providing New Leap with unwarranted benefits would have no countervailing public interest purpose. As we have stated above, we disagree with the Applicants’ assertion that application of the designated entity rules to the present transaction would force the Applicants to abandon the Reorganization Plan or to discontinue service to existing Cricket customers and consumers in general.<sup>90</sup> Similarly, implementation

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<sup>87</sup> *Id.* at 15.

<sup>88</sup> For example, “waiver of . . . payment obligations” could be interpreted as a waiver of any payment obligations for those Licenses with remaining installment debt. Based on other statements in the Application Statement, we conclude that the Applicants are not requesting such relief. *See, e.g.*, Application Statement at 14 (requesting that New Leap “retain the Licenses without penalty and to continue its installment payment financing on its original terms”).

<sup>89</sup> Moreover, the Applicants admittedly seek waiver to avoid reimbursement of bidding credits and loss of the right to continue participation in the installment payment program for certain licenses. Such a result is, by definition, unjust enrichment, which the eligibility and attribution rules are intended to prevent. It would be illogical to grant a waiver of a rule in order for the petitioner to avoid the very consequences for which the rule was created.

<sup>90</sup> Moreover, with our grant of a limited waiver of the timing requirements of section 1.2111(c), as described in detail below, coupled with the acceptance of the Leap Reinstatement Agreement by all relevant parties and the earlier approval by the Bankruptcy Court of the Reorganization Plan, it is clear that our decision to deny the Applicants’ request for general waiver does not run afoul of the *LaRose/Second Thursday* doctrine. *See, e.g.*, *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974) (recognizing Commission’s obligation to accommodate the public interest benefit of protecting innocent creditors, so long as the transaction in question does not unduly interfere with the FCC mandate to ensure that licenses are used and transferred consistently with the Communications Act).



of the Reorganization Plan without grant of the requested waiver will cause no harm to innocent creditors. We therefore conclude that our waiver denial will not, as Applicants assert, “harm the public interest in allowing [bankruptcy] reorganizations”<sup>91</sup> Nor will such denial “effectively penalize Leap for availing itself of Chapter 11 [bankruptcy protection].”<sup>92</sup> As we stated earlier, New Leap is ineligible for entrepreneur and designated entity benefits because it is a fundamentally different entity from Leap and has revenues and assets of its own and through its controlling interests that far exceed the entrepreneur and designated entity financial qualifications; our conclusions in these regards do not flow from Leap’s declaration of bankruptcy or its exercise of any of its rights under the Bankruptcy Code.<sup>93</sup> While the bankruptcy of a licensee can be a relevant consideration in assessing whether the strict application of a given rule will serve the public interest, the foregoing discussion demonstrates that nothing in this case, including the fact that the Assignment Applications were filed pursuant to the Reorganization Plan, constitutes a unique or unusual circumstance that would support the Applicants’ request for general waiver.

31. We conclude, therefore, that good cause does not exist to waive the Commission’s attribution and eligibility rules, and we therefore deny the Applicants’ request. As a result, New Leap is ineligible for designated entity benefits and is therefore subject to the Part 1 unjust enrichment provisions. Specifically, a licensee may assign licenses that have outstanding installment debt or were acquired with bidding credits within the past five years to an entity that is ineligible for such designated entity benefits only upon payment in full of any remaining unpaid principal, interest and late fees accrued through the date of assignment and the prorated amount of the bidding credits used to acquire the licenses.<sup>94</sup>

### C. Resolution of Issues Arising from Bankruptcy Litigation

32. Having determined that the Applicants’ are ineligible for designated entity benefits, we now turn to certain issues raised by the Reorganization Plan and Leap’s settlement of the Commission’s claims in bankruptcy. As discussed above, the Reorganization Plan provided that the Commission’s monetary claim would be “reinstated,” but because those terms were subject to the Commission’s regulatory approval, including the specific determinations we have made herein concerning the issue of eligibility for federal benefits, the Bankruptcy Court left to the parties the power to negotiate details regarding the terms of such reinstatement. DOJ, acting as the Commission’s and the United States’ bankruptcy counsel, recently negotiated mutually acceptable provisions to settle the terms of the “reinstatement” of the FCC’s monetary claim. To summarize, the Leap Reinstatement Agreement provides that the payment of obligations arising from an application of the Commission’s unjust enrichment provisions in section 1.2111 will be fully satisfied, but accommodates New Leap’s plans to emerge from the Chapter 11 bankruptcy process by permitting the full payment to be made under mutually agreed terms for doing so. Accordingly, insofar as the terms reflected in the Leap Reinstatement

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<sup>91</sup> Application Statement at 17. The Applicants argue that the Assignment Applications seek only to effect the Reorganization Plan and that the public interest would be served by waiving “any technical rule that would penalize [New Leap] for its successful reorganization.” *Id.* at 15.

<sup>92</sup> *Id.* at 17.

<sup>93</sup> We believe that the situation is no different had Leap reorganized on its own accord, in lieu of entering into bankruptcy protection, by replacing the board and senior management and having different shareholders, all of which would amount to a transfer of control and thus a fundamentally different entity.

<sup>94</sup> See 47 C.F.R. § 1.2111(c), (d).

Agreement provide for the payment of the entire principal amount owed and any accrued interest for those licenses that were subject to installment financing as well as the entire outstanding amount owed for the bidding credit unjust enrichment, we find that the Leap Reinstatement Agreement satisfies the dollar amount required to be paid under sections 1.2111(c) and (d) of the Commission's rules.<sup>95</sup>

33. We recognize, however, that the Leap Reinstatement Agreement provides that while Leap will pay the full amounts contemplated under sections 1.2111(c)-(d), a portion of the payment owed under section 1.2111(c) will be made over a short period of time following the consummation, not to exceed one year from the execution of the agreement – an arrangement that conflicts with the timing requirement of section 1.2111(c).<sup>96</sup> Under this section, payment of any remaining unpaid principal and accrued interest is required on or before consummation of the assignment of licenses associated with installment financing.<sup>97</sup> The purpose of this timing requirement is two-fold: (a) to ensure that full payment is made promptly; and (b) to prevent the unjust enrichment that a non-designated entity would receive if it were given the opportunity to participate in an installment program reserved for those eligible for such a benefit.

34. In applying the timing aspect of the rule to the particular facts of this case, however, we find that strict application of this requirement would neither serve its underlying purpose nor the public interest. Rather, on balance, we find that a limited waiver is warranted. In granting this waiver, we take into account the primary public interest benefit arising from the Leap Reinstatement Agreement – *i.e.*, the settlement of the Commission's claim in the Leap bankruptcy case, which will allow for the expeditious recovery of the full amount of the outstanding obligations owed to the Commission under section 1.2111(c), without the delay of further litigation.<sup>98</sup> We are also taking into account the public interest benefit of implementing the confirmed bankruptcy plan through the Leap Reinstatement Agreement.<sup>99</sup> In light of these benefits, it is clear that the prompt and certain payment component of our rule is best served

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<sup>95</sup> *Id.*

<sup>96</sup> 47 C.F.R. § 1.2111(c). The Commission has previously clarified that the approval of an assignment or transfer of control that results in installment payment unjust enrichment is conditioned upon the full payment of the required unjust enrichment payment on or before the consummation date. *See* In Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15239, 15314, ¶ 37 (2000). Thus, we must grant a limited waiver of the timing of section 1.2111(c) in order to permit the implementation of the Leap Reinstatement Agreement.

<sup>97</sup> 47 C.F.R. § 1.2111(c). Specifically, section 1.2111(c)(1) states “[i]f a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.”

<sup>98</sup> *Id.* Although the Leap Reinstatement Agreement does not require the full amount to be paid immediately, the settlement protects the financial interests of the Commission by collecting more than half of the total amount upfront, directing these upfront payments more heavily toward the licenses with greater debt obligations, providing for expeditious repayment of the remainder (in at most 12 months, and sooner if anticipated borrowing is successful), and providing additional commercial remedies, such as cross default and increased interest rate in case of default, remedies not included in the original designated entity notes.

<sup>99</sup> *See LaRose v. FCC*, 494 F.2d 1145, 1150 (D.C. Cir. 1974).

by the grant of a limited waiver. Moreover, we find that such waiver will not frustrate the unjust enrichment purpose of the timing component of the full payment rule. As stated above, the timing provision of the rule prevents non-designated entities from being unjustly enriched by participating in a payment program that was intended to benefit only eligible small businesses. There is no such unjust enrichment arising from the present circumstances. Under the terms of the Leap Reinstatement Agreement, New Leap is not continuing to participate in the Commission's installment plan and has acknowledged that the terms of the settlement are not subject to section 1.2110 of the Commission's rules. Instead, in order to resolve the bankruptcy proceeding and to ensure there will be no further litigation regarding the terms for reinstatement of debt under the Plan for Reorganization, DOJ, on behalf of the Commission as a creditor, has reached a negotiated agreement to ensure the prompt receipt of full payment, more than half of which will be paid on or before consummation, and the remainder of which will be collected within one year. Moreover, the Leap Reinstatement Agreement contains several safeguards not found in our rules, which will, like the timing aspects of the payment rule, help ensure the certainty of full payment.<sup>100</sup> Thus, the timing of payment under the Leap Reinstatement Agreement is not such that it frustrates the underlying purpose of the rule. Accordingly, we grant, to the extent necessary, a limited waiver of the timing provisions of section 1.2111(c) so that the Leap Reinstatement Agreement may be implemented.<sup>101</sup> Thus, we consent to the assignment of any licenses held by Leap DIP that have outstanding installment debt or were acquired with bidding credits within the last five years pursuant to the terms of the Leap Reinstatement Agreement.

#### IV. CONCLUSION

35. We find that, pursuant to our review under Section 310(d) of the Communications Act, approval of the Assignment Applications will serve the public interest, convenience, and necessity.<sup>102</sup> We deny, however, the Applicants' requests to waive the Commission's rules regarding attribution, find that a general waiver of the Commission's designated entity eligibility rules is not justified, and conclude that New Leap does not meet the criteria for designated entity or entrepreneur status. Therefore, the licenses in this transaction that remain in the Commission's installment financing program or were acquired using bidding credits are subject to sections 1.2111(c) and (d) of the Commission's rules and the terms of the Leap Reinstatement Agreement.<sup>103</sup>

#### V. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 309(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), 310(d), the applications seeking consent for the assignment of certain C and F block Personal Communications Services licenses from Leap Wireless International, Inc, Debtor-in-Possession, and certain of its subsidiaries to the newly-formed Leap Wireless International, Inc. and its subsidiaries are GRANTED.

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<sup>100</sup> See n. 98 *supra*.

<sup>101</sup> *Id.* See, *Cingular-NextWave Order* at 2590, ¶ 47 (2004) (relying on implementation of settlement agreement and Department of Justice grant of debt forgiveness as significant factors in granting limited waiver of regulatory full payment requirement under Section 1.2111).

<sup>102</sup> 47 U.S.C. § 310(d).

<sup>103</sup> 47 C.F.R. § 1.2111(c), (d).

37. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. §§ 1.3, 1.925, the requests by Leap Wireless International, Inc, Debtor-in-Possession, and certain of its subsidiaries and Leap Wireless International, Inc. and its subsidiaries for waiver included in the assignment applications are DENIED.

38. Furthermore, IT IS ORDERED that, pursuant to 47 C.F.R. §§ 1.3, 1.925, we GRANT a limited waiver of section 1.2111(c) of the Commission's rules, 47 C.F.R. § 1.2111(c) to the extent described herein.

39. These actions are taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John B. Muleta  
Chief  
Wireless Telecommunications Bureau