

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FILED/ACCEPTED

AUG 13 2009

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
PENDLETON C. WAUGH, CHARLES M.) EB Docket No. 07-147
AUSTIN, and JAY R. BISHOP)
)
PREFERRED COMMUNICATIONS) File No. EB-06-IH-2112
SYSTEMS, INC.) NAL/Acct. No. 200732080025
)
Licensee of Various Site-by-Site Licenses in) FRN No. 0003769049
the Specialized Mobile Radio Service.)
)
PREFERRED ACQUISITIONS, INC.) FRN No. 0003786183
)
)
Licensee of Various Economic Area Licenses)
in the 800 MHz Specialized Mobile Radio)
Service)

To: The Commission

APPEAL

Michael D. Judy, on behalf of himself and the undersigned Appellants (collectively “Appellants”), pursuant to section 1.301(a)(1) of the Commission’s rules,¹ hereby appeals the *Order* released by Chief Administrative Law Judge Sippel (the “Presiding Judge” or “Judge”) in the above-captioned proceeding on August 6, 2009.² The *Order* approves a Settlement Agreement by and between the Enforcement Bureau, Preferred Communication Systems, Inc. (“PCSI”), Preferred Acquisitions, Inc. (“PAI”), Charles M. Austin, and Jay R. Bishop and terminates this hearing proceeding. The Presiding Judge, however, declined to act on

¹ 47 C.F.R. § 1.301(a)(1).

² *Pendleton C. Waugh, et al.*, EB Docket No. 07-147, *Order*, FCC 09M-51 (ALJ rel. Aug. 6, 2009).

Appellants' Motion for Limited Intervention, ruling the motion to be moot.³ As discussed herein, the Judge's ruling improperly denies Appellants the right to participate as parties to this proceeding and is incorrect as a matter of Commission rule. The Commission should, therefore, reverse the Presiding Judge's ruling, grant Appellants' party status as requested in their motion and entertain any filing they may make as to the Settlement Agreement.

There is no doubt that Appellants have a strong, direct interest in this matter and should be heard as parties. Appellants' Motion for Limited Intervention, filed with the Presiding Judge on July 16, 2009, demonstrates that each individual Appellant is a shareholder in PCSI, which is one of the non-government parties to this proceeding and the Settlement Agreement.⁴ Mr. Charles M. Austin – PCSI's sole director – purports to represent PCSI in this matter and executed the Settlement Agreement on behalf of PCSI.⁵ Mr. Austin, however, is also an individual party to the proceeding whose personal interest may conflict with the interests of PCSI in reaching a settlement of this matter. Appellants also demonstrated that there were serious legal issues as to PCSI's management for which resolution was being sought in an action filed in Delaware Chancery Court.⁶ A hearing on this matter is scheduled before the Delaware Chancery Court on September 29, 2009,⁷ and Appellants sought limited intervention simply to be able to seek the Presiding Judge's delay of any consideration of a settlement for which Mr. Austin purported to act on the company's behalf until those serious legal issues had been resolved by the Delaware Chancery Court.

³ *Order* at 3 n.5.

⁴ Motion for Limited Intervention, EB Docket No. 07-147, at 2 (filed July 16, 2009).

⁵ *See* Notice of Filing, EB Docket No. 07-147, Attachment at 9 (filed Aug. 6, 2009).

⁶ The plaintiff is seeking, among other things, equitable relief ordering PCSI to hold an annual meeting at which all of the PCSI shareholders may address critical issues regarding the control over the company's management. *See* Motion for Limited Intervention at 2-3, Exhibits 1 and 2.

⁷ *See* Reply to Opposition to Motion for Limited Intervention, EB Docket No. 07-147, at 2.

In short, because PCSI is being managed by a person whose authority to do so and potential self interest has cast serious doubt on the validity of any settlement discussions, Appellants must act to protect their interests and the company's interests.⁸ This is precisely why Appellants sought to intervene in this matter for the limited purposes of ensuring that: (a) if the existing parties presented the Presiding Judge with a proposed settlement, the Appellants could ask the Presiding Judge to hold the matter in abeyance until the Delaware Chancery Court determines whether Mr. Austin is in fact empowered to act on PCSI's behalf; and (b) any settlement of this litigation that is reached is accomplished by PCSI management with the legal authority to settle.⁹

By ruling their motion to be moot, however, the Judge has effectively denied Appellants the ability to take any steps in this proceeding to protect their interests and the interests of the company. Appellants were prevented from introducing the serious questions related to Mr. Austin's lack of authority to undertake a settlement on behalf of PCSI, from participating in settlement discussions or commenting on the Settlement Agreement, and from seeking to have this matter held in abeyance pending the outcome of the hearing next month.¹⁰

⁸ Courts have long recognized that individual shareholders are entitled to act on a company's behalf in cases where the company's management is not doing so in good faith. *See, e.g., Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990) (explaining that the "long-standing equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation" is inapplicable where "the corporation's management has refused to pursue the same action from reasons other than good-faith business judgment"). *See also In re: Troutman Enterprises, Inc.*, 286 F.3d 359, 364 (6th Cir. 2002) (same).

⁹ Motion for Limited Intervention at 2-3.

¹⁰ As the Appellants' noted in their most recent filing with the Presiding Judge, the Enforcement Bureau also recognized that "no party to the settlement negotiations, least of all the Bureau, is interested in expending time and effort in negotiating, executing and complying with a settlement that would ultimately fail due to Austin's lack of authority." *See Reply to Opposition to Motion for Limited Intervention at 2.* And yet that is exactly the circumstance that the Presiding Judge's ruling to accept the Settlement Agreement without permitting Appellants' to participate has created.

The Presiding Judge's ruling could also stand as a potential bar to Appellants' ability to seek relief from the full Commission. Section 1.302 of the Commission's rules appears to contemplate that only a party to this proceeding has standing to appeal the *Order* and the Settlement Agreement.¹¹

Moreover, the Judge's conclusion that Appellants' Motion for Limited Intervention is moot is wrong as a matter of Commission rule. The Judge concluded that the motion is moot because the hearing proceeding is terminated.¹² The *Order's* termination of this hearing proceeding, however, is automatically stayed by operation of section 1.302(b) and cannot be effective for a minimum of 30 days from August 6, 2009.¹³ Thus, Appellants' Motion for Limited Intervention is currently viable and will remain so until such time as the automatic stay under section 1.302(b) is lifted. Under these circumstances, Appellants are entitled to a ruling on the merits of their motion. Indeed, as discussed above, this point is not merely of academic interest but has a direct impact on Appellants' substantive rights to act to protect their interests and those of their company.

¹¹ 47 C.F.R. § 1.302(a) ("If the presiding officer's ruling terminates a hearing proceeding, any party to the proceeding, as a matter of right, may file an appeal from that ruling . . ."). Consequently, and as a protective matter, if the remaining party to this proceeding does not timely file a Notice of Appeal of the *Order*, Appellants might be compelled to file its own Notice of Appeal under section 1.302(b) conditioned on the outcome of the instant appeal. And if a timely Notice of Appeal has been filed, the Presiding Judge's failure to act on the Appellant's Motion prejudices their ability to participate in that appeal as a matter of right.

¹² *Order* at 3 n.5.

¹³ Section 1.302(b) stays for a minimum of 30 days any order by an administrative law judge terminating a hearing proceeding. 47 C.F.R. § 1.302(b) ("Any party who desires to preserve the right to appeal shall file a notice of appeal within 10 days after the ruling is released. If a notice of appeal is not filed within 10 days, the ruling shall be effective 30 days after the ruling is released If an appeal is not filed following notice of appeal, the ruling shall be effective 50 days after the day of its release. . . . If an appeal is filed, or if the Commission reviews the ruling on its own motion, the effect of the ruling is further stayed pending the completion of proceedings on appeal or review.").

The Commission should therefore act expeditiously to remedy the Judge's error. The Commission should confirm that Appellant's Motion for Limited Intervention is not moot, grant Appellants' party status as requested in their motion, and entertain any appeal or other filing they may make as to the Settlement Agreement.

Respectfully submitted.

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August 13, 2009

CERTIFICATE OF SERVICE

I, Michael D. Judy, do hereby certify that on this 13th day of August, 2009, the foregoing Appeal was served by first class mail, postage prepaid, on the following persons:

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