

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FILED/ACCEPTED

AUG 31 2009

Federal Communications Commission  
Office of the Secretary

In the Matter of ) EB Docket No. 07-147  
)  
PENDLETON C. WAUGH, CHARLES M. ) File No. EB-06-IH-2112  
AUSTIN, and JAY R. BISHOP ) NAL/Acct. No. 200732080025  
)  
PREFERRED COMMUNICATION ) FRN No. 0003769049  
SYSTEMS, INC. )  
)  
Licensee of Various Site-by-Site Licenses in )  
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: Chief Administrative Law Judge  
Richard L. Sippel

**ENFORCEMENT BUREAU'S**  
**STATEMENT ON PUBLIC INTEREST AND FAIRNESS**

1. The Enforcement Bureau ("Bureau") hereby provides this statement in support of the Settlement Agreement<sup>1</sup> in this proceeding. This information is provided pursuant to *Pendleton C. Waugh et al.*, Order, FCC 09M-53 (ALJ rel. Aug. 20, 2009) ("August 20<sup>th</sup> Order"), in which the Presiding Judge, subsequent to adopting the Settlement Agreement, granting the Joint Request, and terminating this hearing

<sup>1</sup> The Settlement Agreement was appended to a Joint Request for Approval of Settlement Agreement and Termination of Proceeding ("Joint Request"), filed on August 5, 2009. The parties to the Settlement Agreement and Joint Request consisted of the Bureau, Charles M. Austin, Preferred Communication Systems, Inc. ("PCSI"), Preferred Acquisitions, Inc. ("PAI"), and Jay R. Bishop (collectively, "Settling Parties").

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proceeding,<sup>2</sup> directed the Enforcement Bureau to confirm that such actions were and are in the public interest.

## I. INTRODUCTION

2. The Joint Request previously set forth why resolution of this proceeding as stated in the proposed Settlement Agreement is in the public interest. The Bureau stands by the Joint Request, incorporates herein the public interest justifications advanced in that pleading, and provides the following additional information in support of its belief that the Settlement Agreement represents the best resolution of this hearing and one that is just, equitable, and in the public interest.

3. As directed by the August 20<sup>th</sup> Order,<sup>3</sup> the Bureau will demonstrate below that (a) the public interest does not require resolution of Pendleton Waugh’s character issue; (b) Mr. Waugh has no present entitlement to a hearing on his individual qualifications to be a licensee; and (c) Mr. Waugh did receive fair, timely, and adequate notice that the Settling Parties would seek to resolve this hearing proceeding without his participation. All in all, the Settlement Agreement itself is in the public interest.

## II. DISCUSSION

### A. The Public Interest Does Not Require Resolution of Mr. Waugh’s Character Issue

4. The Presiding Judge instructed the Bureau to “provid[e] an explanation on how the public interest is being served by failing to resolve issues set in the *Order to Show Cause* with respect to [Mr.] Waugh....”<sup>4</sup> The *Order to Show Cause*<sup>5</sup> specified a

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<sup>2</sup> See *Pendleton C. Waugh et al.*, Order, FCC 09M-51 (ALJ Sippel, rel. August 6, 2009) (“August 6<sup>th</sup> Order”).

<sup>3</sup> August 20<sup>th</sup> Order at 3.

<sup>4</sup> *Id.*

number of issues relating to PCSI and PAI (the “Companies”), as well as to Mr. Waugh – a convicted felon, and the other captioned individuals. As stated in the *Order to Show Cause*, the Commission believed at the time that the nature and extent of Mr. Waugh’s involvement in the Companies was such that his criminal background adversely affected his character qualifications and, by extension, the character qualifications of the Companies. Thus, among the issues specified in the *Order to Show Cause*, one related to Mr. Waugh individually and directed the Presiding Judge to determine “the effect of Pendleton C. Waugh’s . . . felony convictions on [his] qualifications . . . to be and remain [a] Commission licensee.”<sup>6</sup>

5. Following discovery in this case, the Bureau now believes that the nature and extent of Mr. Waugh’s involvement in the Companies was such that the material and substantial questions about his individual qualifications are no longer relevant to the Companies’ qualifications to be and remain Commission licensees.<sup>7</sup> Thus, the Bureau believes that resolution of this case via settlement relating to the *Companies’* qualifications is entirely appropriate. The Bureau, moreover, does not have to consider whether Mr. Waugh is qualified to be a Commission licensee because he is not a licensee, permittee, or applicant. Questions about Mr. Waugh’s individual qualifications were only germane to this hearing proceeding to the extent that his participation in the Companies compromised their qualifications. Because the Settlement Agreement

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<sup>5</sup> See *Pendleton C. Waugh, et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 22 FCC Rcd 13363, 13385 (2007) (“*Order to Show Cause*”).

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

<sup>7</sup> The Bureau reserves the right to revisit this view if, for some reason, this proceeding is returned to hearing status. It is the Bureau’s understanding that the Companies have terminated Mr. Waugh’s employment and that have agreed, as part of the Settlement Agreement, not to rehire him or grant him stock in the Companies. Thus, it appears that the parties’ relationship has been severed, for all relevant purposes.

effectively resolves such questions regarding the Companies' qualifications, it no longer is necessary or appropriate at this time, as explained more fully below, for the Bureau to prosecute, or for the Presiding Judge to adjudicate, the one character-related issue against Mr. Waugh.

6. First, such litigation, at this stage, would be contrary to Commission precedent.<sup>8</sup> Adjudicating a licensee's qualifications is a very fact intensive and case specific process. As the Commission states in its Character Policy Statement, "[t]he finding of facts regarding qualifications is not, however, an end in itself. Rather, it is a step in the process of evaluation by which the Commission determines whether the public interest would be served by grant of the application before it."<sup>9</sup> The applicable statutes, rules, and policies contemplate hearing designation in connection with a live case or controversy, such as whether a license should be revoked or whether an application for a license should be granted.<sup>10</sup>

7. Here, with the adoption of the Settlement Agreement, no such live case or controversy exists.<sup>11</sup> No open issues remain concerning Mr. Waugh's qualifications in

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<sup>8</sup> See authorities cited *infra* notes 9-10; *Mobilemedia Corporation*, Order, 13 FCC Rcd 10634, 10639 (1998) (citing *A.S.D. Answer Service, Inc.*, 1 FCC Rcd 753 (1986) and *Allegan Country Broadcasters, Inc.*, 83 FCC 2d 371 (1980))("Kealey has no due process right to a hearing merely 'to clear his name.' This result is consistent with well-established Commission precedent under which the Commission does not conduct hearings unless they are required to adjudicate a pending application or otherwise required to execute our regulatory functions.")

<sup>9</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179 ¶ 2 (1986) (subsequent history omitted).

<sup>10</sup> See, e.g., authorities cited *supra* notes 8-9; 47 U.S.C. § 309(e) ("If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing..."); 47 C.F.R. § 1.91 ("If it appears that a station license or construction permit should be revoked and/or that a cease and desist order should be issued, the Commission will issue an order directing the person to show cause why an order of revocation and/or a cease and desist order, as the facts may warrant, should not be issued.")

<sup>11</sup> See authorities cited *supra* note 8.

connection with any license, application, permit, or operating authority regulated by the Commission,<sup>12</sup> and, given the above-captioned licensees' agreement under the Settlement Agreement, no such connection between them and Mr. Waugh is likely ever to exist. In such circumstances, the Presiding Judge's consideration of Mr. Waugh's qualifications would be akin to a declaratory ruling without a live case or controversy.<sup>13</sup> An extremely fact specific and resource intensive inquiry would have to take place in a vacuum, devoid of any context.

8. Second, such a hearing would contravene the public interest in limiting litigation where no actual case or controversy exists. It would set precedent for such proceedings and open the door to full-blown adjudications regarding any convicted felon seeking to learn the likely future forecast of their licensee qualifications in advance, absent filing an application or holding a license, permit, or operating authority and absent the expenses, procedural rules, and clearly defined burdens of proof attached to a hearing relating thereto. Further, such a broad determination could limit the Commission's options when faced with an actual application filing and the specific circumstances surrounding it, such as location and type of license.

9. Third, conducting such a hearing would exceed the Presiding Judge's authority under the *Order to Show Cause*, which designated Mr. Waugh's qualifications to be and remain a Commission licensee *only* in connection with his activities relating to the above-captioned companies, which are Commission licensees. After the Settlement

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<sup>12</sup> See *id.* In fact, the Settlement Agreement includes no statements about Mr. Waugh's qualifications for a future license, either for or against.

<sup>13</sup> See, e.g., *Guam Telephone Authority*, Order, 12 FCC Rcd 13938 (1997) (finding insufficient case or controversy and dismissing petition for preemption); *APCC Services, Inc. v. IDT Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 7817 (Enf. Bur. 2006) (finding insufficient case or controversy and dismissing complaint as moot).

Agreement, the captioned licensees would no longer be subject to hearing, and thus Mr. Waugh's qualifications would no longer be relevant in the context underlying the *Order to Show Cause*. Furthermore, according to Mr. Waugh, the licenses designated for hearing belong to the Companies, and not to him.<sup>14</sup> Accordingly, any further hearing proceedings regarding Mr. Waugh could only relate to his *future* licensee qualifications.

10. Fourth, any such litigation would waste considerable resources. The course adopted in the August 6<sup>th</sup> Order is in the public interest because, among other things, it saves considerable public and private resources that would be expended in litigating this case.<sup>15</sup> Litigation of the only issue remaining from the *Order to Show Cause* -- to determine the effect, if any, of Mr. Waugh's felony convictions on his individual qualifications to be a Commission licensee -- is not justified as being in the public interest because of the wastefulness of continuing litigation of a moot issue.<sup>16</sup> As noted in the Joint Request, through approval of the Settlement Agreement, litigation of this issue is moot, because it no longer relates to a specific license authorization, application, permit, or operating authority to which to attach such a determination.

11. The Bureau further notes that extensive discovery to date has focused on Mr. Waugh's involvement with the above-captioned licensees, rather than whether, independent of such involvement, he is qualified to be and remain a Commission licensee. If the Presiding Judge determines that a hearing on this issue is necessary, then the Enforcement Bureau would require additional time to redirect its discovery and conduct depositions on this particular issue, which the Bureau respectfully submits is

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<sup>14</sup> See Motion for Partial Summary Decision, filed by Pendleton C. Waugh in EB Docket No. 07-147, at Affidavit of Pendleton C. Waugh at 3, filed August 6, 2009.

<sup>15</sup> See Joint Request at 3.

<sup>16</sup> See *Order to Show Cause* at 13385.

outside the context of the licenses designated for hearing in this case. In sum, resolution of Mr. Waugh's future capacity to be a Commission licensee does not justify imposing such burdens after resolution of the only live case or controversy has been reached.

**B. Mr. Waugh Has No Present Entitlement to a Hearing on His Individual Qualifications to be a Licensee**

12. The Presiding Judge instructed the Bureau to explain "whether or not the [Bureau] agrees that Mr. Waugh has a right to a determination on-the-merits of the issues charged against him before this case is terminated, giving reasons...."<sup>17</sup> At this stage, the Bureau believes that a determination on the merits of the issue against Mr. Waugh is outside the scope of the instant proceeding.<sup>18</sup> Accordingly, the Bureau disagrees that Mr. Waugh has a right to a determination on the merits of the one issue specified against him. At such time as Mr. Waugh presents himself before the Commission in the form of an applicant or party to an application, *then* he will be entitled to his "day in court" and a determination of whether his criminal convictions are impediments to him doing business before this agency.<sup>19</sup> In the absence of such application, a hearing on his qualifications is entirely premature.

**C. Mr. Waugh Received Fair, Timely, and Adequate Notice by the Bureau and Settling Parties That They Sought Termination By Settlement Without Mr. Waugh's Signature.**

13. The Presiding Judge instructed the Bureau to explain "whether or not Mr. Waugh was entitled to fair, timely and adequate notice by the settling parties and/or the [Bureau] that termination by settlement was being sought without Mr. Waugh's

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<sup>17</sup> August 20<sup>th</sup> Order at 3.

<sup>18</sup> See authorities cited *supra* note 10.

<sup>19</sup> See *Mobilemedia Corporation*, Order, 13 FCC Rcd 10634, 10638 (1998) (noting individual's right to hearing only where qualifications of licensee formerly employing him remains at issue or where the individual applies for a license).

participation, giving reasons.”<sup>20</sup> The Bureau believes that Mr. Waugh received fair, timely, and accurate notice by the Bureau and the other settling parties that they sought termination by settlement without his signature, given that his position directly contradicted that of the other settling parties. In fact, Mr. Waugh’s reasons for refusing to participate in settlement negotiations beyond the date of July 8, 2009 relate to private contractual issues he maintains with the Companies, and are only indirectly implicated in the current proceeding. The Bureau has fully addressed this issue in its Settlement Fact Statement, filed August 28, 2009, and incorporates that filing by reference. Briefly, the Bureau advised Mr. Waugh on numerous occasions throughout negotiations that it would attempt to reach settlement without him if the parties could not agree on a certain key issue, alerted him by courtesy call that it would be serving these pleadings, and properly served him with them.

### **III. CONCLUSION**

14. In sum, the Bureau respectfully submits that reinstating the Presiding Judge’s August 6<sup>th</sup> Order without a hearing on any issues surrounding Mr. Waugh, would be in the public interest for all of the foregoing reasons. The Bureau respectfully submits that the Presiding Judge has all the information necessary to support such a decision and to satisfy any concerns that the Settlement Agreement does indeed represent an outcome that is in the public interest.

15. The Bureau respectfully submits that the terms of this Settlement Agreement support the public interest. First, it is important to the public that the spectrum licensed to the companies in this proceeding in Puerto Rico and U.S. Virgin Islands become operational after years of being silent. This settlement is the swiftest

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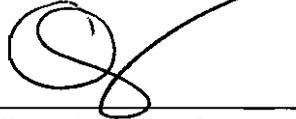
<sup>20</sup> August 20<sup>th</sup> Order at 3.

pathway to allow these licensees to construct, operate and provide service using this spectrum because it will remove questions surrounding the future of those licenses and allow the licensees to direct their resources towards operating the licenses rather than litigating. Second, the Commission has spent years embroiled in the so-called “rebanding” proceedings wherein it seeks to shift frequencies to facilitate the use of public safety spectrum. Rebanding in Puerto Rico and the U.S. Virgin Islands has been delayed, in part, due to the instant case.<sup>21</sup> The terms of the settlement remove this impediment to rebanding. Third, the Settlement Agreement includes a \$100,000 voluntary contribution, which the Bureau considers an industry-wide deterrent towards future violations of the nature alleged in the *Order to Show Cause*. Finally, the Settlement Agreement also provides for a compliance plan intended to secure future compliance by the licensees in this specific case, the Companies.

16. For the above reasons, the Bureau respectfully requests the Presiding Judge to reinstate his August 6<sup>th</sup> Order.

Respectfully submitted,

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<sup>21</sup> Several parties have appealed the Commission’s decisions in regard to rebanding, and the Office of General Counsel has sought and been granted a stay on appellate proceedings in the D.C. Circuit relating to appeals of decisions as to the above-captioned licensees in the rebanding proceeding (WT Docket No. 02-55). See *James A. Kay v. Federal Communications Commission*, Docket No. 06-0176, Order (D.C. Cir. August 7, 2009).

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