

FEDERAL COMMUNICATIONS COMMISSION

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

Received & Inspected

OCT 5 - 2009

FCC Mail Room

In the Matter of

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

To: The Commission

**NOTICE OF APPEAL<sup>1</sup>**

Pendleton C. Waugh ("Waugh"), a party to the above-captioned proceeding, hereby submits a Notice of Appeal pursuant to section 1.302 of the Commission's Rules, 47 CFR Sec. 1.302. In support, the following is shown:

<sup>1</sup> Waugh filed a Notice of Appeal of the initial Order of the Judge granting the settlement and terminating this proceeding (Order, FCC 09M-51, released August 6, 2009) on August 13, 2009, and an Appeal on September 8, 2009. As noted, *infra*, the Judge subsequently issued an Order (FCC 09M-53, released August 20, 2009) in which he held the August 6 Order in abeyance. On September 25, 2009, the Judge issued a Memorandum Opinion and Order (FCC 09M-57) in which he "renewed" the August 6 Order and "reterminated" the proceeding. This Notice of Appeal is filed out of an abundance of caution since it is unclear to what extent the Judge may have lost jurisdiction of the proceeding following his first termination. However, it is, in effect, a supplement to the earlier filings, and incorporates these earlier filings by reference.

FILED OCT 13 2009  
FCC MAIL ROOM

1. This proceeding was initiated by an Order to Show Cause and Notice of Opportunity for Hearing. (FCC 07-125) released July 20, 2007. The Enforcement Bureau was given the burden of proceeding and the burden of proof on the following issues designated against Preferred Communications Systems, Inc. ("PCSI"), Preferred Acquisitions, Inc. ("PAI"), Pendleton C. Waugh ("Waugh"), Charles M. Austin ("Austin"), and Jay R. Bishop ("Bishop"):

a. To determine whether Pendleton C. Waugh was an undisclosed real party in interest in filings before the Commission, in willful and/or repeated violation of Section 1.2112 of the Commission's Rules;

b. To determine whether PCSI engaged in an unauthorized transfer of control, in willful and/or repeated violation of Section 310(d) of the Communications Act of 1934, as amended;

c. To determine whether PCSI and/or PAI misrepresented material facts to, and/or lacked candor in its dealings with the Commission, in willful and/or repeated violations of Section 1.17 of the Commission's Rules;

d. To determine the effect of Pendleton C. Waugh's and Jay R. Bishop's felony convictions on their qualifications and those of PCSI and PAI to be and remain Commission licensees;

e. To determine whether PCSI and/or PAI failed to maintain the continuing accuracy of filings pending before the Commission in willful and/or repeated violation of Section 1.65 of the Commission's Rules;

f. To determine whether PCSI failed to respond fully and completely to official requests for information from the Commission, in willful and/or repeated violation of Section 308(b) of the Communications Act of 1934, as amended;

g. To determine whether, in fact, PCSI discontinued operation of its licenses for more than one year, pursuant to Section 90.157 of the Commission's Rules;

h. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned individuals and/or entities are qualified to be and remain Commission licensees;

i. To determine, in light of the evidence adduced pursuant to the foregoing issue, whether the referenced authorizations should be revoked.

3. The Enforcement Bureau (“Bureau”) engaged in extensive discovery<sup>2</sup> in the proceeding and the parties entered into settlement negotiations. Waugh did not join in the settlement agreement primarily because the Enforcement Bureau refused to settle the case unless Mr. Waugh was completely severed from any connection at all with PCSI, a company for which Mr. Waugh had worked as a consultant for approximately ten years and pursuant to an agreement entered into by PCSI’s management with him ten years ago was entitled to a considerable beneficial ownership in the company’s stock.<sup>3</sup> The Bureau threatened that if Mr. Waugh did not capitulate to its settlement requirements, the Bureau would reach a unilateral settlement with the other parties.

4. On August, 5, 2009, the Bureau, PCSI, PAI, Austin and Bishop filed: (1) Joint Motion to Accept Settlement Agreement under Seal; (2) Joint Request for Approval of Settlement Agreement and Termination of Proceeding; and (3) the proposed Settlement Agreement under Seal. On the very same day, the Presiding Judge issued an Order granting the relief requested. The Judge’s Order was released the following day, August 6, 2009.

5. Pursuant to paragraph 21 of the Settlement Agreement, PCSI, PAI, Austin and Bishop agreed that Mr. Waugh “shall not work for, contract for, consult for, or hold any ownership interest (outright or beneficial interests through stocks, warrants, voting trusts, or any other mechanism) in PCSI, PAI, any Affiliate of PCSA, and or any Affiliate of PAI.”

6.. On August 6, 2009, Waugh timely filed a Motion for Partial Summary Decision pursuant to Section 1.251 with the Presiding Judge demonstrating that there were no genuine issues of material fact as to the designated issues as they related to him, thus seeking to resolve

---

<sup>2</sup> Literally thousands of documents were produced and the Bureau conducted depositions of Messrs. Waugh and Austin here in Washington, D.C., which spanned a full week for each.

<sup>3</sup> Such agreement was referenced in several filings with the Commission including the Form 175 and Form 601 filed by PAI in July and September 2000.

the issues in this proceeding without hearing. This pleading had obviously been in preparation for some time and the fact that it was filed on the same day that the Judge's Order terminating this proceeding was released should have no legal affect. The Bureau immediately filed an Opposition on August 7 with the Presiding Judge arguing, ironically, that he should dismiss the Motion for Summary Decision since he no longer had jurisdiction of the case. On August 12, 2009, Waugh filed a Request for Permission to File Reply and Reply to Opposition to Motion for Summary Decision contending that his Motion for Partial Summary Decision was the proper vehicle to resolve the case without hearing and that by fiat, due consideration of this timely filed pleading had been denied. Waugh concluded by urging the Judge to rescind his Order terminating the proceeding and give due consideration to the Motion. Waugh indicated that the Bureau should be given an opportunity to comment on the merits of the Motion, but observed that it was unlikely that the Bureau would have settled the case with the other parties if it thought genuine issues of material fact remained as to the parties' basic qualifications.

7. On August 20, 2009, the Judge released an Order (FCC 09M-53) in which he granted Waugh's Request for Permission to File Reply stating that for the Judge to have inadvertently caused harm by the premature termination presented good cause for further reflection and inquiry. He thus directed the signatories to the settlement agreement to submit a Settlement Fact Statement setting forth the circumstances and occurrences leading up to the execution of the agreement by August 28, 2009. The Judge also ordered the Enforcement Bureau to file a Statement on Public Interest and Fairness by August 31. He subsequently ordered Waugh to also file a Settlement Fact Statement by August 28, 2009. See Order, (FCC 09M-54) released August 25, 2009.

8. The Bureau, Waugh and PCSI all filed Settlement Fact Statements on August 28, 2009, and the Bureau filed a Statement on Public Interest and Fairness on August 31, 2009. In neither the Settlement Fact Statement nor the Statement of Public Interest and Fairness, did the Bureau acknowledge that as a precondition to entering into a universal settlement, it required Waugh to forfeit any beneficial interest in PCSI. The Bureau also explained its rationale for entering into the settlement agreement as follows:

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.... 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.

Enforcement Bureau's Statement on Public Interest and Fairness, p. 3 (hereinafter "Public Interest and Fairness Statement"). Waugh filed Comments on the Bureau's Statement on Public Interest and Fairness on September 2, 2009. On the same day, the Bureau filed a Motion to Strike, Motion for Leave to File Response, and Motion for Pre-Hearing Conference addressed to Waugh's pleading. On September 3, 2009, the Presiding Judge placed a freeze on further filings and on September 4, issued an Order scheduling a conference for September 9, 2009 to discuss procedures to terminate this case as to all parties without a hearing and to set a schedule for further pleadings, if needed. Order, FCC 09M-55, released September 8, 2009.

9. Subsequent to the conference, the Judge issued an Order (FCC 09M-56, released September 10, 2009) in which he stated that counsel for the Bureau and Mr. Waugh were prepared to recommend to their clients that "a proviso be added to the Settlement Agreement to the effect that the prohibition of issuance of stock to Mr. Waugh, even non-voting stock under

trust arrangement, would be subject to challenge in a court of competent jurisdiction, with rights of appeal.” He also ordered the parties to file a status report with the Judge by September 21, 2009, and indicated that an earlier freeze on all papers and pleadings was still in effect.

10. On September 10 by electronic mail served on the Judge, the Bureau proposed to modify paragraph 21 of the settlement agreement which held that Waugh would be barred from being an employee, consultant or holding any stock, even a beneficial interest in PCSI, by adding the language “unless a court of competent jurisdiction has decided otherwise, and such decision is final and non-appealable.” The settlement agreement so modified was not acceptable to Mr. Waugh and by letter dated September 16, 2009, Mr. Waugh submitted his status report to the Judge explaining why he could not enter into the proposed settlement. Waugh also set forth three matters which precluded the immediate grant of the proposed settlement agreement<sup>4</sup> and requested that the Judge withhold a final resolution until the Delaware Court of Chancery ruled on Mr. Austin’s authority to enter into any settlement agreement. The Enforcement Bureau filed a letter on September 17 in opposition and also a Status Report on September 21, 2009.

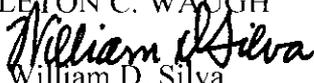
11. The Judge issued a Memorandum Opinion and Order (FCC 09M-57, released September 25, 2009) in which he “cancelled” his Order FCC 09M-53 which placed Order FCC 09M-51 in abeyance, “renewed” his August 6 Order granting the settlement, and “reterminated” the proceeding. It is this Memorandum Opinion and Order which will be appealed and to which this Notice of Appeal relates. Waugh is a party to this proceeding and pursuant to Section 1.302 of the Commission’s Rules he is entitled to file an appeal of the Judge’s Order terminating this

---

<sup>4</sup> Waugh contended that there remained a jurisdictional question, that the proper way to resolve the proceeding without further hearing was by granting Waugh’s Motion for Summary Decision and not by resolving it in derogation of Section 1.93(b) of the Commission’s Rules, and by postponing a decision on the matter until after September 29 when the Delaware Court of Chancery was to hear a case which questioned Mr. Austin’s authority to enter into a settlement agreement.

proceeding.<sup>5</sup> See, e.g., *Jersey Shore Broadcasting Corporation v. FCC*, 37 F. 3d 1531, 1535 (D.C. Cir. 1994). This Notice is filed pursuant to Section 1.302 (b) to preserve his right to appeal and to stay the effectiveness of the Judge's Memorandum Opinion and Order.

Respectfully submitted,  
PENDLETON C. WAUGH

By:   
William D. Silva  
William D. Silva  
His Attorney

Law Offices of William D. Silva  
P.O. Box 1121.  
Stevensville, MD 21666  
443-249-0109

October 5, 2009

---

<sup>5</sup> This proceeding was brought under Sections 308 and 312 of the Communications Act of 1934, as amended, and Section 1.91 of the Commission's Rules. Section 1.93 of the Commission's Rules defines a "consent order" and then states that "[C]onsent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license (See 47 U.S.C Sections 308 and 309)." The Order to Show Cause and Notice of Opportunity for Hearing cited Sections 308 and 312 of the Act and Section 1.91 of the Rules as the basis for this proceeding. Based upon a plain reading of Sections 308 and 312 of the Act and Sections 1.91-1.93 of the Rules, the Enforcement Bureau had no authority to negotiate its so-called "Settlement Agreement" and the Presiding Judge was without authority to approve such agreement and issue his Order. See, e.g., *Talton Broadcasting Co.*, 67 FCC 2d 1594, 1596-99 (1978).

**CERTIFICATE OF SERVICE**

I, William D. Silva, certify that I have caused a copy of the foregoing "Notice of Appeal" to be sent by electronic mail, this 5th day of October, 2009, to the following:

Hon. Richard L. Sippel  
Chief Administrative Law Judge  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.S., Room 1-C861  
Washington, D.C. 20554  
[richard.sippel@fcc.gov](mailto:richard.sippel@fcc.gov)

Jay R. Bishop  
1190 South Farrell Drive  
Palm Springs, CA 92264  
[jaybishopp@aol.com](mailto:jaybishopp@aol.com)

Gary A. Oshinsky, Esquire  
Investigations and Hearing Division  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 4-C330  
Washington, D.C. 20554  
[gary.oshinsky@fcc.gov](mailto:gary.oshinsky@fcc.gov)

Anjali K. Singh, Esquire  
Investigations and Hearing Division  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room 4-C330  
Washington, D.C. 20554  
[anjali.singh@fcc.gov](mailto:anjali.singh@fcc.gov)

Charles M. Austin  
Preferred Communications Systems, Inc.  
400 E. Royal Lane, 9Suite N-24  
Irving, TX 75039  
[precomsys@aol.com](mailto:precomsys@aol.com)

  
/s/ William D. Silva  
William D. Silva