

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

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
PENDLETON C. WAUGH, CHARLES M.)
AUSTIN, and JAY R. BISHOP)
)
PREFERRED COMMUNICATION)
SYSTEMS, INC.)
)
Licensee of Various Site-by-Site Licenses in)
the Specialized Mobile Radio Service.)
)
PREFERRED ACQUISITIONS, INC.)
)
Licensee of Various Economic Area Licenses)
in the 800 MHz Specialized Mobile Radio)
Service)

EB Docket No. 07-147

File No. EB-06-IH-2112

NAL/Acct. No. 200732080025

FRN No. 0003769049

FRN No. 0003786183

To: The Commission

ENFORCEMENT BUREAU'S
OPPOSITION TO PENDLETON C. WAUGH'S APPEALS

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SUMMARY

This case involves the appeal of an Administrative Law Judge's August 6, 2009 and September 25, 2009 rulings approving a settlement agreement between the Bureau and all captioned parties except Mr. Waugh. Although Mr. Waugh claims that the Administrative Law Judge's acceptance of the settlement is unfair to him, in fact, Mr. Waugh is attempting to use the Commission's hearing process to put himself into a better position in a decade-long private dispute with Preferred Communication Systems, Inc. ("PCSI") and Preferred Acquisitions, Inc. ("PAI") about his compensation for past services. The settlement agreement, however, is not only fair, it is in the public interest because it equitably and expeditiously concludes this case, facilitates the Commission's rebanding effort, and aids the licensees in commencing new, much-needed wireless services in Puerto Rico and the U.S. Virgin Islands.

The Commission designated for hearing in this case a number of issues pertaining to PCSI and PAI (collectively, the "Companies"), including their relationship with Mr. Waugh, and whether that relationship affected the Companies' qualifications to be Commission licensees. All parties except Waugh have agreed on a way to resolve the case without the need for a hearing, and the Administrative Law Judge ("ALJ") has approved that settlement after specifically considering Mr. Waugh's assertion that it was unfair to him. A felon who was convicted of securities fraud while helping others apply for wireless licenses, Mr. Waugh seeks to place his private pecuniary interests above those of the general public. He never explains how the Commission's rejection of the settlement will advance the licensees' interest, let alone the public interest, and he does not supply a legal basis for the Commission to overturn the ALJ's rulings. Mr. Waugh's dissatisfaction with the settlement agreement is fundamentally premised on his unhappiness with PCSI's decision to sever its relationship with him. Mr. Waugh's issues

with PCSI, however, can and should be addressed directly with the company, in state court. There is no reason for the Commission to conduct a hearing to address that private dispute.

The Presiding Judge and parties made every effort to accommodate Mr. Waugh's concerns and to be fair to him. The Presiding Judge's rulings approving the settlement are fully consistent with all Commission rules, policies, and precedent. Indeed, the disposition of this hearing *via* settlement comports with the resolution of other similarly situated adjudicatory proceedings. The approval of the settlement did not deprive Mr. Waugh of any due process rights or cognizable property interest, as he claims. To the extent that Mr. Waugh seeks to continue the hearing simply to demonstrate in the abstract that he is qualified to be a licensee, Commission precedent is unequivocal that the agency will not conduct a hearing simply to make such a ruling in a vacuum. There is nothing unlawful or unfair about the settlement, and no public interest is served by continuing with a hearing.

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To: The Commission		

**ENFORCEMENT BUREAU'S
CONSOLIDATED OPPOSITION TO PENDLETON C. WAUGH'S APPEALS**

I. On September 8 and October 26, 2009, Pendleton C. Waugh ("Waugh") filed appeals¹ of two related rulings by the Presiding Judge approving a settlement among all parties in this case except Mr. Waugh and terminating the case.² The settlement as approved is in the public interest, and is both lawful and fair. The settlement removes impediments to important Commission proceedings that, once resolved, will permit the two licensees to construct, operate, and provide service. The licensees, their investors, and the public that they serve will all benefit. Moreover, as part of the settlement, the licensees must also pay a voluntary contribution of

¹ See Appeal from Presiding Officer's Final Ruling, filed by Pendleton C. Waugh on September 8, 2009 ("Initial Appeal"); Appeal from Presiding Officer's Final Ruling filed by Pendleton C. Waugh on October 26, 2009 ("Supplemental Appeal"). Collectively, these pleadings will be referred to as "Appeals."

² See *Pendleton C. Waugh, et al.*, Order, FCC 09M-51 (ALJ Sippel, rel. August 6, 2009) ("August 6 Ruling"); *Pendleton C. Waugh, et al.*, Memorandum Opinion & Order, FCC 09M-57 (ALJ Sippel, rel. September 25, 2009) ("September 25 Ruling").

\$100,000 and effectuate a compliance plan, sending a strong deterrent message to potential wrongdoers that violating the Commission's rules yields a commensurate penalty. The Presiding Judge's ruling is correct, promotes the public interest, and therefore the Chief, Enforcement Bureau, by her attorneys and pursuant to Section 1.302 of the Commission's Rules, hereby opposes Mr. Waugh's requests for relief.³

I. BACKGROUND

A. The Order to Show Cause

2. Preferred Communication Systems, Inc. ("PCSI") and its wholly-owned subsidiary, Preferred Acquisitions, Inc. ("PAI") (collectively, "Licensees" or "Companies"), hold two categories of wireless authorizations. This case was designated as to PCSI's 77 site-by-site licenses in the Specialized Mobile Radio ("SMR") Service, and PAI's 38 economic area licenses in the SMR Service. Currently, neither company is operating under its licenses, in large part due to relocation of the licenses' frequencies as part of the Commission's 800 MHz rebanding proceeding in WT Docket No. 02-55.⁴

3. By *Order to Show Cause and Notice of Opportunity for Hearing*, ("Order to Show Cause"),⁵ the Commission, on July 20, 2007, commenced the instant hearing proceeding.⁶ The *Order to Show Cause* directed the Presiding Judge to determine whether the Commission should

³ On October 7, 2009, the Bureau requested leave of the Commission to file one consolidated opposition to Mr. Waugh's Appeals within 15 days of his second such filing. See Enforcement Bureau's Request Regarding Pendleton C. Waugh's Notice of Appeal, filed on October 7, 2009.

⁴ The 800 MHz rebanding proceeding in Docket No. 02-55 was initiated by rulemaking and seeks "to explore all available options and alternatives for improving the spectrum environment for public safety operations in the 800 MHz Band and to ensure that public safety agencies have access to adequate spectrum resources in the 800 MHz band to support their critical missions." *Improving Public Safety Communications in the 800 MHz Band and Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, FCC 02-81, Notice of Proposed Rulemaking (rel. March 15, 2002); *Improving Public Safety Communications in the 800 MHz Band and Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, 67 Fed Reg. 16351-02 (April 5, 2002).

⁵ 22 FCC Rcd 13363 (2007).

⁶ See *Pendleton C. Waugh, et al.*, *Order to Show Cause and Notice of Opportunity for Hearing*, 22 FCC Rcd 13363 (2007) ("*Order to Show Cause*").

revoke the Companies' licenses due to undisclosed real-party-in-interest, unauthorized transfer of control, and misrepresentation issues, among others.⁷ The Commission designated this case for hearing based on evidence suggesting that, at the time, the Companies had deliberately avoided disclosing to the Commission a controlling present and/or future interest in the Companies held by Mr. Waugh, a convicted felon. The *Order to Show Cause* inquired into both the qualifications of the Companies and the individual qualifications to be Commission licensees of Mr. Waugh and other above-captioned persons.

B. Settlement Negotiations⁸

4. Pursuant to a request submitted jointly by all the parties in this case, the Presiding Judge, on March 11, 2009, stayed the procedural schedule to allow formal settlement negotiations aimed at reaching a universal accord.⁹ Initially, the Bureau was optimistic about the possibility of ultimately executing an agreement among all the parties in this case. Toward this goal, the parties subsequently requested, and the Presiding Judge granted, additional time to

⁷ The Commission designated the hearing to determine: (a) 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) 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 ("Act"); (c) whether PCSI and/or PAI misrepresented material facts to, and/or lacked candor in its dealings with the Commission, in willful and/or repeated violation of Section 1.17 of the Commission's rules; (d) 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) 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) 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 Act; (g) 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) 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; and (i) in light of the evidence adduced pursuant to the foregoing issue, whether the referenced authorizations should be revoked. The Commission also designated for hearing whether any forfeitures should be assessed against the Licensees with respect to the apparent violations. *See id.* at 13385-86 (citing 47 U.S.C. §§ 308(b), 310(d); 47 C.F.R. §§ 1.17, 1.65, 1.2112, 90.157).

⁸ Ordinarily, the Bureau would not discuss the substance of settlement negotiations in its pleadings. Because Mr. Waugh has put those discussions at issue, however, we believe that we must discuss them in order to clarify the issues here.

⁹ *See Pendleton C. Waugh, et al.*, Order, FCC 09M-27 (ALJ Sippel, rel. March 11, 2009).

continue settlement talks.¹⁰ Notably, in the second such joint status report, the parties reported that they had reached a “significant breakthrough” in negotiations.¹¹ The Presiding Judge directed the parties to provide a further status report by August 11, 2009.¹²

5. Regrettably, however, on July 8, 2009, Mr. Waugh informed the other parties that he repudiated all of his prior positions in the settlement in principle.¹³ This scuttled the progress made over the course of several months of negotiations. Furthermore, Mr. Waugh renewed old demands and included significant *new* ones that were entirely beyond the scope of the instant hearing. Among other things, Mr. Waugh demanded that the Companies agree to provide him with a present and/or future equity interest in PCSI rather than a cash payout for his work for the Companies.¹⁴ In addition, he demanded that the Bureau agree to arrange for the Office of General Counsel to modify the Commission’s position in pending litigation in the D.C. Circuit Court and for the Public Safety and Homeland Security Bureau and Wireless Telecommunications Bureau to grant certain relief to the Companies on other pending matters.¹⁵

6. Thereafter, the Bureau informed Mr. Waugh that his demands were unacceptable and/or beyond the Bureau’s control. The Bureau also advised Mr. Waugh that the other parties intended to execute a settlement agreement among them if they concluded that an accord which

¹⁰ See *Pendleton C. Waugh, et al.*, Order, FCC 09M-39 (rel. May 6, 2009); *Pendleton C. Waugh, et al.*, Order, FCC 09M-44 (ALJ, rel. June 12, 2009).

¹¹ See Second Joint Status Report, at 2, filed June 10, 2009.

¹² See *Pendleton C. Waugh, et al.*, Order, FCC 09M-44 (ALJ, rel. June 12, 2009).

¹³ Mr. Waugh did so through a letter that he later filed for the record. See Settlement Fact Statement, at Attachment at July 8, 2009 Letter, at 2-3, filed by Pendleton C. Waugh, on August 28, 2009.

¹⁴ See *id.* The Bureau considered the extent of any cash payment by PCSI to Mr. Waugh in compensation for his services to be a private contractual matter outside the scope of this proceeding, a sentiment which the Bureau conveyed to Mr. Waugh and the other parties on numerous occasions. On the other hand, given his unresolved felony convictions for securities fraud, Mr. Waugh’s present and/or future ownership or involvement in the Companies was and remains a concern to the Bureau.

¹⁵ See *id.* For a variety of reasons, not the least of which involved the Commission’s *ex parte* restrictions, the Bureau did not believe that any of these peripheral demands were viable. In short, these demands would have required off-the-record communication between the Bureau and other offices and bureaus within the Commission on the merits of the instant hearing and other proceedings pending before those offices and bureaus.

included Mr. Waugh was beyond reach.¹⁶ Nevertheless, in an effort to keep the lines of communication open, the Bureau invited Mr. Waugh to advise at once if his position changed in any way. When Mr. Waugh did not so advise by August 5, 2009, the remaining parties in this proceeding entered into a settlement agreement among them, and they presented a joint request for approval of such agreement and termination of this proceeding to the Presiding Judge.

C. Settlement Agreement

7. As discussed above, pursuant to the settlement agreement that the parties (less Mr. Waugh) presented to the Presiding Judge, the Companies agreed, among other things, to make a voluntary contribution of \$100,000; to implement an internal plan to ensure their future compliance with all relevant Commission rules and regulations; and to exclude Mr. Waugh from further association with, or employment by, PCSI and/or PAI. In addition, the Bureau agreed to inform the Wireless Telecommunications Bureau (“WTB”), before which an important waiver request filed by PAI was pending, of the Presiding Judge’s action approving the settlement agreement and terminating the instant proceeding, thereby allowing WTB to resume processing PAI’s waiver request in the ordinary course.¹⁷ The Bureau entered into the settlement because it believed that termination of the hearing proceeding, as contemplated in the settlement agreement, presented the most favorable circumstances -- if not the only viable opportunity -- for the Companies to provide needed wireless service to Puerto Rico and the U.S. Virgin Islands. So long as the Companies’ licenses were (or are) tied up in litigation in the instant proceeding, appellate litigation pending before the D.C. Circuit Court of Appeals relating to rebanding in

¹⁶ The possibility of a settlement that did not include Mr. Waugh had been discussed as early as during informal settlement negotiations in 2008.

¹⁷ The request sought a waiver of pending construction deadlines applicable to PAI’s licenses.

those areas remains stayed.¹⁸ Accordingly, the Companies' ability to determine the frequencies on which they will construct and operate on remains in limbo.

D. Presiding Judge's Rulings

8. In an August 6, 2009 Order ("August 6 Ruling"), the Presiding Judge approved the settlement agreement entered into by all parties except Mr. Waugh and terminated this proceeding.¹⁹ Thereafter, the Presiding Judge issued a further order ("Stay Order") temporarily staying his August 6 Ruling to entertain concerns raised by Mr. Waugh identical to the concerns he raises here.²⁰ As directed in the Stay Order, the Bureau, Mr. Waugh, and PCSI each filed a Settlement Fact Statement on August 28, 2009. The Bureau also filed a Statement of Public Interest and Fairness on August 31, 2009. In its August 31 filing, the Bureau explained:

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.²¹

Thus, while the Bureau expressed confidence in the qualifications of the Companies, it made no similar expression with respect to the individual qualifications of Mr. Waugh, who holds felony convictions for securities fraud and whose qualifications would require a fact-intensive examination at hearing coupled with credibility findings by a presiding judge.

9. On September 9, 2009, the Presiding Judge held an exhaustive two-hour conference, on-the-record, to further consider the concerns raised by Mr. Waugh and the other

¹⁸ See *James A. Kay v. Federal Communications Commission*, Docket No. 06-0176, Order (D.C. Cir. August 7, 2009)(staying appeals regarding rebanding due to the instant hearing proceeding).

¹⁹ See August 6 Ruling at 2.

²⁰ See *Pendleton C. Waugh, et al.*, Order, FCC 09M-53 (ALJ, rel. August 20, 2009) ("Stay Order").

²¹ See Enforcement Bureau's Statement on Public Interest and Fairness, at 2, filed August 31, 2009 (emphasis in original).

parties. As a result of that conference, the Bureau agreed to amend the terms of the settlement agreement in a manner specifically suggested by the Presiding Judge²² and in a manner that Mr. Waugh's counsel had represented at the conference would likely satisfy his client's concerns.²³ Nevertheless, in a letter to the Presiding Judge, dated September 16, 2009, Mr. Waugh rejected outright the proposed amendment to the settlement agreement, and requested that the Presiding Judge defer resolution of this hearing proceeding pending disposition of a shareholder-related lawsuit (to which Mr. Waugh is not a party) brought against PCSI in the Delaware Court of Chancery.²⁴

10. In a September 25, 2009 MO&O ("September 25 Ruling"), the Presiding Judge lifted his stay of the August 6 Ruling, having heard and rejected all of Mr. Waugh's positions and exhausted all reasonable efforts to accommodate him. The Presiding Judge determined that resolution of this hearing proceeding in the manner contemplated by the referenced settlement agreement would be "reasonable and advantageous to the public interest,"²⁵ the above-mentioned voluntary contribution, severance of convicted felons from the Licensees, and saving of resources otherwise spent litigating this case.²⁶ In addition, the Presiding Judge flatly rejected Mr. Waugh's request for deferral of this proceeding until conclusion of the Delaware litigation, saying "[t]o grant one party's opposed request for an indefinite hold on a Commission

²² The Presiding Judge later affirmed the rulings made at the September 9, 2009 Conference by Order, FCC 09M-56 (ALJ, rel. September 10, 2009).

²³ The Presiding Judge later observed, "Mr. Waugh's counsel was positive about settlement at the close of the Conference . . . [and] [h]e also agreed that [his client's] peripheral demands [made of the Bureau] would be dropped." September 25 Ruling at 2.

²⁴ Mr. Waugh claims that the amendment to the settlement agreement that the Presiding Judge suggested and to which Mr. Waugh's counsel agreed during the September 9 conference was not neutrally worded and that both the Presiding Judge and the Bureau adopted an "unreasonable and illogical take-it-or-leave-it settlement approach." See Supplemental Appeal at 11, 13-14. These are mischaracterizations. During a September 10, 2009, telephone conversation, the Bureau invited Mr. Waugh to propose alternative language to that suggested by the Presiding Judge and offered by the Bureau. However, Mr. Waugh ultimately rejected the idea of amending the settlement agreement altogether without ever proposing any alternative language that he might consider more "neutral" or favorable. See *id.* at 13-14; September 25 Ruling at 2-3. Thus, to suggest that the Presiding Judge or the Bureau attempted to "strong-arm" Mr. Waugh is inconsistent with the facts, and without merit.

²⁵ September 25 Ruling at 3.

²⁶ See *id.*

proceeding that is dependent upon another court's decisional schedule would be irresponsible management of Commission business."²⁷

II. ARGUMENTS

A. No Legal or Factual Issue Exists Requiring a Hearing.

11. Mr. Waugh asserts in his Initial Appeal that the termination of this proceeding by the Presiding Judge unlawfully deprives him of a hearing on issues relating to his character qualifications to be a Commission licensee,²⁸ and that he must be given an opportunity to clear his name.²⁹

12. Commission precedent is unequivocal, however, that Mr. Waugh has no entitlement whatsoever to a resource-intensive adjudicatory hearing simply to clear his name in the abstract.³⁰ Mr. Waugh cites to no case in which the Commission has adjudicated an

²⁷ *Id.*

²⁸ See Initial Appeal at 10-11; Supplemental Appeal at 12-14.

²⁹ Initial Appeal at 10. Along these lines, Mr. Waugh argues in further support that he participated fully in the discovery phase of the hearing, including making himself available for depositions. See *id.*; Supplemental Appeal at 12. The fact that Mr. Waugh cooperated in the discovery phase of this instant proceeding does not afford him an entitlement to a hearing beyond what the Act and the Rules provide. In this regard, as discussed below, as an individual with no present interest in any license or application, there is no basis for adjudicating his qualifications at this time. Further, cooperation with Commission fact finding efforts is required by law and can be compelled by subpoena.

³⁰ See *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))(finding that a party seeking a hearing "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.") Mr. Waugh attempts unsuccessfully to distinguish his situation from the one presented in *ASD Answer Service, Inc.*, 1 FCC Rcd 753 (1988), cited by the Bureau. In that case, the presiding judge found that a company was an undisclosed real-party-in-interest behind an applicant. Various parties sought to settle the case and to oust former principals of the company from any future involvement except stock ownership. One of those ousted sought a separate hearing to clear his name, but his request was denied because of a lack of connection between the former principal and any current licensee or application. Mr. Waugh attempts to distinguish his situation from that case, based on distinctions that have no bearing on the issues at hand, namely that (1) unlike the former principal, Mr. Waugh is a party; (2) a settlement in this case was reached before a full development of the record; and (3) the former principal was allowed to keep a voting stock interest.

The Commission should reject these arguments and deny Mr. Waugh's request for a hearing. Mr. Waugh fails to show how any of these distinctions are meaningful or material. The principle at issue is whether an individual, absent ownership or interest in a license or application, is entitled to a hearing on qualifications to be a Commission licensee. *ASD Answer Service Inc.* stands for the proposition that he is not. In fact, as a convicted felon who *never*

individual's qualifications to be a licensee with no particular license at issue.³¹ Furthermore, the Communications Act and the Commission's Rules explicitly provide that hearings will be held only in connection with the disposition of pending applications or existing authorizations.³² In analogous situations with no live case or controversy, the Commission has rejected requests for hearing.³³

13. Questions regarding 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 Companies have chosen not to grant him that interest and Mr. Waugh holds no interest in any other Commission authorization or applicant, questions about his individual qualifications should not be resolved at this time.

14. Holding such a hearing to adjudicate Mr. Waugh's qualifications in the absence of an existing license or pending application would not only unnecessarily consume valuable Commission resources but also establish a new Commission practice requiring adjudication of the qualifications of *any* individual or entity seeking merely to establish a prospective entitlement to a Commission authorization. The Commission has never before allowed parties to

possessed an ownership interest in the licensee, Mr. Waugh occupies a position *inferior* to that of the principal in *ASD Answer Service Inc.*

³¹ As the Commission has stated, "[t]he finding of facts regarding qualifications is not . . . 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." *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order, and Policy Statement, 102 FCC 2d 1179 ¶ 2 (1986) (subsequent history omitted).

³² See Section 309(e) of the Communications Act of 1934, as amended, 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...."); and Section 1.91 of the Commission's Rules, 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.").

³³ 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).

establish their qualifications in the abstract and it should not do so for Mr. Waugh. Such a course would be manifestly inconsistent with the public interest.³⁴

B. The Settlement Agreement is Both Lawful and Fair.

15. Mr. Waugh contends that the settlement agreement imposes an unlawful condition by requiring the Companies to refrain from issuing stock to him through a voting trust held for his benefit, despite an alleged oral agreement to do so.³⁵ Mr. Waugh also opines that a restriction on his future business relationship with the Companies contravenes the Commission's Character Policy Statement³⁶ because felony convictions do not, *per se*, disqualify him as a licensee.³⁷

16. Mr. Waugh misses the point. The Bureau did not unilaterally impose the terms of the settlement agreement. All of the signatories, notably the Companies, agreed to these negotiated terms. Thus, the Companies apparently believed that severing business ties with Mr. Waugh, now and in the future, was in the Companies' best interests. Those terms were entirely consistent and compatible with the Bureau's interests in eliminating the concerns that led to a hearing designation in the first instance by inhibiting future misconduct by these licensees or

³⁴ It is evident that Mr. Waugh seeks resolution of a matter not specifically and directly contemplated at hearing and detached from the designated Licensees. As an example, because the issue designated for hearing was specific to the Companies, the Bureau's extensive discovery in this proceeding focused on the nature and extent of Mr. Waugh's involvement in the corporate Licensees, not his independent qualifications to be a Commission licensee. A hearing on Mr. Waugh's qualifications to hold an unspecified license is an altogether different question. It would require additional discovery and intensive fact-based examination by the Bureau as well as credibility findings by the Presiding Judge.

³⁵ See Initial Appeal at 11-12; Supplemental Appeal at 14-16.

³⁶ See Initial Appeal at 13 (citing Policy Regarding Character Qualifications in Broadcast Licensing, 5 FCC Rcd 3252 (1990)); Supplemental Appeal at 16 (same).

³⁷ See Initial Appeal at 13; Supplemental Appeal at 16-17. Mr. Waugh asserts that "[e]ven if Waugh's interest was considered to be attributable, which the Bureau now concedes is not the case, his felony convictions should not have been disqualifying *per se*." See Supplemental Appeal at 16. This assertion mischaracterizes the Bureau's position and confuses the Bureau's settlement position with its position *vis-à-vis* the litigation. If the settlement agreement is not upheld, for some reason, then the Bureau reserves the right to revisit any of the positions agreed to as part of settlement, a point it has reiterated previously and does so again here. See, e.g., Enforcement Bureau's Statement on Public Interest and Fairness, at 3 n.7 (filed August 31, 2009).

others.³⁸ In any event, this restriction did nothing more than memorialize the very circumstances that have existed between the Licensees and Mr. Waugh for a period of almost a year – they terminated his employment with no plan to rehire him, all long before settlement negotiations started. Most importantly, the *Presiding Judge*, acting as a fair, impartial entity, twice determined that the public interest would be served by approval of the settlement agreement.

17. Contrary to Mr. Waugh’s suggestions regarding the Character Policy Statement, the settlement agreement did not decide whether a voting trust in favor of a convicted felon insulates a licensee from otherwise disqualifying character qualification issues. Nor did the Presiding Judge’s rulings collectively constitute a pronouncement on the legality of restricting a convicted felon from owning stock in a licensee. The rulings simply referenced a settlement agreement that is lawful, within the Companies’ purview to negotiate, and within the Presiding Judge’s discretion to approve, whether or not Mr. Waugh personally benefits from or likes the terms.³⁹

18. The question of whether the Licensees issued stock to Mr. Waugh without disclosure to the Commission was part of the basis on which the instant matter was designated for hearing.⁴⁰ It would be irresponsible for the Bureau to settle the matter without addressing the troubling fact pattern that caused it to be designated for hearing. Even so, the Bureau’s agreement here is immaterial because the Companies already handled matters concerning his

³⁸ The Bureau articulated these same concerns to the Presiding Judge at the September 9 conference. *See* Tr. 162:11-164:15, 198:21-200:3. The Presiding Judge concurred, recognizing that “[t]here is an enforcement interest ...in having people who are disqualified by a character disqualification not having ...stock in a company... You can’t – so far there hasn’t been a structure presented to you that you can trust that is going to be ironclad that’s going to keep Mr. Waugh out from becoming, somehow becoming a stockholder or having owning rights or having control rights or something within the company.” Tr. 196:5-196:9, 198:14-198:20.

³⁹ Mr. Waugh points to a change in the Licensees’ negotiating position during formal settlement negotiations vis-à-vis those negotiations taking place in July of 2008 where the Licensees initially agreed to explore a stock offering to Mr. Waugh. This change, however, supplies no basis for arguing that the Commission should hold the Licensees to their former negotiation position. It is noteworthy that Mr. Waugh offers no legal authority whatsoever for any of the restrictions he advocates should curtail the parties’ positions in settlement negotiations. *See* Supplemental Appeal at 15 n.15. The Licensees may change their positions at any point about any issue during negotiations, as they in fact did. Mr. Waugh contests this change in position simply because he disagrees with it.

⁴⁰ *See Order to Show Cause*, 22 FCC Rcd at 13374-75.

stock issuance and employment as they deemed fit before formal settlement negotiations began, as discussed above.

19. Further, the Bureau strenuously disagrees that the settlement agreement should be rejected because Mr. Waugh wants to be placed in a *better* position than he was in prior to the commencement of this hearing.⁴¹ Mr. Waugh seeks to use the settlement agreement process and his perceived veto power over it to force the Companies to issue him stock when, by his own admission,⁴² they have, for more than 10 years, steadfastly refused to do so in their own best judgment, and in fact have severed all ties with him.⁴³ Rejecting the settlement in order to impose such an outcome on the Licensees serves neither the Licensees' nor the public's best interest.

20. Finally, the Bureau submits that the Presiding Judge's rulings were fair to Mr. Waugh.⁴⁴ There are no adverse findings or conclusions against Mr. Waugh, no restrictions placed on his capacity to apply for Commission authorizations in the future, and no voluntary contributions or forfeitures are imposed on him. To the extent that the Companies have agreed to settlement terms that Mr. Waugh believes may violate some preexisting contractual arrangement, neither the settlement agreement nor the Presiding Judge's rulings prevent Mr. Waugh from pursuing private remedies in a local court of competent jurisdiction.

⁴¹ Mr. Waugh accuses the Bureau of taking sides in a private dispute, but fails to explain how this argument has any bearing on the issues at hand. The Bureau is a party in this case and an advocate for the public interest. The positions it advances in each instance are dictated by what is in the best interest of the public. In the instant case, the terms and conditions contained in the settlement agreement were consistent with the public interest as well as the private interests of the other signatories thereto. In addition, Mr. Waugh is the party that inserted his private contractual dispute into settlement negotiations by insisting that his private remuneration must encompass stock ownership and by tying settlement to unrelated Delaware litigation. Moreover, as the Bureau has explained in an earlier pleading, the pending Delaware lawsuit referenced by Mr. Waugh (to which he is not even a party) has no bearing on this case or the Licensee's authority to execute the settlement agreement. *See* Enforcement Bureau's Opposition to Michael D. Judy's Appeal, at 5 n.16, filed October 14, 2009.

⁴² The Bureau does not concede this point here, but simply visits it for the sake of argument.

⁴³ *See* Settlement Fact Statement, at 5-6, filed by Preferred Communication Systems, Inc., Preferred Acquisitions, Inc., and Charles M. Austin, on August 28, 2009; Initial Appeal at 12.

⁴⁴ *See* Initial Appeal at 12 n.2.

C. Mr. Waugh Has No Property Interest in PCSI.

21. Mr. Waugh asserts that the Presiding Judge's rulings deprive him of a property interest without a hearing, violating the 5th Amendment to the United States Constitution and Section 554 of the Administrative Procedures Act.⁴⁵ Mr. Waugh's argument in this regard, is, upon closer analysis, internally inconsistent, and without merit.

22. Mr. Waugh has repeatedly claimed from the beginning of this case that he has never possessed and does not hold a present interest in PCSI.⁴⁶ Yet, he asserts in his Initial Appeal that the Presiding Judge's rulings have somehow deprived him of such a property right. Stated otherwise, Mr. Waugh would have the Commission believe that the Presiding Judge's rulings stripped him of a property interest that he has argued he does not possess.

23. The settlement agreement approved by the Presiding Judge does not take away any present property interest that Mr. Waugh has in the Companies. Rather, the settlement agreement reflects the Companies' intentions to refrain from providing Mr. Waugh with any *future* interest in the form of a voting trust. Thus, the settlement agreement merely restricts one form by which he may acquire a *future* legal claim to an interest in the Companies.

D. Due Process Was Served.

24. Mr. Waugh claims that the Presiding Judge failed to afford him the opportunity to oppose the Joint Request for Approval of Settlement Agreement and Termination of Proceeding, filed on August 5, 2009 by the parties to the settlement agreement ("Joint Request").⁴⁷ Although the Presiding Judge granted the Joint Request prior to entertaining a formal opposition pleading

⁴⁵ See *id.* at 13-15; Supplemental Appeal at 17-19. In these sections of Mr. Waugh's Appeals, he attempts to distinguish cases cited by the Bureau, above, and the Bureau answers these attempts. See, *supra*, Section II.A.

⁴⁶ See, e.g., Motion for Partial Summary Decision, at Affidavit of Pendleton C. Waugh at 3, filed by Pendleton C. Waugh on August 6, 2009 (asserting that "PCSI never actually issued stock to the Raymond Hebrank Voting Trust[,] which was supposed to hold such stock for Mr. Waugh's benefit).

⁴⁷ See Initial Appeal at 15.

from Mr. Waugh, the Presiding Judge subsequently did everything possible to ensure that he thoroughly considered and vetted all of Mr. Waugh's concerns.

25. As recited above, after the Presiding Judge issued his August 6 Ruling approving the settlement agreement and terminating the proceeding, he issued a Stay Order holding the former in abeyance. In his Stay Order, the Presiding Judge directed all of the parties -- including Mr. Waugh -- to file further pleadings advancing their respective positions. Mr. Waugh availed himself of that opportunity, voicing the same concerns described in his Initial Appeal.⁴⁸ In addition, as further recited above, the Presiding Judge held a two-hour, on-the-record conference, in which he further considered Mr. Waugh's concerns about the settlement, and whether these concerns should bar resolution of this case without a hearing. In his subsequent September 25 Ruling, the Presiding Judge noted that he had "made reasonable effort to accommodate Mr. Waugh . . . to hear fully his position on settlement."⁴⁹

26. Mr. Waugh asserts that he did not fully advance his position at the conference or in other filings,⁵⁰ but he can hardly place the blame for that on the Presiding Judge. To the extent that Mr. Waugh argues that the August 6 Ruling was premature, various filings that the Presiding Judge allowed Mr. Waugh to submit since the August 6 Ruling, the September 9 conference, and the September 25 Ruling cured any alleged infirmities.

27. In sum, Mr. Waugh had ample opportunity to, and did in fact, oppose the then-proposed settlement agreement. The Commission should reject arguments to the contrary.

E. The Judge's Rulings are Consistent with Commission Precedent.

⁴⁸ See, e.g., Settlement Fact Statement, at Attachment, filed by Pendleton C. Waugh, on August 28, 2009 (enclosing various settlement documents describing Mr. Waugh's continued insistence throughout most of settlement negotiations on claiming stock in PCSI through a voting trust); Comments on Enforcement Bureau's Statement on Public Interest and Fairness, passim, filed by Pendleton C. Waugh, on August 31, 2009 (objecting to terms of Settlement Agreement on same grounds as in subsequently filed Initial Appeal).

⁴⁹ September 25 Ruling at 3.

⁵⁰ See Supplemental Appeal at 19 n.16.

28. Mr. Waugh's final argument challenges the Presiding Judges' rulings as inconsistent with Section 1.93 of the Commission's Rules.⁵¹ As shown below, Mr. Waugh's argument, however, ignores Commission precedent and is predicated on a flawed interpretation of Section 1.93.

29. There is substantial Commission precedent where a revocation hearing has been terminated following settlements among the parties.⁵² Not only did Section 1.93 of the Rules not bar these presiding judges from approving the settlement agreements, but also, in several instances, the presiding judges specifically found that the settlements complied with the requirements of Section 1.93 of the Rules.⁵³ Further, these settlements are final and controlling law because the Commission did not disturb them.⁵⁴

30. In this regard, we note that the prohibition on negotiating consent orders with respect to matters involving a party's basic statutory qualifications applies specifically to application proceedings but not to license revocation hearings. Section 1.93(b) states, in pertinent part, that "[c]onsent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications (see 47 U.S.C. 308 and 309)."⁵⁵ However, the statutory provisions referenced in Section 1.93(b) -- Sections 308 and 309 of the Act -- relate to the processing of *applications*. The rule is silent with respect to Section 312, relating to license revocation proceedings. As the Commission noted in *Talton Broadcasting Company*, Section

⁵¹ See Initial Appeal at 15-16.

⁵² See *Kurtis J. Kintzel, et al.*, Order, FCC 09M-52, (ALJ Sippel, rel. August 6, 2009) (approving settlement to resolve revocation proceeding); *Commercial Radio Service, Inc.*, Memorandum Opinion and Order, FCC 07M-12 (ALJ Steinberg, rel. April 26, 2007)(same); *Publix Network Corporation*, Consent Order, 20 FCC Rcd 5857 (ALJ Sippel, 2005)(same and holding "[a]ccordingly, based upon a review and evaluation of the *Consent Decree*, it is concluded that the requirements of §§ 1.93 and 1.94 of the Commission's rules are satisfied, and that the public interest would be served by approval"); *Business Options, Inc.*, Consent Order, FCC 04M-08 (ALJ Sippel, rel. February 20, 2004)(holding same as *Publix*); *NOS Communications, Inc.*, Consent Order, FCC 03M-42 (ALJ Steinberg, rel. October 29, 2003)(holding same as *Publix*).

⁵³ *Id.*

⁵⁴ The Commission could have reviewed any of these decisions on its motion under 47 C.F.R. § 1.302(b), the same rule under which Mr. Waugh appeals the Presiding Judge's rulings.

⁵⁵ 47 C.F.R. § 1.93(b).

309 requires a finding that the public interest will be served by the grant or renewal of a license.⁵⁶ The Commission properly concluded that it alone is charged with the responsibility of making the public interest determination – not the parties – and that “if a consent order were employed to terminate a renewal hearing, it would not meet the statute’s requirement that a public interest finding be made.”⁵⁷ Section 312, by contrast, does not specifically include a public interest finding and, thus, there is discretion to permit resolution by settlement among the parties with approval by the judge.

31. With one exception,⁵⁸ in the years since *Talton*, the Commission has consistently interpreted Section 1.93(b) to proscribe the use of consent orders only in application-related hearing proceedings. Thus, in 1996, the Commission again had the opportunity to examine Section 1.93 in *La Star Cellular Telephone Company*,⁵⁹ a decision on which Mr. Waugh relies. In that case, the Commission properly concluded that consent orders may not be used to resolve character qualification issues in what was an *application-related* adjudicatory hearing. The Presiding Judge in *Liberty Cable Co., Inc.*,⁶⁰ another case upon which Mr. Waugh relies, made a similar observation about the applicability of Section 1.93(b) in an application hearing case.

F. Waugh’s Partial Summary Decision Motion Is Untimely and Substantively Deficient.

32. Mr. Waugh incorrectly asserts that the Presiding Judge should have considered *and* granted his motion for partial summary decision (“Summary Motion”), filed August 6,

⁵⁶ *Talton Broadcasting Company*, Memorandum Opinion and Order, 67 FCC 2d 1594, paras. 7-9 (1978).

⁵⁷ *Id.*

⁵⁸ See *Capitol Radiotelephone, Inc.*, 11 FCC Rcd. 8232 (1996) (subsequent history omitted). Waugh does not cite this case. Even if he did, however, that case should not be construed as having extended Section 1.93(b) to revocation proceedings. In that case, the discussion regarding the applicability of Section 1.93(b) constituted dicta, was ultimately moot, and contained no analysis or explanation. Furthermore, the discussion relied exclusively on *La Star*, an application-related hearing case. Thus, to the extent that *Capitol Radiotelephone* dealt with Section 1.93(b) at all, it appears to be an anomaly that was not followed in any subsequent proceeding.

⁵⁹ Memorandum Opinion and Order, 11 FCC Rcd 1059 (1996),

⁶⁰ Initial Decision, 13 FCC Rcd 10,716, 10,797 (ALJ, 1998).

2009.⁶¹ As shown below, Mr. Waugh's Summary Motion was flawed for several reasons. In addition, the Presiding Judge did consider it and in the proper exercise of his discretion, determined it to be improper in his September 25 Ruling.⁶²

33. Although the Bureau did not have cause to file a substantive opposition to the Summary Motion because it was untimely and moot, the Bureau nonetheless notes several fatal flaws in the Summary Motion. First, Section 1.251 sets forth requirements as to when a motion for summary decision may be filed.⁶³ The motion may not be filed after a hearing proceeding has been terminated. Accordingly, Mr. Waugh's Summary Motion was untimely.⁶⁴

34. Mr. Waugh claims that it was difficult to determine the proper filing deadline and whether advance permission from the Presiding Judge was required under the Rules because no hearing date had been established due to the formal suspension of the procedural schedule to allow for settlement negotiations. However, Mr. Waugh, who, at all times was represented by experienced communications counsel, ignores the plain fact that the proceeding had *already been terminated*, and all questions concerning a hypothetical hearing date were obviated. Thus, the Presiding Judge was entirely correct that, absent his permission or invitation, the Summary Motion was untimely and improperly filed. Even if the Presiding Judge had been incorrect in this ruling, however, as a practical matter, the Presiding Judge's adoption of the settlement agreement moots the need to rule on the Summary Motion in any event.

⁶¹ See Supplemental Appeal at 21-24.

⁶² See September 25 Ruling at 3.

⁶³ See 47 C.F.R. § 1.251.

⁶⁴ Mr. Waugh asserts that he had been preparing his Summary Motion for a long time and that such efforts should have been considered by the Presiding Judge. Mr. Waugh presents no authority for this proposition because there is none. The length of time that one may take to prepare a pleading for filing is of no consequence in determining whether it was actually filed on time. See Supplemental Appeal at 5.

35. Moreover, the Bureau pointed out to the Presiding Judge during the September 9 conference⁶⁵ that the Summary Motion sought summary decision only of those issues relating to Mr. Waugh, none of which were ripe for resolution by summary decision. In support of his claim that he is qualified to be a licensee, Mr. Waugh simply presents self-serving observations and conclusory statements that his felony convictions were old, that he is rehabilitated, and that he did not engage in the misconduct alleged in the *Order to Show Cause*. However, as the Presiding Judge properly noted in his September 25 Ruling, “the issues against Mr. Waugh, except for his admitted felony conviction, are highly fact intensive requiring discovery, witness testimony, and credibility findings.”⁶⁶ Thus, the Presiding Judge correctly rejected the Summary Motion.

III. CONCLUSION

36. The Settlement Agreement and Final Ruling are unquestionably in the public interest. They allow the Licensees to rebuild, permit rebanding in Puerto Rico and the U.S. Virgin Islands to move forward, and include powerful deterrents against future potential misconduct. The proper recourse for any pecuniary grievance of Mr. Waugh’s against the Company is not an issue for this Commission. Such matters are to be addressed in private civil litigation. The relief Mr. Waugh seeks, rejection of the settlement and remanded to the Presiding Judge for a hearing respecting Mr. Waugh’s character, directly contradicts Commission precedent and does not serve the public interest.

⁶⁵ See *Pendleton C. Waugh, et al.*, Order, FCC 09M-55 (ALJ Sippel, rel. September 8, 2009) (scheduling conference).

⁶⁶ September 25 Ruling at 3 n.7.

37. Accordingly, the Bureau respectfully requests that the Commission deny the Appeals.

Respectfully submitted,
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November 10, 2009

CERTIFICATE OF SERVICE

David Bradford, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that he has, on this 10th day of November 2009, sent by first class United States mail or electronic mail, as noted, copies of the foregoing "Enforcement Bureau's Consolidated Opposition to Pendleton C. Waugh's Appeals," to:

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