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

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

**REPLY TO OPPOSITIONS**

1. Pendleton C. Waugh ("Waugh"), by and through counsel and pursuant to Section 1.302(g) of the Commission's Rules, 47 CFR Sec. 1.302(g), hereby files a Reply to Oppositions filed by the Enforcement Bureau ("EB") and Preferred Communications Systems, Inc. ("PCSI"), Preferred Acquisitions, Inc. ("PAI"), and Charles M. Austin ("Austin") (collectively "the Company"). EB and the Company opposed Waugh's Appeals from the Presiding Officer's Final Ruling in this proceeding which granted a settlement agreement entered into between them and terminated the proceeding.<sup>1</sup> The Judge's August 6 Order and his

<sup>1</sup> Waugh filed an Appeal to the Judge's first Order terminating this proceeding (FCC 09M-51, released August 6, 2009) on September 8, 2009. This Order granted a settlement agreement which provided, *inter alia*, that 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 PCSI, and or an Affiliate of PAI" and, as noted, terminated the proceeding. In a subsequent Order (FCC 09-53, released August 20, 2009), the August 6 Order was held in abeyance. On September 25 2009, the Judge released a Memorandum Opinion and

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September 25, Memorandum Opinion and Order (“MO&O”)(collectively “Termination Orders”) are unlawful and unfair and, consequently, do not serve the public interest. The goal of expediting service to the public can be properly achieved by granting Waugh’s timely filed Motion for Partial Summary Decision. In support, the following is shown:

2. The very purpose of this proceeding was to determine whether Mr. Waugh was an undisclosed principal of or had assumed control of the Company without prior Commission approval and whether the Company failed to disclose or misrepresented his involvement because he was a felon. If there was no transfer of control and Waugh was only a consultant who had been promised a beneficial ownership interest in the Companies, his felony conviction would be irrelevant. This is exactly what discovery has revealed.<sup>2</sup> Still, the Bureau insisted that Waugh could not hold even a beneficial interest unless a court found otherwise. Consequently, and not surprisingly, Waugh did not enter into the settlement agreement.

3. The Bureau settled with the Company anyhow. The Judge granted the so-called settlement agreement without acknowledging that it was, in fact, a consent decree **on the very same day it was filed**, thus depriving Waugh of the opportunity to file an opposition. This error was not remedied by the subsequent hearing conference whose purpose was to “discuss procedures to terminate the case as to all the parties without a hearing.”<sup>3</sup> In any event, the conference clearly did not remedy two serious unlawful acts committed in the first termination order which were perpetuated in the MO&O.

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Order (FCC 09M-57), in which he renewed the August 6 Order in full force and effect and “reterminated” the proceeding. Waugh filed an appeal to the Memorandum Opinion and Order on October 26, 2009.

<sup>2</sup> Even the Bureau now concedes this point. It states: “Following discovery, in this case, the Bureau now believes that the nature and extent of Mr. Waugh’s involvement with the companies was such that the material and substantial questions of fact about his individual qualifications are no longer relevant to the Companies’ qualifications to be and remain Commission licensee.” See Enforcement Bureau’s Statement on Public Interest and Fairness, at 2, filed August 31, 2009, and Opposition to Pendleton C. Waugh’s Appeals, p. 6.

<sup>3</sup> See Order , FCC 09M-55, released September 8, 2009, and Order, FCC 09M-56, released September 10, 2009.

**The MO&O is an unlawful Consent Order negotiated and entered  
into in derogation of Section 1.93 of the Rules**

4. First, the MO&O is a Consent order which was negotiated and entered into in direct conflict with Section 1.93(b) of the Commission's Rules.<sup>4</sup> The Rule itself, its legislative history, and Commission precedent all demonstrate this fundamental error in the MO&O. The rule unequivocally provides that, "Consent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license (Sec 47 U.S.C. 308 and 309)." 47 C.F.R Sec. 1.93(b). The issues in this proceeding involve a party's statutory qualifications to hold a license, for example: undisclosed real party in interest (Issue a), unauthorized transfer of control (Issue b), misrepresentation and lack of candor (Issue c), and willful and/or repeated violation of Section 308(b) of the Act (Issue f). In fact, the penultimate issue reads as follows:

(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.

These are the very kind of issues which cannot be the subject of a Consent Order.

5. The purpose of this limitation is clear from the legislative history of the rule. In summarizing the new consent procedures, the Commission stated in pertinent part: "These new procedures will afford the opportunity for avoiding protracted adjudication where compliance with Commission rules and policies can be secured through agreement, **and the party's qualifications to remain a licensee are not in question.**" *Amendments to Parts 0 and 1 of the Commission's Rules with Respect to Adjudicatory Re-Regulation Proposals*. 58 FCC 2d 865, 866

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<sup>4</sup> It is telling that neither the ALJ nor the Bureau refer to the "settlement agreement" as a consent decree or the MO&O as a Consent Order.

(1976)(emphasis supplied). These new formal procedures “would be available [to a] ... party to a hearing – on issues involving violations of law, rules or policy **other than issues involving his basic qualifications to be a licensee ...**” Id. at 867 (emphasis supplied). “The consent procedures will be applicable to **all adjudicatory cases** to which they are suited...” Id. (emphasis supplied). Thus, it is the nature of the issues in the hearing and not the nature of the hearing that determines whether the consent procedures are appropriate. No where in the legislative history does the Commission suggest that the bar on using consent procedures to resolve basic qualifying issues does not apply in revocation proceedings.

6. Finally, Commission precedent makes it clear that consent procedures may not be used where the issues involve a party’s basic qualifications to be or remain a Commission licensee regardless of whether the issues are raised in a renewal, initial licensing or revocation proceeding. In *La Star Cellular Telephone Company*, 11 FCC Rcd 1059 (1996), an initial licensing proceeding, the Commission stated:

Under 47 C.F.R. Sec. 1.93, a consent decree in a hearing case may not be approved with respect to matters which involve a party’s basic statutory qualifications to hold a license. Misrepresentation and lack of candor represent serious misconduct that may implicate a party’s basic qualifications. Accordingly, we cannot approve a consent decree, since it purports to resolve such potential character qualifications questions. See *Talton Broadcasting Co.*, 67 FCC 2d 1594, 1596-99 para.s 7-12 and n. 12 (1978).

11 FCC Rcd at 1060, 1061. The Commission proceeded to resolve the case without further hearing. While it rejected the consent decree, it gave credence to a summary decision in a related proceeding which resolved all the character qualifications issues.

7. The Bureau, however, contends that there is ample Commission precedent for the Judge to issue a Consent Order in this proceeding. It cites several decisions by ALJs and contends that these constitute precedent because the Commission could have reviewed them on

its own motion, but chose not to. Enforcement Bureau's Opposition, p. 15. This novel theory of jurisprudence would elevate virtually every decision by an ALJ to be of precedential value in other proceedings since all final decisions of judges in hearing cases may be reviewed by the Commission on its own motion. See, e.g., Sections 1.276 and 1.302. The Bureau also contends that the prohibition on negotiating consent orders with respect to basic qualifying issues only applies in application proceedings and not revocation proceedings. As already noted, the rule, its legislative history, and unequivocal Commission precedent hold otherwise. The sole case relied upon by the Bureau is also inapposite.<sup>5</sup>

8. In *Talton Broadcasting Company*, 67 FCC 2d 1594 (1978), the Commission held that consent procedures could not be used to resolve issues in renewal hearings since before a renewal application (or most other applications) could be granted, the Commission had to make an affirmative finding that the public interest would be served thereby. A finding on the merits was thus necessary and the consent procedures were designed to dispose of issues without a determination on the merits. However, *Talton* did not hold that consent procedures could be used in revocation proceedings regardless of the issues because there was no application before the Commission in such a proceeding. Nevertheless, the Bureau, in an obvious *non sequitur*, argues that since there is no application at stake in a revocation proceeding, the bar on entering into a consent decree involving basic qualifying issues does not apply.<sup>6</sup> This interpretation is

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<sup>5</sup> The Bureau cites one case where its position is rejected, but dismisses the case stating that it "constituted dicta, was ultimately moot, and contained no analysis or explanation." Enforcement Bureau Opposition, n. 58. The case, *Capitol Radiotelephone, Inc.*, 11 FCC Rcd 8232 (1996) was a revocation proceeding which involved, *inter alia*, misrepresentation and lack of candor issues. The ALJ denied a Motion for Approval of Consent Agreement holding that under Section 1.93, a consent agreement is inappropriate in a hearing proceeding, such as this, involving a party's basic statutory qualifications. The Commission stated that the ALJ's ruling was correct, and cited the Commission's explanation in *LaStar Cellular Telephone Company* as the proper interpretation of the rule. *Id.* at 8241. This is not dicta, but was provided in response to the Review Board's invitation to clarify the applicable law.

<sup>6</sup> In addition, the Bureau, in arguing that the bar contained in Section 1.93(b) only applies in cases brought under Sections 308 and 309 of the Act, fails to recognize that the issues in this case specifically implicate Section 308 of the Act, e.g., Issue (f).

contrary to the rule, its legislative history, *LaStar* and logic. *Talton* does not state that the bar only applies to hearings involving applications. A more careful reading of the case shows that the holding again focuses, not on the nature of the adjudication, but on the nature of the issues. Issues which involve basic qualifications require a resolution on the merits and cannot be resolved through the consent procedure which is designed to secure a promise of future conduct. *Talton* also recognizes that an appropriate means of resolving basic qualifying issues without hearing where it becomes apparent after designation that there are no genuine issues of material fact might be through a motion for summary decision. *Id.* at 1598. Finally, the question of whether this case should be resolved through the consent procedure or through the summary decision process is not simply an academic one. As explained in *Talton*, it is essential that qualifying issues be decided on the merits and this requirement should apply in **any** adjudicatory proceeding.

**The Judge failed to give due consideration to Waugh's Motion for Partial Summary Decision and his basis for rejecting it was incorrect as a matter of fact and law**

9. Waugh has been accused of scuttling the settlement and using the process as leverage to exact a ransom out of the Company. However, the Bureau and the Company either ignore or discount Waugh's efforts to "settle" the case using the proper procedure, *i.e.*, summary decision under Section 1.251 of the Commission's Rules.<sup>7</sup> The Bureau attempts to dodge the issue by simply arguing that Waugh's motion was untimely. There is no support for this extraordinary

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<sup>7</sup> Waugh's Motion is primarily directed to the allegations of real party in interest and unauthorized transfer of control. He demonstrated, using the test enunciated in *Intermountain Microwave*, 24 RR 983, 984 (1963), that Mr. Austin, and not Mr. Waugh, controlled the Company. The Bureau could not have entered into the "settlement agreement" with Austin, PCSI and PAI if it believed that Waugh was an undisclosed principal or that there had been an unauthorized transfer of control since, if that were the case, these parties were also guilty of misrepresentation under Issue c, lacking candor under issue e, and failing to fully respond to the Commission under issue f. Nor could the Judge approve the "settlement agreement" if he believed that Waugh was an undisclosed principal and that PCSI relinquished control to him without prior Commission approval.

position. Waugh filed his Motion on the very same day that the Judge's first termination order was released before any hearing date was set and before the Judge's Order became effective.<sup>8</sup> Waugh proceeded in good faith to timely file the motion<sup>9</sup> and it clearly cannot be rendered untimely simply by fiat; the release of the Judge's concededly premature ruling.<sup>10</sup> Nor can the Motion be dismissed because it was not filed in response to an invitation from the Presiding Judge. Section 1.251(a)(1) clearly states that:

Any party to an adjudicatory proceeding may move for summary decision of all or any of the issues set for hearing. The motion shall be filed at least 20 days prior to the date set for commencement of the hearing.

47 C.F.R. Sec. 1.251(a)(1).

10. It was also error to reject the Motion because it was not "appropriate" since it would necessitate "witness testimony, and credibility findings." Thus the Judge in note 7 stated:

Mr. Waugh would like to wipe clean his criminal slate with the FCC through a partial summary decision. But the issues against Mr. Waugh, except for his admitted felony convictions, are highly fact intensive requiring discovery, witness testimony, and credibility findings.

MO&O, n. 7. However, the Judge seems to ignore the fact that in granting the settlement, he has, in effect, ruled that there was no unauthorized transfer of control and no misrepresentation. Otherwise, he could not have approved the settlement agreement and permitted the Company to

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<sup>8</sup> Under Section 1.302(b), the Judge's ruling is still not effective. The rule provides in pertinent part that the ruling is stayed once a Notice of Appeal is filed within 10 days and thereafter, "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." 47 C.F.R. Sec. 1.302(b).

<sup>9</sup> Waugh circulated the motion to the Company and requested that it join in the Motion. It would appear that this would have been a more advantageous way to resolve the proceeding from the Company's standpoint. For one thing, it would not have been required to make a voluntary contribution of One Hundred Thousand dollar (\$100,000) to the U.S. Treasury. However, Waugh never received a response.

<sup>10</sup> The Judge in his Order holding the first termination Order in abeyance, stated, "For the Judge to have inadvertently caused harm by premature termination presents good cause for further reflection and inquiry." FCC 09M-53, released August 20, 2009.

remain a Commission licensee.<sup>11</sup> If the Company did not relinquish control to Mr. Waugh, surely Mr. Waugh cannot be punished for assuming control. Consequently, the only issue that would remain for resolution would be the affect of Mr. Waugh's ten year old felony convictions on his qualifications; whether he has been rehabilitated. This issue has been resolved through summary decision in other proceedings and there is no reason it cannot be so resolved in this proceeding.<sup>12</sup> Moreover, there is no need for further discovery on this issue. The Bureau has had two years to pursue discovery and it has pursued discovery aggressively. Mr. Waugh has produced thousands of documents and made himself available in Washington for a full week of depositions. The Bureau has specifically inquired about his felony convictions. See *e.g.*, Enforcement Bureau's First Interrogatories to Pendleton C. Waugh, No. 41. Clearly, the need for additional discovery is not a legitimate basis for rejecting Waugh's motion outright. Nor is there any apparent need for witness examination or credibility findings. Waugh has sworn under oath that he has not suffered any adverse actions since the two felony convictions in 1994 and 1999. See Affidavit attached to Waugh's Motion for Summary Decision. If the Bureau disputes this fact, it can certainly come forward and oppose Waugh's motion with documentary evidence.

11. The Commission has stated that a felony conviction should be considered in assessing a licensee's character qualifications, but it may not necessarily be a dispositive factor, and all such convictions may not be equally probative. See, *e.g.*, *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCCR 3252, (1990) (hereinafter "*1990 Policy*")

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<sup>11</sup> As noted, *supra*, the Bureau presumably would not oppose summary resolution of the real party in interest, transfer of control or the misrepresentation/lack of candor and failure to disclose issues stemming from them. It has stated that, "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." Public Interest and Fairness Statement, p.3. The Bureau has also expressed confidence in the qualifications of the Company. Enforcement Bureau's Opposition to appeal, p. 6.

<sup>12</sup> See, *e.g.*, *Big Country Communications*, 6 FCC Rcd. 1247 (ALJ. 1991).

*Statement*”). Moreover, the FCC’s character policy sets forth a number of mitigating factors to be considered in evaluating misconduct:

the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall compliance with FCC rules and policies, and rehabilitation.

*Contemporary Media, Inc. v. FCC*, 214 F.3rd 187, 194 (D.C. Cir 2000), citing *1990 Policy Statement* at 3252. Regarding the currentness of the misconduct, the instructions to FCC Form 301, which is used to file for a new broadcast station, state that, “In responding to Item 6 [which calls for disclosure of any adverse findings including felony convictions against any party to the application], the applicant should consider any relevant adverse finding that occurred within the past ten years.” Although the instructions to the corresponding wireless form, FCC Form 601, do not contain such language, the broadcast form does give an indication of the Commission’s view of the relevance to be placed on an adverse action which occurred ten years ago based upon misconduct which occurred during July-August 1992. The MO&O renders this precedent a nullity and deprives Mr. Waugh of the opportunity to demonstrate that he has been rehabilitated.

### **Conclusion**

12. The public interest will be served by overruling the Termination Orders and remanding the case to the Presiding Judge for consideration of Waugh’s Motion for Partial Summary Decision.<sup>13</sup> This is the proper and not simply the expedient way<sup>14</sup> to expedite service

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<sup>13</sup> Waugh’s motion only relates to issues that affect him directly, but can be expanded to include Mr. Bishop and the non-basic-qualifying issues. The non-basic-qualifying issues could also be subject to a Consent Order, e.g., Issue 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.”)

<sup>14</sup> This rush to judgment is also exemplified by the Judge’s failure to withhold action on the settlement agreement until the Chancery Court in Delaware ruled on whether Mr. Austin had the authority to enter into the agreement on behalf of PCSI among other things. The lawsuit was filed before the Court of Chancery in Delaware by Michael D.

to the public. The public will also be served by reining in the Enforcement Bureau's misdirected prosecutorial zeal and unlawful practices. This procedure will benefit the Company by removing the cloud of unlawful conduct and will not detract from the deterrence of wrongdoing, since there was no wrongdoing in this proceeding to deter. Finally, it will permit a person, whose reputation and livelihood have been adversely affected by the untruthful allegations in the designation order from being automatically blackballed from holding an attributable interest in Commission licensees and the opportunity to seek a beneficial interest in a company to which he devoted ten years of his life.

**WHEREFORE**, the premises considered, the Commission should overrule the Termination Orders and remand the proceeding back to the Presiding Judge for consideration of Waugh's Motion for Summary Decision.

Respectfully submitted,  
PENDLETON C. WAUGH

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November 20, 2009

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Judy, *et al.*, on July 8, 2009. Significantly, on September 29, 2009, the Court granted Mr. Judy Summary Judgment with regard to his actions against PCSI and Mr. Austin. The Court ordered PCSI to produce books and records and to convene a stockholder's meeting on December 9, 2009. The Court also appointed a Master to conduct the stockholder's meeting, removing Mr. Austin as PCSI's sole director until such meeting is held and a minimum of four directors are elected. See Appeal filed by Judy on October 1, 2009, p. 2.

**CERTIFICATE OF SERVICE**

I, William D. Silva, certify that I have caused a copy of the foregoing "Reply to oppositions" to be sent by electronic mail, this 20<sup>th</sup> day of November, 2009, to the following:

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