

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

In Re:)	
)	
)	
Application of Convey Communications Inc.)	File No. 0003926139
And Green Eagle Networks, Inc.)	
For Assignment of Authorization of)	
PCS Licenses)	
)	
Green Eagle Communications, Inc.,)	
Petition For Declaratory Ruling and)	
Request for Waiver of Section 20.5(a) of the)	
Commission's Rules)	
)	
)	

To: **Wireless Telecommunications Bureau**

**OPPOSITION TO PETITION TO DENY APPLICATION OF
CONVEY COMMUNICATIONS, INC. AND GREEN
EAGLE NETWORKS, INC. AND TO DENY PETITION
OF GREEN EAGLE COMMUNICATIONS, INC. FOR A
DECLARATORY RULING UNDER SECTION 310(b)(4) OF THE
COMMUNICATIONS ACT OF 1934, AS AMENDED
AND REQUEST FOR WAIVER OF THE COMMISSION'S RULES**

Convey Communications, Inc. ("Convey") and Green Eagle Networks, Inc. ("GEN", together, the "Applicants")¹ hereby submit this their Opposition to Petition to Deny ("Petition") the Application of Convey Communications, Inc. and Green Eagle Networks, Inc. and To Deny Petition of Green Eagle Communications, Inc. for a Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, As Amended (the "PDR") and Request for Waiver of the Commission's Rules (the "Waiver Request," together, the "Application"). The Petition was filed

¹ Convey is wholly owned by Telemetrix, Inc. ("Telemetrix") and GEN is wholly owned by Green Eagle Communications, Inc. Thus, to the degree that they are implicated in the Petition, Telemetrix and Green Eagle Communications, Inc. join in this Opposition.

with the Wireless Telecommunications Bureau (“Bureau”) of the Federal Communications Commission (“Commission” or “FCC”) on September 10, 2009 by Michael J. Tracy and Tracy Broadcasting Corporation, Debtor-in-Possession (together, the “Petitioners”).²

In support of this Opposition, the following is respectfully shown:

I. INTRODUCTION

1. In their late-filed pleading, the Petitioners present a revisionist history of the various past and present proceedings and filings. They make false accusations, unsupported allegations and conclusions without any basis in fact by a former officer, a present Telemetrix minority stockholder and alleged creditors of the assignors. But most importantly, they bring to the Federal Communications Commission matters over which it has no jurisdiction, which the Petitioners specifically list: the Securities and Exchange Commission (“SEC”); the Bankruptcy Court; other civil courts; and arbitrations. The Commission cannot rule on these matters and there have been no investigations, proceedings or rulings against the Applicants in the other fora. Therefore, this Petition must be dismissed, or in the alternative, denied.

II. PROCEDURAL ISSUES

A. The Petition Was Untimely Filed.

2. On August 12, 2009, the Wireless Telecommunications Bureau published its Report Number 5173, accepting the Application for consent to assignment of licenses from Convey Communications Inc. to Green Eagle Networks, Inc. On page 1 of the Report, the Bureau clearly stated that the Applications had a 14-Day Notice Period. The date for filing a Petition to Deny was August 26, 2009.

² Pursuant to 47 USC §309(d)(1), the Applicants present only facts of which official notice may be given. Therefore, they enclose no declaration.

3. Nevertheless, on September 10, 2009, the referenced Petition to Deny was filed. The Petition was late filed by more than two weeks. Further, the Petitioners did not so much as ask for leave to file late or for acceptance of the late filed Petition. In the past, courts have mandated that the Commission dismiss such late-filed petitions for being untimely, absent a showing that there were “extremely unusual circumstances.”³ There was no such showing here. On that basis, the Petition should not be considered and must be dismissed.

B. The Petitioners Lack Standing.

4. In the alternative, the Petitioners, individually or collectively, do not have standing as parties in interest, pursuant to Section 1.939(d)(1) of the Rules and Section 309(d)(1) of the Act, to file the referenced Petition. Neither Petitioner claims to be a competitor for PCS services in the market covered by the licenses subject to the Application. The only basis on which the Petitioners argue that they have an interest are matters that are in other fora: the SEC; the US Bankruptcy Court in the District of Colorado; or civil/financial dispute arenas which are best litigated there, as indeed the Petitioners are doing and have done. See, for example, Exhibit B of the Petition. To the extent that Michael J. Tracy claims to be a Telemetrix shareholder,

³ See, for example, *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) “we have discouraged the Commission from accepting such petitions in the absence of extremely unusual circumstances.” citing *Reuters Limited v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); See also, *Networkip, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008) “As we explained in *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990), before the FCC can invoke its good cause exception, it both must explain why deviation better serves the public interest, and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation,’ *id.* at 1166. The reason for this two-part test flows from the principle ‘that an agency must adhere to its own rules and regulations, ‘and ‘[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.’ *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986)”; and *21st Century Telesis Joint Venture v. F.C.C.*, 318 F.3d 192, 199-200 (D.C. Cir. 2003) “ The court has discouraged the Commission from accepting late petitions in the absence of extremely unusual circumstances. *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); cf. *Gardner v. FCC*, 530 F.2d 1086, 1091-92 & n. 24 (D.C. Cir. 1976).”

his interest is being represented here by appropriate corporate officers. If he believes that is not the case, then he would need to file a shareholder action in court.⁴

5. The Petitioners have filed actions in the only fora that are appropriate for the alleged grievances of a shareholder and/or a creditor. The FCC does not want and does not have the jurisdiction to referee such issues.⁵ Put simply, the Petitioners are in the wrong place at the wrong time and lack the necessary standing to show that the grant of the Application would cause them "direct injury" in any way that the FCC would accept.

6. In sum, the Petitioners' bold statement that they have standing cannot imbue them with it since the Petitioners cannot show: "(1) a personal injury-in-fact that is (2) 'fairly traceable' to the defendant's conduct and (3) redressable by the relief requested."⁶ It is possible that they may have standing elsewhere, but there is no redress for their grievances at the FCC. Whether the FCC licenses are assigned to Green Eagle or not does not affect the Petitioners in the least. There is simply no direct injury to the Petitioners before the FCC.

7. Therefore, in light of the late filed pleading and the lack of standing, there is no basis for consideration under even an informal request pursuant to Section 1.41 since the matters stated cannot be litigated at the FCC. The Petition must be dismissed.

III. DISCUSSION

⁴ See, *Order*, FCC 09M-48, EB Docket No. 07-147, released July 16, 2009, "Shareholder derivative complaints against corporate management are recognized in civil courts but not at the FCC."

⁵ See, for example, *PCS 2000, LP*, 12 FCC Rcd 168 1, 169 1 (1997) (private transactions involving the exercise of business judgment are best resolved by courts of competent jurisdiction); see also, *WC Services, Inc.*, 11 FCC Rcd 12136 (1996), and *GTE Corporation*, FCC 00-221, 15 FCC Rcd 14032, ¶365 (2000) "We find that this is a civil dispute not relevant to our analysis under section 310(d) authority and best resolved in a state court of competent jurisdiction.

⁶ *Suncom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386, 1387 (D.C. Cir. 1996)("Suncom").

A. The FCC Has No Jurisdiction for Issues Presented.

8. As stated above, the Petition is full of references to the Securities and Exchange Commission and various court proceedings. But the bottom line in all of the unfounded and derogatory accusations is that the Petitioners have an ongoing, obviously vicious, feud about financial issues with the Applicants, specifically, the Becker family.⁷ Unfortunately, for the Petitioners, the FCC does not get involved in such matters nor does it negotiate, arbitrate or rule on such matters. A multitude of cases demonstrates that such financial matters will **not** be ruled on by the FCC.⁸ And because of the FCC refusal to be a platform for civil litigation, it must dismiss or deny this Petition.

B. The Petition Contains Unsupported Conclusions.

9. In addition, the Petition is rife with allegations that are simply not supported. The Petitioners accuse the Applicants of deceit, fraud, lack of candor and various other misdeeds. However, it must be emphasized that **no** SEC investigations or enforcement proceedings were identified. No orders, final or otherwise, with findings concerning deceit, fraud, lack of candor or any other misdeeds were referenced from the SEC, the Bankruptcy Court or any other forum.⁹ Yet the Petitioners make these bald, conclusionary statements without a scintilla of authentication from any regulatory agency, court, arbitration proceeding or wherever else the Petitioners have pursued the Applicants.

10. The Petitioners, even assuming standing, have failed to show that a grant of the referenced Application, the related Waiver Request and PDR is inconsistent with the public

⁷ See Petition at 8, where the Petitioners complain that "...the transaction is designed to enable Telematrix and Convey to avoid paying its non-Becker family creditors as well as injuring its non-Becker family shareholders by stripping the assets...."

⁸ See note 5.

⁹ See Petition at 9, where there is a long dissertation on state law in Delaware and Nebraska that is simply inappropriate and inapplicable before the Federal Communications Commission.

interest. There are no credible allegations supported by any facts. There is nothing but speculation and innuendo.

11. In essence, the Petitioners seek a stay of any action on the assignment pending resolution of non FCC issues in other arenas. Yet, the Petitioners have not even addressed the high standard for a stay.¹⁰ This private fight should be left to the courts and the referenced Application, Waiver Request and PDR granted.

12. Further, one of the Petitioners, Michael J. Tracy, may have issues himself at the FCC. The Petitioners proclaim that, “The Commission relies heavily on the honesty and probity of its licensees for a system that is a large [sic] self policing.”¹¹ However, during the tenure of Mr. Tracy as President of Convey, formerly known as Tracy Corporation II, the licensee defaulted on payments on its auction installment payments on a license from Auction No. 11.¹² Yet, Mr. Tracy, as President and sole owner of a recently formed company, Greenfly LLC, on two recent FCC Auction Forms 175 applications, certified that he had never been involved in any license defaults at the FCC.¹³ Thus, it appears hypocritical at the least to state as the Petitioners do, “The U.S. Supreme Court held long ago that the fact of concealment may be more significant than the facts concealed, and a willingness to dupe a regulatory body may be disclosed by immaterial and useless deception as well as by material and persuasive ones.”¹⁴

¹⁰ *WMATA v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977)

¹¹ Petition at 12, citing *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000).

¹² See *Memorandum Opinion and Order*, DA 07-915, 22 FCC Rcd 4071 (2007), which describes the history of the default and the reinstatement of the license.

¹³ See FCC Auction Applications FCC Files No. 0002939777 (Auction No. 71, filed in March 2007) and 0003245083 (Auction No. 73, filed November 30, 2007).

¹⁴ Petition at 13, citing, *FCC v. WOKO, Inc.* 329 U.S. 223, 277 (1946).

IV. CONCLUSION

13. For the reasons demonstrated herein, the Commission should dismiss or deny the referenced Petition.

Respectfully submitted,

CONVEY COMMUNICATIONS, INC.

/s/ William Becker
Director

GREEN EAGLE NETWORKS, INC.

/s/ Larry L. Becker
President

6650 Gunpark Drive, Suite 100
Boulder, CO 80301
Telephone: (303) 652-0103
Facsimile: (303) 652-3452

Dated: September 23, 2009

CERTIFICATE OF SERVICE

I, Chrys Claypool, do hereby certify that on this 23rd day of September 2009, the foregoing **OPPOSITION TO PETITION TO DENY APPLICATIONS OF CONVEY COMMUNICATIONS, INC. AND GREEN EAGLE NETWORKS, INC. AND TO DENY, PETITION OF GREEN EAGLE COMMUNICATIONS, INC. FOR A DECLARATORY RULING UNDER SECTION 310(b)(4) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED AND REQUEST FOR WAIVER OF THE COMMISSION'S RULES** was served on the following person by first-class United States mail, postage prepaid:

Michael J. Tracy
Tracy Broadcasting Corporation
731 East 38th Street
Scottsbluff, NE 69361

/s/Chrys Claypool