

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
International Section 214 Authorization for)	File Nos. ITC-214-20010427-00255
Assignment of Transfer of Control of)	ITC-T/C-20151008-00236
Northwest Missouri Cellular Limited)	
Partnership)	
)	
To: Chief, International Bureau)	

**REPLY TO OPPOSITION TO PETITION TO DENY
OR INFORMAL REQUEST FOR COMMISSION ACTION**

Nicholas Robb, as court-appointed receiver for Oregon Farmers Mutual Telephone Company (“Oregon Farmers”) (hereinafter, “Mr. Robb” or the “Receiver”), by his attorneys and pursuant to Section 63.20(d) of the Commission’s Rules, hereby responds to the “Opposition to Petition to Deny or Supplement or Informal Objection” (the “Opposition”) filed by Northwest Missouri Cellular Limited Partnership (the “Partnership”) on November 30, 2015, in response to the underlying Petition to Deny or Informal Request for Commission Action (the “Petition”).

At the outset, Mr. Robb notes that the Partnership has agreed that the Commission is not the appropriate forum for resolution of the merits of either the bankruptcy or state-law related questions that have been raised in this proceeding.¹ As a result, the Commission should place the above-captioned application in a pending status and then dismiss the application upon resolution of this matter in favor of Mr. Robb in the appropriate forum. Neither the courts in Missouri nor Delaware have ruled on the

¹ Opposition at 2.

Partnership's claims.² Therefore, any suggestion in the above-captioned application that there was no involuntary transfer of control of the Oregon Farmers general partnership interest to Mr. Robb is inaccurate and premature.

Mr. Robb's Petition has already shown that the filing of the bankruptcy petition did not result in the extinguishment of Oregon Farmer's partnership interests, since the bankruptcy petition was quickly dismissed – a fact not reported in the Partnership's captioned application even though the dismissal had occurred months before the application was filed. As shown in the Petition, Bankruptcy law restored the Oregon Farmers' partnership interest, and Delaware precedent recognizes this outcome.³

The Partnership now argues for the first time that Oregon Farmer's general partnership interest was extinguished when the company "consented to the appointment of a receiver," even though the captioned application cited only to April 6, 2015 (i.e., the date that the bankruptcy petition was filed) as the date the interest was allegedly extinguished.⁴ This argument relies upon Section 17-402(a)(4)(f) of the Delaware Code,⁵ which provides in pertinent part that:

² On November 6, 2015, Mr. Robb filed a Motion to Enforce Receiver Order and for Declaration of Rights in the Circuit Court for Holt County, Missouri, which was set for evidentiary hearing by Order issued November 19. A copy of the Order is attached.

³ Petition at 2-3.

⁴ Opposition at 2.

⁵ The Opposition at 2 argues that extinguishment of Oregon Farmers' partnership interest is justified in part because "appointment of that receiver [Mr. Robb] was not vacated or stayed within 90 days after June 15, 2015." This argument would seem to be invoking Section 17-402(a)(5) of the Delaware Code, which states in relevant part that a partnership interest is extinguished "if within 90 days after the appointment without the general partner's consent or acquiescence of a trustee, receiver or liquidator of the general partner or of all or any substantial part of his or her properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated." (Emphasis added). Since the Partnership's Opposition (at 2) concedes that "OFM [Oregon Farmers] consented to the appointment of a receiver on or before June 15, 2015", it is not clear that Section 17-402(a)(5), which deals with the appointment of a receiver without the general partner's consent, would apply to this situation.

(a) A person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

...

(4) Unless otherwise provided in the partnership agreement, or with the written consent of all partners, the general partner:

...

(f) Seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the general partner or of all or any substantial part of his or her properties.

This argument fails for two reasons: First, the filing of the July 2015 application that notified the FCC of the transfer of the cellular partnership interest to Mr. Robb as receiver must be viewed as constituting written consent of the partners under Section 17-402(a)(4) of the Delaware Code, which nullifies the portion of the statute that would extinguish the partnership interest. Mr. Robb consulted with the Partnership about the receivership situation, and the Partnership reacted not by objecting to the receivership appointment or the validity of the partnership interest, but instead by filing an application reporting the transfer of the Oregon Farmers partnership interest to Mr. Robb. The signature of the General Manager of the Partnership was the memorialization of the written consent required in Subsection (4).

Moreover, if it is assumed *arguendo* that Partnership consent was not present, then the interpretation of the Delaware statute that the Partnership now advocates must be deemed preempted by the Communications Act and the Commission's regulations. Here,

the Partnership filed the captioned application almost three months after the appointment of a receiver, and yet claims that an involuntary transfer of control happened, without Commission intervention, when the receiver was put into place.

It is well established that every general partner in a licensee partnership interest is viewed by the Commission as having “control”, no matter how small the amount of equity held.⁶ Thus, any time a general partnership interest is transferred or extinguished, it changes the control of the licensee, thereby triggering a need for transfer of control approval by the Commission under Sections 214 and 310(d) of the Act, and corresponding sections of the Commission’s rules. The Oregon Farmers interest that the Partnership now claims was extinguished by Delaware law includes a general partnership interest. By filing an after the fact notification informing the FCC that this extinguishment of the partnership interest by law was an “involuntary transfer of control”, the Partnership is claiming that this situation is similar to other involuntary transfers, such as when an executor is appointed upon the death of a partner, or a trustee in bankruptcy is appointed when a partner enters bankruptcy. However, when an executor, trustee or receiver is appointed, the involuntary transfer procedure is appropriate, because the appointment of an executor, trustee or receiver is only a temporary “caretaker” measure, and the FCC will have the opportunity to approve in advance the ultimate substantive ownership of the partnership interest when the executor, trustee or receiver distributes the interest he or she is safeguarding. But when a state

⁶ See Stephen F. Sewell, Assignments and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934, 43 Fed. Comm. L.J. 277, 310 (July 1991) (“ Unlike corporate licensees, however, any change in general partners or their equity interests requires prior Commission approval.”).

statute automatically extinguishes a general partner interest, it effectuates a full blown and permanent transfer of control of the licensee that would short-circuit the approval requirements of the Act and the Commission's rules, and therefore frustrate the requirement that Congress mandated for the Commission to follow in safeguarding the public interest.

The effect of the Delaware statute, when applied to a general partner with an interest in an FCC licensee, is akin to the effect of creating a lien or an automatic reversionary interest in a Commission-issued license without the required evaluation under Section 310(d), something that the Commission has universally prohibited because it would bypass the requirements of Section 310(d).⁷

The FCC addressed the potential harms of state actions that automatically shifted the permanent substantive ownership of a licensee in *Applications of Kirk Merkley, Receiver; For Involuntary Assignment of License of Station KPRQ, Murray, Utah*.⁸ In its decision, the Commission confirmed that reversionary interests in a license are forbidden, indicating as follows:

While the Commission has a general policy of not questioning the appointment of a receiver or trustee in bankruptcy by state and federal courts [or his request for temporary acquisition of a license], where such an appointment involves the enforcement of a reversionary interest in a broadcast license and the recognition of a security interest in that license by

⁷ *Id.* at 837; see *Application of Walter O'Cheskey, Trustee-in-Bankruptcy for NCPT Cellular, Inc. (Assignor) and Triad Cellular L.P. (Assignee); For Consent to the Assignment of License of Cellular Radio Station KNKN334, Market 625A; Texas I – Dallam RSA*, Memorandum Opinion and Order, 13 FCC Rcd 10656 (1998) (A creditor may not obtain a lien in the license itself [Citing *In re Application of Bill Welch*, Memorandum Opinion and Order on Review, 3 RCC Rcd 6502 (1988)]).

⁸ 94 F.C.C.2d 829 (1983), recons. den., 56 Rad. Reg. 2d (P & F) 413 (1984), *aff'd sub nom. Smith v. Heckler*, 776 F.2d 365 (D.C.Cir. 1985).

creditors, the application seeking consent to assign the broadcast license to the receiver or trustee is unacceptable for filing.⁹

Likewise, when the appointment of a receiver in the present case is not merely to implement the “temporary acquisition of a license,” but instead is claimed to permanently eliminate a controlling interest in the licensee, the Commission must reject that outcome as it did in *Merkley*. As the Commission noted in *Merkley*: “If the parties were allowed to make one representation to the Commission, while a contrary course was pursued at a later time in another forum, our obligation to review license assignment transactions under the Act would be thwarted.”

The application for transfer of control of international 214 authorization suffers the same fatal complications. Preemption of liens and other state measures that interfere with the Commission’s obligations and powers under the Act is appropriate. In *New York v. FCC*,¹⁰ the Supreme Court stated:

Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982). Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. *Crisp*, 467 U.S. at 700; *De la Cuesta*, *supra*, at 152-154.

⁹ *Id.* at 829.

¹⁰ 486 U.S. 57, 64 (U.S. 1988).

The Supreme Court reinforced the Commission's exclusive authority over license transfer matters under Section 310(d) in *Radio Station WOW, Inc., et. al. v. Johnson*.¹¹ In that case, the Court nullified a state court's order that an assignee of a license must "do all things necessary" to secure the return of the license to its original holder, in the face of fraud findings. The Court stated:

To be sure, the Communications Commission's power of granting, revoking and transferring licenses involves proper application of those criteria that determine "public convenience, interest, or necessity." § 307 (a), 48 Stat. 1064, 1083, 47 U. S. C. § 307 (a). But insofar as the Nebraska decree orders the parties "to do all things necessary" to secure the return of the license, it hampers the freedom of the Society not to continue in broadcasting and to restrict itself, as it properly may, to its insurance business. Equally does it prevent WOW from opposing a return to the Society, or, as the United States suggests, from seeking another license of its own. These are restrictions not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. It disregards practicalities to deny that, by controlling the conduct of parties before the Communications Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it.

It is respectfully submitted that, if the Delaware statute is allowed to make a final disposition of a controlling general partner interest in a licensee, without prior Commission review of that outcome, then that statute likewise disregards "restrictions upon the licensing system which Congress established," and is operates like a prohibited reversionary interest.¹² Thus, this aspect of the Delaware statute, while permissible in

¹¹ 326 U.S. 120; 65 S. Ct. 1475; 89 L. Ed. 2092; 1945 U.S. LEXIS 1861.

¹² The partnership cannot now seek *pro forma* treatment of the captioned application under the FCC's forbearance policy because the Partnership did not file the appropriate Form 603 notification and Form 602 ownership report within 30 calendar days of the triggering event. See *Forbearance from Section 319(d) Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers*, Memorandum Opinion and Order, 13 FCC Rcd 6293, para. 33 (1998) (*Forbearance Order*).

numerous other contexts, must be considered preempted when applied to the general partners of FCC licensees.¹³ Therefore, this case is different from the cases cited by the Partnership for the principle that the Commission can approve a transaction application that is the subject of a private contractual dispute.¹⁴ This is not a mere case of parties arguing over which potential assignee would better serve the public interest, but rather an instance where a state statute usurps the Commission's obligation to review and approve transfers of control of authorizations under the Act. For the same reasons, the application for transfer of control of the international 214 authorization, which is based on the transfer of control of a cellular license, should likewise be denied.

Finally, Mr. Robb cannot agree with the Partnership's assertion that the Commission's acceptance of the captioned application "does not prejudice the Receiver in any way."¹⁵ The erroneous acceptance of this application creates (a) an obstacle to Mr. Robb's court-ordered obligation to dispose of the property for which he was appointed receiver by a court of competent jurisdiction; and (b) the risk that the Oregon Farmers' partnership rights could become the subject of a third party transaction without its knowledge or consent, since the Partnership has taken the position in the above-captioned application that Oregon Farmers' valuable partnership interests have been extinguished. Thus, acceptance of the above-captioned application in its present form will lead to confusion, since the application and the assertions therein do not accurately reflect

¹³ Preemption would apply to the Delaware statute with regard to the purported extinguishment of a partnership interest under both the bankruptcy petition and receiver appointment prongs of Section 17-402(a)(4). However, as shown above and in Mr. Robb's Petition, the bankruptcy provision was also trumped by the Bankruptcy Code, which restored Oregon Farmer's partnership interest upon dismissal of the invalid bankruptcy petition.

¹⁴ Opposition at 2-3.

¹⁵ Opposition at 3.

Oregon Farmers' ownership interest in the Partnership or the controversy pending on that matter.

Conclusion

For the forgoing reasons, the Commission should place the above-captioned application in a pending status, and should reject arguments that the appointment of a receiver under Delaware law automatically extinguished the Oregon Farmers general partnership interest as being in conflict with Sections 214 and 310(d) of the Act and therefore preempted.

Respectfully submitted,

NICHOLAS ROBB, RECEIVER

By: _____



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Dated: December 10, 2015

IN THE CIRCUIT COURT OF HOLT COUNTY, MISSOURI

Townes Missouri, Inc.)
) Case No. 14HO-CC00011
 Petitioner.)
)
 vs.)
)
 Northwest Missouri Holdings, Inc., et al)
)
 Defendants)

ORDER

On this day the Court takes up the Receiver’s Motion to Enforce Receiver Order and for Declaration of Rights by Receiver and the Motion to Intervene and Amended Motion to Intervene filed by Northwest Missouri Cellular Limited Partnership (“Cellular Partnership”) and Motion for Continuance. After consideration of the Receiver’s Motion and the motions regarding intervention, other filings in this case, and arguments by the Receiver and interested parties, the Court finds and states as follows:

1. The Court grants the Amended Motion to Intervene and Motion for Continuance filed by the Cellular Partnership.
2. The Cellular Partnership is hereby a party to the above-captioned case.
3. The Court retains jurisdiction to determine Oregon Farmers Mutual Telephone Company’s general partnership interest in the Cellular Partnership.
4. The Court will hear evidence and arguments on Receiver’s Motion to Enforce Receiver Order and for Declaration of Rights by Receiver, and determine Oregon Farmers Mutual Telephone Company’s general partnership interest in Cellular Partnership. The Receiver is to make parties to this determination all parties having an interest in Cellular Partnership not otherwise a party to this action. Leave is granted to Receiver to file such

amended motion as may be necessary so that the issue of what interest, including the possibility of a general partnership interest in Cellular Partnership, or remaining interest in the same, is being conveyed to Plaintiff by reason of its settlement agreement with Defendants and such other issues as Receiver may identify so that all disputed issues can be declared.

5. This Court finds that it has jurisdiction to hear these issues and declare the rights of the parties as the Receiver and all assets he controls are located in Missouri and the initial parties have previously submitted themselves to the jurisdiction of this Court.
6. As soon as possible after the last entry of appearance of a party or 30 days after the service of the last of the parties, the Receiver is directed to initiate a phone conference for purposes of scheduling in anticipation of an evidentiary hearing to take place March 31, 2016.

SO ORDERED.

11/19/2015



Judge Roger Prokes

CERTIFICATE OF SERVICE

I, Salvatore Taillefer, Jr., an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP, do hereby certify that on this 10th day of December, 2015, I caused a copy of the foregoing “Reply to Opposition to Petition to Deny or Informal Request for Commission Action” to be served as follows:

Via First-Class Mail:

Gregory W. Whiteaker, Esq.
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Bethesda, Maryland 20817



Salvatore Taillefer, Jr.

Dated: December 10, 2015