

John A. Prendergast

From: John A. Prendergast
Sent: Monday, February 08, 2016 7:34 PM
To: 'Kathy Harris'; 'Sumita Mukhoty'
Cc: 'Roger Noel'; 'Denise.Coca@fcc.gov'; 'David Krech'; 'Susan OConnell'; Benjamin H. Dickens; Salvatore Taillefer; Richard D. Rubino; 'Nicholas Robb'; 'Robin Tuttle'; 'Greg Whiteaker'
Subject: RE: Northwest Missouri Cellular Limited Partnership, Transfer of Control Applications File Nos. 0006932939 & ITC-T/C-20151008-00236.

Dear Kathy and Sumita,

This note is to provide an update on a January 21, 2016 proceeding before the Delaware Chancery Court on a motion to dismiss brought by the Receiver, Nicholas Robb. On that date, the Delaware Court heard arguments on the motion and stayed the Delaware proceeding brought by the partners of Northwest Missouri Cellular Limited Partnership in deference to the Circuit Court for Holt County, Missouri. You may recall that the Missouri Court had issued an order in November 2015 indicating its intention to determine ownership in the Oregon Farmers Mutual general partnership interest. Therefore, this matter is now before the Missouri court for resolution. We will provide further updates as appropriate.

Thanks,

John

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From: John A. Prendergast
Sent: Tuesday, January 19, 2016 11:18 PM
To: 'Greg Whiteaker'; 'Kathy Harris'; 'Sumita Mukhoty'
Cc: 'Roger Noel'; 'Denise.Coca@fcc.gov'; 'David Krech'; 'Susan OConnell'; Benjamin H. Dickens; Salvatore Taillefer; Richard D. Rubino; 'Nicholas Robb'; 'Robin Tuttle'
Subject: RE: Northwest Missouri Cellular Limited Partnership, Transfer of Control Applications File Nos. 0006932939 & ITC-T/C-20151008-00236.
Importance: High

The Receiver Nicholas Robb has evaluated the proposal of Northwest Missouri Cellular Limited Partnership ("NWMC") to file applications that do not fully acknowledge the partnership interest of Oregon Farmers

Mutual Telephone (OFM) in NWMC, as a way to remove the Receiver from participation in this matter. Mr. Robb has confirmed that this is an unacceptable approach, for the following reasons:

1. Mr. Robb, as Receiver, is simply not willing to transfer the stock under his stewardship into the legal limbo that NWMC invites through its proposed application maneuver. Per the June 14, 2015 Order of the Circuit Court of Holt County, Missouri, Mr. Robb has been charged by the Missouri court with a duty to manage and preserve the OFM assets, including FCC license interests, with the goal of satisfying the substantial debt of OFM. This was not an instruction to merely dump the stock in the most expedient albeit incomplete route available. Mr. Robb was charged with his obligation to protect these assets, including the cellular partnership interest held by OFM, pursuant to a valid lawsuit filed by creditor Townes Telecommunications, Inc. (Townes) to enforce its rights with regard to its *bona fide* purchase of the debt of OFM and its parent company. NWMC has already attempted to impair that interest through a fundamentally unfair and flawed course of conduct, which is discussed below.

2. In this regard, it is apparent that NWMC's proposal is yet another maneuver to gain advantage in pending civil litigation. Upon the appointment of Mr. Robb as Receiver, the Partnership correctly filed an involuntary transfer of control application in July 2015 reporting that a Receiver had been appointed, resulting in a transfer of control of the OFM partnership interest. Mr. Robb was involved in the preparation of this filing and it bore his signature. However, the partnership later filed what purported to be a "Correction" application on September 1, 2015, without prior notification to Mr. Robb, much less his participation. The "Correction" sought to persuade the Commission that Mr. Robb's rights to the OFM partnership interest had evaporated. Mr. Robb was only notified by the Partnership on the 28th day after the filing, when Commission action on the filing was imminent; and indeed, the "Correction" application was "accepted" (thus granted) just two days later, before the Bureau could consider any objection by the Receiver. Rather than seeking reconsideration of the Commission's action on the July application, and serving Mr. Robb in accordance with the Commission's rules, NWMC instead employed the device of a "correction" even though it was filed months after the alleged involuntary event (discussed further below). A Petition for Reconsideration is now pending on behalf of Mr. Robb.

The partnership argued (in the September 1 application) that the partnership interest was extinguished by a bankruptcy petition filed by OFM. When Mr. Robb showed that the bankruptcy petition was dismissed as improper, and precedent dictated that the cellular partnership interest was reinstated *status quo ante*, NWMC then came up with the argument that the partnership interest was extinguished by virtue of the appointment of Mr. Robb by the Missouri court as Receiver. Now that Mr. Robb and the court have expended great effort in working toward a resolution of Townes' rights, and the matter is set for action by the Court on March 31, 2016, NWMC is looking for an avenue to take the Receiver out of the picture, and derail the Missouri court proceeding – thereby impacting the very facts on which NWMC has based its attack on the OFM partnership interest, and trying for an advantage in the civil litigation.

Therefore, Mr. Robb is not able to sign any application which represents to the Commission and the public that the OFM partnership interest may not exist. Instead, he stands by the July 2015 application that he and NWMC both signed, correctly reporting to the Commission that a transfer of control of NWMC occurred when Mr. Robb was appointed as Receiver. Commission precedent indicates that it is inappropriate for the Commission to now entertain an application under circumstances where eligibility for Commission action is the subject of litigation, as discussed below.

Moreover, NWMC has engaged in sharp practices by unilaterally granting itself the relief it seeks in court, by excluding OFM participation in managing the partnership, and withholding OFM's partnership distributions. Such practices are likely to worsen once the Receiver is removed from a role in which he can try to preserve the assets under his charge. The FCC should not take actions that may actually impact the court battle between two parties.

3. In addition, NWMC's proposal runs counter to a longstanding policy against contingent applications. This policy is seen in Rule Section 73.3517 (governing broadcast applications), and has been followed by other Commission Bureaus. The purpose of this restriction is to "avoid the work of reviewing an application only to discover that it was ungrantable because the contingency ultimately was not resolved." See *In re: Amendment of 1.517*, 61 FCC 2d 238, 239 (1976). In this instance, the controversy between the parties over the existence of the OFM general partnership interest is central to both Bureau's jurisdiction over the distribution of OFM stock to Townes, and is tied up for imminent court action that is unfolding over a matter of weeks, not months. A hearing on the merits before the Missouri court is scheduled for March 31, 2016; and there is a hearing before the Delaware court to dismiss or stay the action on January 21, 2016. When previously faced with a contractual dispute over the existence of an interest in a licensee, the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division deferred to the court to resolve the matter, and dismissed a pending assignment application concerning the affected licenses pending action by the court. See *Western Management Corporation, Memorandum Opinion and Order*, 16 FCC Rcd 840, 844 (PSPWD 2001)(Assignment applications dismissed due to pending litigation over an ownership interest in the licensee: "[W]e believe it would be inappropriate to grant any of these applications until the Wyoming state courts determine the respective rights of the parties."). When faced with pending civil litigation over a fact key to eligibility for Commission action on a pending Schools and Libraries support request, the Commission's Wireline Competition Bureau followed a similar course. *In the Matter of Request for Review of the Decision of the Universal Service Administrator by Electronic Classroom of Tomorrow, Columbus, Ohio*, 18 FCC Rcd 2889, 2890-91; 2003 FCC LEXIS 928 (WCB 2003)("[W]e find that the best course of action is to dismiss the pending Request for Review. . . Permitting the state court to resolve this issue will therefore conserve Commission resources and avoid the possibility of inconsistent legal conclusions and a resulting federal-state conflict." [footnotes omitted]).

In the instant matter, Mr. Robb is not inclined to participate in the filing of contingent applications under circumstances where the Commission has traditionally found that the public interest is served by dismissal of such applications against a backdrop of civil litigation.

4. The submission of the proposed applications would also create confusion in the Commission's licensing records, and more importantly would put Mr. Robb (and creditor Townes Telecommunications) in an awkward situation: Having the Receiver and Townes sign an application form presenting the FCC and the public with two alternative versions of reality could technically be construed as a false certification. By signing the Form 603 application for transfer authority, Mr. Robb and Townes would each make a certification under penalty of perjury that "all statements made in this application and in the exhibits, attachments, or documents incorporated by reference are material, are part of this application, and are true, complete, correct, and made in good faith." This certification would cover the representation by Mr. Robb that he has under his receivership a general partnership interest in NWMC to transfer to Townes (and by Townes that such partnership interest exists). Mr. Robb signed the July 2015 application, prepared and submitted in cooperation with NWMC, correctly representing that he controls such an interest. He is not willing to sign an application suggesting that he does not know for sure whether he holds a valid interest. Clearly, at least one of the parties to the application is making a representation concerning the partnership interest which is inaccurate, since both versions of reality cannot be correct. It would be inappropriate to put the Receiver and Townes in this position. The Form 603 application form contains the following warning with each signature box: WILLFUL FALSE STATEMENTS

MADE ON THIS FORM OR ANY ATTACHMENTS ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. Code, Title 18, Section 1001) AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. Code, Title 47, Section 312(a)(1)), AND/OR FORFEITURE (U.S. Code, Title 47, Section 503). The Commission's definition of "willful" under Section 503(b) of the Act does not require a finding that there was an intent to deceive or otherwise act unlawfully. Rather, the FCC must merely find that "the party knew it was doing the acts in question." *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

3. Finally, the proposed contingent application would put Townes in a difficult position, as the company will have to explain to existing and potential lenders and others that the authorizations it has received from the FCC do not really grant authority for the most important asset held by OFM. Again, this is at odds with Mr. Robb's duty to the court.

Therefore, public interest is served by allowing the process to play out properly, and Mr. Robb has concluded that it would not be proper for him to sign the contingent (and inaccurate) applications proposed by NWMC. Rather than having the parties engage in speculative contingent applications that leave the protected party with uncertainty, and are inconsistent with the Court's charge to Mr. Robb, the Commission should let the courts do their job without undue interference. The Commission can then act on non-contingent, properly filed applications. The Receiver and the Missouri court have an interest in defending their jurisdiction and the *bona fides* of their actions, and preserving the integrity of the process that has proceeded nearly to conclusion under Missouri law.

Please direct any questions to the undersigned.

John Prendergast
Counsel for Nicholas Robb, Receiver

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From: John A. Prendergast
Sent: Tuesday, January 19, 2016 5:54 PM
To: Greg Whiteaker; Kathy Harris; Sumita Mukhoty
Cc: Roger Noel; Denise.Coca@fcc.gov; David Krech; Susan OConnell; Benjamin H. Dickens; Salvatore Taillefer; Richard D. Rubino; Nicholas Robb; Robin Tuttle
Subject: RE: Northwest Missouri Cellular Limited Partnership, Transfer of Control Applications File Nos. 0006932939 & ITC-T/C-20151008-00236.

Mr. Robb, the Receiver is in the process of finalizing his input on this matter and will provide it shortly.

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From: Greg Whiteaker [<mailto:greg@hermanwhiteaker.com>]
Sent: Tuesday, January 19, 2016 5:34 PM
To: Kathy Harris; Sumita Mukhoty
Cc: Roger Noel; Denise.Coca@fcc.gov; David Krech; Susan OConnell; John A. Prendergast; Benjamin H. Dickens; Salvatore Taillefer; Richard D. Rubino; Nicholas Robb; Robin Tuttle
Subject: Re: Northwest Missouri Cellular Limited Partnership, Transfer of Control Applications File Nos. 0006932939 & ITC-T/C-20151008-00236.

Dear Kathy and Sumita,

I know that you must be extremely busy (with the auction approaching on top of everything else), but I am following-up to inquire if the below proposal is something the staff will consider. I am not asking for a determination at this time that the parties may proceed in the manner proposed below, but merely that the staff will consider proceeding as proposed below. Thank you for your guidance.

Greg Whiteaker

Counsel for Northwest Missouri Cellular Limited Partnership

From: Greg Whiteaker <greg@hermanwhiteaker.com>
Date: Wednesday, January 13, 2016 at 1:56 PM
To: Kathy Harris <kathy.harris@fcc.gov>, Sumita Mukhoty <Sumita.Mukhoty@fcc.gov>
Cc: Roger Noel <Roger.Noel@fcc.gov>, "Denise.Coca@fcc.gov" <Denise.Coca@fcc.gov>, David Krech <David.Krech@fcc.gov>, Susan OConnell <Susan.O'Connell@fcc.gov>, John Prendergast <jap@bloostonlaw.com>, "Benjamin H. Dickens" <bhd@bloostonlaw.com>, Salvatore Taillefer <sta@bloostonlaw.com>, "Richard D. Rubino" <rdr@bloostonlaw.com>, Nicholas Robb <nrobb@mortonreedlaw.com>, Robin Tuttle <rtuttle@hermanwhiteaker.com>
Subject: Northwest Missouri Cellular Limited Partnership, Transfer of Control Applications File Nos. 0006932939 & ITC-T/C-20151008-00236.

Dear: Kathy and Sumita,

As the parties have reported in various pleadings in connection with the above-referenced applications, the Circuit Court of Holt County Missouri ("Circuit Court") has appointed a receiver, Mr. Nicholas Robb ("Receiver"), to, among other things, assign the stock of Northwest Missouri Holdings, Inc. ("Holdings") to Townes Missouri, Inc. ("Townes") and to seek any required regulatory approvals for the same. Such assignment would, among other things, transfer control of the assets of Holding's wholly-owned subsidiary, Oregon Farmers Mutual Telephone Company ("OFM"), including OFM's wireline telephone operations and any licenses or authorizations held or controlled by OFM.

The Receiver and Northwest Missouri Cellular Limited Partnership ("NWMC") disagree regarding whether or not OFM holds a general partnership interest in NWMC. This issue has been raised in the Court of Chancery of the State of

Delaware and the Circuit Court in Missouri. Pending resolution of the issue, however, the Receiver has argued before the Circuit Court that NWMC is preventing the Receiver from fulfilling his obligations by preventing the Receiver from filing all necessary applications to obtain all required FCC approvals.

NWMC desires to cooperate with the Receiver to the extent possible while also preserving NWMC's and its partners' rights with respect to the disposition of the OFM-partnership interest. To this end, NWMC desires to explore a creative licensing approach that may allow the Receiver to complete his work while still protecting NWMC's and its partners' rights.

From an FCC licensing perspective, if OFM does not hold a general partnership interest in NWMC (which is the position of NWMC), then no FCC consent for the transfer of control of NWMC is required for the Receiver to assign the stock of Holdings to Townes. The Receiver would be free to assign such stock upon obtaining any applicable consents unrelated to NWMC. If, however, OFM holds a general partnership interest in NWMC (which is the position of the Receiver), then FCC consent would be required for the transfer of control of this interest to Townes through the assignment of the Holdings stock to Townes. Upon obtaining consent for the transfer of control of NWMC and of other applicable consents unrelated to NWMC, the Receiver would be able to assign the stock of Holdings to Townes. Were a court subsequently to determine that OFM does not hold a general partnership interest in NWMC, then the FCC consent for the transfer of control of NWMC would be superfluous.

NWMC proposes to work with the Receiver – while fully reserving NWMC's and its partners' rights and maintaining their position regarding the disposition of the OFM interest – to file applications to allow the Receiver to seek FCC consent for the “transfer of control” of NWMC. Specifically, subject to the further qualifications and limitations below, NWMC proposes the following approach.

- NWMC would consent to the FCC returning application File No. 0006932939 to pending status as requested by the Receiver.

- NWMC would agree that the FCC defer consideration of application File No. ITC-T/C-20151008-00236 pending a judicial determination (or further agreement by the parties) of the status of the partnership interest.

- NWMC would work with the Receiver to initiate applications (FCC Form 603 and ITC/TC) pursuant to which the Receiver could seek FCC consent to assign the stock of Holdings to Townes. Presumably, these applications would be styled as applications seeking FCC consent for the transfer of control of wireless licenses and International 214 authority held by NWMC, but in an exhibit to such applications, NWMC would reserve all its rights and would continue to maintain its position that OFM does not hold a general partnership interest in NWMC.

- Upon receipt of FCC consent (assuming the FCC consents) for the “transfer of control” of NWMC (and any consents unrelated to NWMC), the Receiver could assign the stock of Holdings to Townes and would be able to wind up the receivership.

- No notice of consummation would be filed regarding the “transfer of control” of NWMC until a court of competent jurisdiction, in an action including all partners of NWMC as parties, finally determines the status of the OFM partnership interest.

 - The FCC would agree to waive the 30-day window in which to file a notice of consummation.

 - If the determination is that OFM holds a general partnership interest, then NWMC would agree to the filing of a notice of consummation of the transfer of control of NWMC.

 - If the determination is that OFM does not hold a general partnership interest, then the Receiver would agree to NWMC's notifying the FCC that there was no consummation of a transfer of control of NWMC and that the FCC should accept applications 0006932939 and ITC-TC-20151008-00236. The Receiver also would withdraw the various petitions opposing these applications.

NWMC would only be willing to proceed in this fashion pursuant to an agreement with the Receiver setting forth the approach outlined above. Under any approach, NWMC would fully reserve its rights and position that OFM ceased to hold a general partnership interest in NWMC (unless and until finally adjudicated otherwise by a court of competent jurisdiction in an action including all partners of NWMC as parties).

NWMC believes that there are public interest benefits in proceeding with consideration of the transfer of control applications at the same time that the courts consider the partnership question. Notably, there are other assets that are tied up in the receivership that are unrelated to NWMC. Proceeding in the manner outlined above would facilitate the

transfer of the wireline telephone assets to Townes so that Townes can take over the wireline operations of OFM. This approach also would allow the Receiver to complete and wind up his receivership without additional delay.

This approach would not unduly burden FCC resources. There are only two clearly defined possible outcomes, albeit one of which does not require FCC consent for the transfer of control of NWMC. NWMC, however, assumes (while fully-reserving all rights) that review of a transfer of control to Townes would be a straight-forward review. If the FCC consents to the transfer of control of NWMC and a court subsequently determines that OFM does not hold a general partnership interest in NWMC, then the consent would have been unnecessary, but the situation would be no different than when the FCC consents to a transaction and the parties do not consummate the transaction for whatever reason. The FCC's consent to a transaction does not obligate the parties to consummate.

Would FCC staff be willing to consider the above approach or a modified approach to facilitate the Receiver completing his work, while also preserving NWMC's and its remaining partners' rights? NWMC welcomes the opportunity to discuss this approach with staff and the Receiver.

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