

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

In the Matter of)
Airadigm Communications, Inc.)
Motion to Clarify and Dismiss as Moot) DA 03-2606
Contingent Emergency Petition for Reinstatement)
of C and F Block PCS Licenses or for Partial)
Waiver of Section 1.2110(f) of the Commission's)
Rules)

ORDER ON RECONSIDERATION

Adopted: April 10, 2006

Released: April 10, 2006

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Wireless Telecommunications Bureau ("Bureau") has before it a Petition for Reconsideration and Clarification ("Petition for Reconsideration") filed by Telephone and Data Systems, Inc. ("TDS") of an Order,1 which granted a Motion of Airadigm Communications, Inc. ("Airadigm") and dismissed as moot a then-pending Petition.2 For the reasons discussed below, we dismiss the Petition for Reconsideration.

II. BACKGROUND

2. Airadigm participated in the C and F block Personal Communications Services ("PCS") auctions and won fifteen (15) licenses,3 all of which were financed pursuant to the Commission's

1 See In the Matter of Airadigm Communications, Inc., Order, 18 FCCR 16296 (2003). The Order resolved two pleadings filed by Airadigm Communications, Inc. including: (1) Contingent Emergency Petition for Reinstatement or in the Alternative for Waiver filed by Airadigm Communications, Inc., on February 7, 2000 ("Petition") and (2) Motion to Clarify and Dismiss as Moot filed by Airadigm Communications, Inc. on February 4, 2002 ("Motion").

2 See Petition for Reconsideration and Clarification filed by Telephone Data Systems, Inc., on September 8, 2003 ("Petition for Reconsideration").

3 Airadigm's fifteen PCS licenses, won in Auction Nos. 5 and 11, covered the Appleton - Oshkosh, Eau Claire, Fond du Lac, Green Bay, Janesville-Beloit, La Cross, Madison, Manitowoc, Sheboygan, Stevens Point-Marshfield-Wisconsin Rapids, Wausau-Rhineland, and Marinette, Wisconsin Basic Trading Areas, and the Cedar Rapids, Waterloo-Cedar Falls, and Dubuque, Iowa Basic Trading Areas. See also Attachment A. (continued...)

installment payment program.⁴ On July 28, 1999, Airadigm filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code.⁵

3. Airadigm subsequently filed its Petition with the Commission on February 7, 2000, arguing that its licenses could not automatically cancel for non-payment while it was in bankruptcy.⁶ In that filing, Airadigm stated that, out of an abundance of caution, it alternatively sought reinstatement of its licenses or waiver of the Commission's automatic license cancellation rule.⁷

4. On November 15, 2000, the bankruptcy court confirmed Airadigm's joint plan of reorganization ("Confirmed Plan"). The Confirmed Plan provided for payment in full of the FCC's secured claim; it also provided for the funding of the plan subject to certain contingencies.⁸ Several provisions of the Confirmed Plan were later the subject of litigation in the bankruptcy court, as described *infra*.

5. On February 4, 2002, Airadigm filed a Motion with the Commission, seeking clarification that, consistent with the D.C. Circuit's June 22, 2001 *NextWave Decision*,⁹ Airadigm's licenses did not cancel for non-payment while it was in bankruptcy.¹⁰ In its Motion, Airadigm argued that the law was clear that licenses could not cancel for non-payment of installment debt while a licensee was in Chapter 11 and, therefore, Airadigm's licenses did not cancel.¹¹ In addition to seeking clarification that its licenses had not cancelled, Airadigm also requested that the Commission dismiss its then-pending Petition as moot.¹²

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⁴ 47 C.F.R. §§ 1.2110, 24.711 and 24.716 (1999). A detailed history of the installment payments made by Airadigm prior to declaring bankruptcy can be found in the *Order*. See *Order* at ¶ 3.

⁵ See *In re Airadigm Communications, Inc.*, Case No. 99-335000 (Bankruptcy, W.D. Wis. 1999) ("*Airadigm Bankruptcy Proceeding*").

⁶ Petition at 2.

⁷ *Id.* The Bureau issued a Public Notice on February 24, 2000 seeking comment on Airadigm's Petition by March 17, 2000 and replies by March 31, 2000. Wireless Telecommunications Bureau Seeks Comment on Airadigm Communications Inc.'s Contingent Emergency Petition for Reinstatement or in the Alternative for Waiver, *Public Notice*, DA 00-368 (rel. Feb. 24, 2000) ("February 24 Public Notice"). Fifteen comments (fourteen in support and one in opposition) and two reply comments were received in response to the Public Notice.

⁸ See *Order Confirming the Plan of Reorganization* (Bank. W.D. Wisc. November 15, 2000).

⁹ *NextWave v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *affirmed*, 537 U.S. 293, 123 S.Ct. 832 (2003).

¹⁰ Motion at 2-3.

¹¹ *Id.* at 2.

¹² *Id.* at 3.

6. After Airadigm filed its Motion, the Supreme Court issued its decision in the *NextWave* matter.¹³ Based on that decision, the Bureau subsequently released an *Order* that granted Airadigm's Motion and clarified that, because Airadigm was under the protection of Chapter 11 of the Bankruptcy Code, the Commission's asserted license cancellation was ineffective. The Bureau also dismissed Airadigm's then-pending Petition as moot.

7. On September 8, 2003, TDS, a secured creditor in Airadigm's bankruptcy proceeding, filed the instant Petition for Reconsideration.¹⁴ TDS sought reconsideration and clarification from the Commission regarding whether Airadigm had the financial resources necessary to carry out its financial obligations to the United States government and its responsibilities as an FCC licensee.¹⁵ Additionally, TDS requested that the Commission determine whether it should accept Airadigm's "buildout" showings.¹⁶

8. In its Petition for Reconsideration, in a section entitled "Standing," TDS explained that on August 29, 2003, Oneida Enterprise Development Authority ("OEDA"), another interest-holder in Airadigm's bankruptcy proceeding, had filed a motion with the bankruptcy court seeking to establish that TDS had an obligation to fund the Confirmed Plan.¹⁷ TDS explained that "the filing of the OEDA motion has now given Petitioner an interest in the legal significance of the *Order*."¹⁸ TDS further explained that, prior to the filing of the OEDA motion, TDS had no interest in the *Order*; that apart from TDS' potential liability to fund as alleged in the OEDA motion, "Petitioner's status was that of creditor and potential acquiror of certain of Airadigm's licenses, with no reason to participate in the licensing proceeding, in which its interests were aligned with Airadigm's."¹⁹

8. In response, Airadigm filed an Opposition arguing that TDS lacked standing to challenge the Bureau's decision.²⁰ Airadigm maintained that the substantive questions presented by TDS were not germane to the underlying *Order* and, therefore, as new issues not previously presented to the

¹³ *Federal Communications Commission v. NextWave Personal Communications, et al.*, 537 U.S. 293, 123 S.Ct. 832, 840 (2003) ("*NextWave Decision*") (noting that Section 525 of the Bankruptcy Code "prevented the FCC from ... canceling licenses because of failure to pay debts dischargeable by bankruptcy courts").

¹⁴ *See generally* Petition for Reconsideration.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

¹⁷ *Id.* at 4-6.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *See* Motion to Dismiss and Opposition to Petition of Telephone Data Systems For Reconsideration and Clarification, filed by Airadigm Communications, Inc. on September 24, 2003 ("*Opposition*") at 5.

Commission, could not be raised in a petition for reconsideration.²¹ In its Reply, TDS countered that TDS did have standing, and that the Bureau's consideration need not be limited to the narrow issue of automatic cancellation.²²

9. On November 17, 2003, the bankruptcy court issued an order resolving the funding dispute between OEDA and TDS.²³ The order denied OEDA's motion and rejected its argument that TDS had an obligation to fund the Confirmed Plan. The bankruptcy court's order was not appealed and subsequently became final.

10. Pursuant to a settlement, TDS subsequently acquired OEDA's interest in the Airadigm bankruptcy proceeding.²⁴

III. DISCUSSION

11. We dismiss the Petition for Reconsideration on procedural grounds. We conclude that the substantive issues raised by TDS are outside the scope of the *Order*; the issues presented in the Petition for Reconsideration should have been raised, if at all, in a separate proceeding. We also observe that TDS specifically predicated its interest in this matter on the pendency of a motion adverse to its interests that was filed in Airadigm's bankruptcy proceeding. Although TDS also maintained that the public interest would be served by the Commission addressing its Petition for Reconsideration, TDS itself conceded that OEDA's "August 29 Motion [had] given [it] a newfound interest in the Order and the issues raised in [its] Petition."²⁵ Insofar as OEDA's motion was denied and is no longer subject to appeal, the self-asserted basis for TDS's interest in the *Order* has evaporated, leading us to conclude that TDS lacks standing to pursue this case.

12. The purpose of the Bureau's *Order* was to address the Motion filed by Airadigm, which sought clarification on the question of whether Airadigm's licenses had automatically cancelled while Airadigm was in Chapter 11 bankruptcy. The Bureau concluded that the *NextWave* decision controlled, and that Airadigm's licenses had not automatically cancelled, for the reasons articulated by the Court in its *NextWave* decision. TDS's Petition for Reconsideration did not attempt to distinguish the two cases or otherwise dispute the correctness of the straightforward legal conclusion that *NextWave* controlled on the automatic cancellation question. Rather, TDS sought to initiate a separate investigation of the financial and related qualifications of Airadigm to remain an FCC licensee, matters outside the scope of the narrow question raised in Airadigm's Motion and addressed in the Bureau's *Order*. Contrary to TDS's arguments, the resolution of such matters was not necessary for the Bureau to address the Motion that had been filed by Airadigm.

²¹ *Id.* at 5, 11.

²² *See* Reply, filed by Telephone Data Systems, Inc. on October 1, 2003 ("Reply") at 1.

²³ *See Amended Order Denying Motion of Oneida Enterprise Development Authority for an Order Interpreting Confirmed Plan and Enforcing its Terms*, (Bank. W.D. Wisc. Nov. 17, 2003).

²⁴ *See Order Substituting Claimant Pursuant to R. 3001(e)(2)*, (Bank. W.D. Wisc. Aug. 4, 2004).

²⁵ *See* Petition for Reconsideration at 5.

13. Moreover, the issues raised by TDS were not even germane to Airadigm's Motion, which was designed solely to determine the state of the law regarding the automatic cancellation of Airadigm's licenses. Instead of seeking reconsideration of the Bureau's legal conclusions on that matter, TDS instead attempted to use the Bureau's *Order* as a vehicle for putting at issue Airadigm's qualifications to remain a licensee. As a general matter, the Commission takes character qualification issues very seriously, and the fact that a licensee avails or has availed itself of the protections of the bankruptcy laws does not otherwise insulate that licensee from its regulatory obligations.²⁶ But TDS's attempt to piggyback its request for an agency investigation of licensee qualifications, by means of a motion to reconsider, onto Airadigm's own limited and unrelated request regarding the legality of automatic license cancellation does not, as TDS asserts, serve the public interest, when appropriate procedures exist for raising legitimate questions about a licensee's continuing compliance with its regulatory obligations.²⁷ For the foregoing reasons, we conclude that the Petition for Reconsideration is procedurally defective and should be dismissed.

14. We also conclude that TDS lacks standing. Under Section 1.106(b)(1) of the Commission's rules, a person who is not a party must establish that it has an interest in the proceeding in order to file a petition for reconsideration: the petition "shall state with particularity the manner in which the person's interests are adversely affected by the action taken."²⁸ In filing its Petition for Reconsideration, TDS predicated its Section 1.106(b)(1) standing on the possibility that the bankruptcy court might grant OEDA's pending motion in the Airadigm bankruptcy proceeding and thereby require TDS to fund the Confirmed Plan. In such case, a decision by the Bureau finding that Airadigm's licenses had not automatically cancelled would assertedly have kept TDS on the hook for funding the Plan; in contrast, a decision by the Bureau that resulted in the loss of the licenses would disrupt the Plan and likely eliminate TDS's potential funding obligation. The question, however, of whether this connection between TDS's interests and the Bureau's *Order* would satisfy Section 1.106(b)(1) is moot. The bankruptcy court denied OEDA's motion some time ago, and the court's denial is no longer subject to review. Accordingly, TDS now occupies the same position that it did before OEDA filed its motion, when TDS, in its own words, had "no reason to participate in th[is] licensing proceeding," because its interests were aligned with those of Airadigm.²⁹ Without any evidence that TDS's interest is adversely affected by the Bureau's action, we find that TDS lacks standing to file its Petition for Reconsideration of the *Order*.³⁰

²⁶ For instance, where a party has emerged from bankruptcy protection, it is clear that the Commission's regulatory requirements with regard to transferring licenses and installment payments apply in full force. *See e.g.*, In the Matter of Leap Wireless International, Inc. and its Subsidiaries, Debtors in Possession and Leap Wireless International, Inc. and its Subsidiaries, *Memorandum Opinion and Order*, 19 FCCR 14909 (2004).

²⁷ We are not suggesting that further proceedings are or are not warranted; only that a challenge to the Bureau's *Order* is a wholly inappropriate vehicle for raising the issues that TDS has identified.

²⁸ 47 C.F.R. § 1.106(b)(1). The Section 1.106(b)(1) requirement for establishing standing to file the petition has a second element: the non-party must also "show good reason why it was not possible for him to participate in the earlier stages of the proceeding." *Id.*

²⁹ Petition for Reconsideration at 5.

³⁰ *Cf. 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 197-198 (D.C. Cir. 2003) (explaining that the court must evaluate mootness and its effect on a petitioner's Article III standing through all stages of the controversy) (citations omitted). Although agencies like the FCC are not bound by the same Article III restrictions (continued....)

IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition for Reconsideration and Clarification is DISMISSED on the alternative grounds that the matters presented are outside the scope of the proceeding; and that the Petitioner lacks standing.

FEDERAL COMMUNICATIONS COMMISSION

Catherine W. Seidel
Acting Chief
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that would compel a court to dismiss a claim for lack of standing, the FCC generally follows the principles of Article III standing and will not decide a case in which the petitioner no longer has an interest, absent some compelling public interest reason to the contrary. For the reasons discussed in the text above, the peculiar circumstances of this case fall short of that standard.

APPENDIX A

CALL SIGN	MARKET	BTA
KNLF394	Appleton-Oshkosh, WI	018
KNLF395	Cedar Rapids, IA	070
KNLF396	Eau Claire, WI	123
KNLF397	Fond du Lac, WI	148
KNLF398	Green Bay, WI	173
KNLF399	Janesville-Beloit, WI	216
KNLF400	La Crosse, WI	234
KNLF401	Madison, WI	272
KNLF402	Manitowoc, WI	276
KNLF403	Sheboygan, WI	417
KNLF404	Stevens-Point-Marshfield-Wisconsin Rapids, WI	432
KNLF405	Waterloo-Cedar Falls, IA	462
KNLF406	Wausau-Rhineland, WI	466
KNLF881	Dubuque, IA	118
KNLG278	Marinette, WI	279