

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

In the Matter of)
)
Application to Assign License from Alpine-Fresno)
C, LLC, Debtor-in-Possession, to Cricket Licensee)
(Reaction), Inc.; Call Sign WPOJ687)
)
File No. 0001853571)

ORDER ON RECONSIDERATION

Adopted: January 31, 2007

Released: January 31, 2007

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration (“Petition”) filed by Alpine PCS, Inc. and Alpine Operating, LLC (“Petitioners”) on June 13, 2005.¹ Petitioners seek reconsideration of the May 13, 2005, decision (the “Order”) by the Wireless Telecommunications Bureau’s Mobility Division (the “Division”) dismissing the petition to deny and granting consent to assign a 30 MHz C-block Personal Communications Services license (the “License”), call sign WPOJ687, from Alpine–Fresno C, LLC, Debtor-in-Possession (the “Debtor”), to Cricket (collectively with the Debtor, the “Applicants”).² Petitioners argue that we should vacate the Order and require the Applicants to re-file their application seeking such consent (the “Assignment Application”).³ For the reasons set forth below, we deny the Petition.

¹ On June 27, 2005, Cricket Licensee (Reaction), Inc. (“Cricket”), a wholly owned subsidiary of Leap Wireless International, Inc., filed an Opposition to Petition for Reconsideration (“Opposition”), and on July 5, 2005, Petitioners filed a Reply to Opposition to Petition for Reconsideration (“Reply”). Petitioners admit that they neglected to service their Petition on Cricket’s counsel until June 16, 2005, when Petitioners accomplished service by hand-delivery. Cricket seeks waiver to file by June 27, 2005, as if it had been served by mail on June 13, 2005, and Petitioners do not object. We find it appropriate to grant the waiver and, accordingly, consider Cricket’s Opposition to have been timely filed.

² Application to Assign License from Alpine-Fresno C, LLC, Debtor-in-Possession, to Cricket Licensee (Reaction), Inc.; Call Sign WPOJ687, *Order*, 20 FCC Rcd 8862 (WTB 2005) (“Order”).

³ Application Assigning License from Alpine–Fresno C, LLC, Debtor-in-Possession, to Cricket Licensee (Reaction), Inc., File No. 0001853571 (filed Aug. 27, 2004); Cricket Licensee (Reaction), Inc. Ownership Report (FCC Form 602) (filed Apr. 15, 2005).

II. BACKGROUND

2. On August 5, 2003, Alpine-Fresno C, LLC (“Alpine-Fresno”) along with other licensees, all controlled at the time by Robert F. Broz (“Broz”), filed voluntary petitions for bankruptcy relief under Chapter 11 of the Bankruptcy Code (“Chapter 11”)⁴ in the United States Bankruptcy Court Central District of California, Northern Division (“Bankruptcy Court”).⁵ Pursuant to the Commission’s rules,⁶ an involuntary application was filed on September 4, 2003, to assign the License from Alpine-Fresno to the Debtor.⁷ The Commission granted this involuntary application without written decision on October 1, 2003.⁸

3. On January 5, 2004, the Bankruptcy Court ordered relief from the Chapter 11 automatic stay to permit the Debtor’s creditors to pursue the appointment of a receiver in state court.⁹ Certain creditor banks then filed a receivership action in the Circuit Court for the County of Otsego, Michigan (“Michigan Court”) requesting appointment of William B. Calcutt (“Calcutt”) as the receiver with respect to the stock or membership interests of the Debtor (and certain other related debtors controlled by Broz, collectively with Debtor, the “DIPs”), and on February 3, 2004, the Michigan Court entered an order approving the lenders’ request.¹⁰ The Debtor subsequently filed with the Commission an involuntary transfer of control application, dated March 3, 2004, reporting transfer of control of the License from Broz to Calcutt, as Receiver (the “Fresno Receivership Application”).¹¹ While that application remained pending, on August 27, 2004, the Applicants filed the Assignment Application seeking consent to assign the License from the Debtor to Cricket.¹²

⁴ 11 U.S.C. §§ 1101 *et seq.*

⁵ See Exhibit A to Application Assigning License from Alpine-Fresno C, LLC to Alpine-Fresno C, LLC, Debtor-in-Possession, File No. 0001440052 (filed Sept. 4, 2003) (“Fresno DIP Application”) at 1.

⁶ See 47 C.F.R. §§ 1.948(c)(2), (g), 24.839(a)(4).

⁷ See Fresno DIP Application, *supra* note 5, Exhibit A at 1.

⁸ See Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1631 (rel. Oct. 8, 2003).

⁹ In re: Robert F. Broz, No. ND 03-12189-RR (Bankr. Ct. Cent. D. Ca. Jan. 8, 2004), *available at* Joint Opposition, filed by Cricket Licensee (Reaction), Inc. and Alpine-Fresno C, LLC (Sept. 29, 2004) (“Joint Opposition”), Exhibit A. See also Joint Opposition at 2.

¹⁰ See CoBank, ACB v. RFB Cellular, Inc., et al., Order Appointing Receiver, File No. 03-10334-CH, at 2 (Cir. Ct. Cty Otsego Feb. 3, 2004), *available at* Joint Opposition, Exhibit B. See also Motion to Dismiss, filed by Cricket Licensee (Reaction), Inc. and Alpine-Fresno C, LLC, at 3 (Sept. 22, 2004) (“Motion to Dismiss”); Joint Opposition at 2.

¹¹ See Application of Alpine-Fresno C, LLC, Debtor-in-Possession, File No. 0001653450 (filed Mar. 4, 2004, amended June 29, 2004). Numerous other applications were concurrently filed the same date to transfer control of licenses held by other DIPs from Broz to Calcutt. See Application of Alpine-Michigan E, LLC, Debtor-in-Possession, File No. 0001653360 (filed Mar. 4, 2004, amended June 29, 2004); Application of Alpine-Michigan F, LLC, Debtor-in-Possession, File No. 0001653396 (filed Mar. 4, 2004); Application of RFB Cellular, Inc., Debtor-in-Possession, File No. 0001689365 (filed Mar. 19, 2004, amended Mar. 22, 2005); Application of Alpine-Hyannis F, LLC, Debtor-in-Possession, File No. 0001653424 (filed Mar. 4, 2004, amended Apr. 28, 2005); Application of Alpine-California F, LLC, Debtor-in-Possession, File No. 0001689365 (filed Mar. 19, 2004 and amended Mar. 22, 2005, Apr. 20, 2005, and Apr. 25, 2005) (collectively with the “Fresno Receivership Application,” the “Receivership Applications”).

¹² The Bankruptcy Court authorized the sale of the License to Cricket on August 13, 2004. See Application, Description of Transaction and Public Interest Statement, at 1; see also In re: RFB Cellular, Inc., No. ND 03-12187-RR (Bankr. Ct. Cent. D. Ca. Aug. 13, 2004), *available at* Joint Opposition, Exhibit C.

4. Petitioners contested the Fresno Receivership Application, filing a petition to deny dated May 5, 2004.¹³ In addition, on September 16, 2004, Petitioners filed a petition against the Assignment Application, requesting that it be denied or designated for hearing.¹⁴ In both proceedings, the Division dismissed the petitions to deny as procedurally defective.¹⁵ The Division exercised its discretion, nonetheless, to discuss the merits of Petitioners' arguments in both petitions, but found them unpersuasive.¹⁶ On May 13, 2005, the Division denied the petition to deny the Assignment Application, and, finding "the assignment of the License from the Debtor to Cricket to be in the public interest, convenience, and necessity," granted the Assignment Application.¹⁷

5. In its petition for reconsideration of the Assignment Application, Petitioners' sole argument is that because the Assignment Application was filed by the Receiver and accepted for filing by the Commission prior to the action on the Fresno Receivership Application, these actions were premature. Petitioners' requested remedy for the allegedly premature filing is that the Commission vacate the Order and require the Applicants to refile the Assignment Application. Petitioners do not otherwise assert that the Commission erred in granting the assignment of the License from Debtor to Cricket.¹⁸

III. DISCUSSION

6. Petitioners have merely reiterated an argument that the Commission has already addressed in a related proceeding, and on this ground, we find the Petition procedurally defective. Specifically, in the proceeding involving the applications for assignment of certain other licenses formerly controlled by Broz

¹³ Petition to Deny, filed by Alpine PCS, Inc. and Alpine Operating, LLC, at 2 (May 5, 2004). Petitioners also filed a Supplement to that pleading. See Supplement to Petition to Deny, filed by Alpine PCS, Inc. and Alpine Operating, LLC, on May 18, 2004. For additional background information regarding the Debtor's bankruptcy proceeding, see Applications to Transfer Control of Licenses from Robert F. Broz to William B. Calcutt, *Order*, 20 FCC Rcd 8848 (WTB 2005) at 1-3 ("Receivership Order").

¹⁴ Petition to Deny, filed by Alpine PCS, Inc. and Alpine Operating, LLC (Sept. 16, 2004).

¹⁵ The petition to deny the Assignment Application had been untimely filed. See *Order*, 20 FCC Rcd at 8864. Pursuant to our streamlined approval procedures for license assignments and transfers of control, all petitions to deny had to be filed within fourteen days from the release of the Public Notice issued on September 1, 2004. See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Report and Order and Further Notice and Proposed Rulemaking*, 18 FCC Rcd. 20,604, 20,683 ¶ 197 (2003); Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and De Facto Transfer Lease Applications Accepted for Filing, *Public Notice*, Report No. 1926 (rel. Sept. 1, 2004) ("Accepted for Filing PN"). Thus, the Accepted for Filing PN established that petitions to deny the Assignment Application had to be filed by September 15, 2004. However, Petitioners did not file their petition to deny until September 16, 2004. Moreover, Petitioners did not provide any explanation as to why they had been unable to file in a timely manner. Concerning the petition to deny the Receivership Applications, the Division found it had been improperly filed, citing the Communications Act (47 U.S.C. § 309(d), which exempts involuntary applications from the public notice requirement and, if no such public notice appears, does not provide for the filing of petitions to deny against such applications. See *Receivership Order*, 20 FCC Rcd at 8851-52 (case citations omitted).

¹⁶ See *Order*, 20 FCC Rcd at 8865-67; *Receivership Order*, 20 FCC Rcd at 8852-59.

¹⁷ See 47 U.S.C. § 310(d); *Order*, 20 FCC Rcd at 8867. On that same date, the Division granted the Receivership Applications as well. See *Receivership Order*, 20 FCC Rcd at 8861.

¹⁸ Petitioners claim that they reserve the right to raise anew arguments already made in the proceeding below as well as any additional arguments "when the subject assignment application is properly resubmitted for filing." Petition at 2, n.2.

from certain DIPs to Dobson Cellular Systems, Inc. (“Dobson”),¹⁹ these same Petitioners asserted that the assignment should be denied on grounds that, *inter alia*, the applications had been filed by Calcutt, as Receiver, when he lacked authority to do so prior to the Commission’s grant of the relevant Receivership Applications.²⁰ The Division rejected that argument, noting that “the filing and processing of an involuntary application – such as the transfer of control . . . from Broz to Calcutt – is intended to reflect an event that has already occurred pursuant to, for example, the order of a court with appropriate jurisdiction.”²¹

7. Petitioners do not raise any new facts or concerns to warrant reconsideration of the Division’s earlier decision regarding the Receiver’s authority to file the Assignment Application on August 27, 2004. As the Commission has stated, a petition for reconsideration “that simply repeats arguments previously considered and rejected will be denied.”²² On this basis, we deny the Petition.

8. In any event, we have reviewed the entire record in this case and find that the facts do not support Petitioners’ argument. The Michigan Court had appointed Calcutt as Receiver on February 3, 2004, as noted above. The Michigan Court granted the Receiver the right, *inter alia*, to exercise all voting, consent and approval rights with respect to the stock or membership interests of the Debtors.²³ The Receiver exercised these rights and appointed Bruce C. Conklin, Jr. (“Conklin”) as the sole managing member of the Debtor, subject to the approval of the Bankruptcy Court.²⁴ On March 15, 2004, the Bankruptcy Court approved the Debtor’s motion to appoint Conklin as the sole managing member of the Debtor, and to strip Broz of his title as Chief Executive Officer and appoint Conklin as Chief Responsible Officer (“CRO”). Conklin signed the Assignment Application in his capacity as CRO. Petitioners do not claim that Conklin exceeded his authority in so doing. Moreover, it is the Commission’s long-standing policy to defer to courts of competent jurisdiction, including where, as here, a court determines that a Commission license should be assigned to a Receiver.²⁵ We find no basis on which to depart from that policy in this case.

¹⁹ Applications to Assign Licenses from Alpine-Michigan E, LLC, Debtor-in-Possession, Alpine-Michigan F, LLC, Debtor-in-Possession, and RFB Cellular, Inc., Debtor-in-Possession, to Dobson Cellular Systems, Inc., File Nos. 0001885064, 0001885147, and 0001882409.

²⁰ As noted above, *see supra* note 11, multiple Receivership Applications were filed, covering, among others, the licenses that were subsequently assigned to Dobson as well as the License assigned to Cricket. *See also* Receivership Order, *supra* note 13.

²¹ *See* Applications to Assign Licenses from Alpine-Michigan E, LLC, Debtor-in-Possession, Alpine-Michigan F, LLC, Debtor-in-Possession, and RFB Cellular, Inc., Debtor-in-Possession, to Dobson Cellular Systems, Inc., File Nos. 0001885064, 0001885147, and 0001882409, and Notifications of Spectrum Manager Leases between Alpine-Michigan E, LLC, Debtor-in-Possession, Alpine-Michigan F, LLC, Debtor-in-Possession, and RFB Cellular, Inc., Debtor-in-Possession, and Dobson Cellular Systems, Inc., File Nos. 0001889423, 0001889451, and 0001889361, *Order*, 20 FCC Rcd 9822, 9830 (WTB 2005) (the “Alpine-Dobson Order”).

²² Infinity Broadcasting Operations, Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 4216, 4216 (2004) (citing Bennett Gilbert Gaines, 8 FCC Rcd 3986 (Rev. Bd. 1993)).

²³ *See* Receivership Order, 20 FCC Rcd at 8850 n.16.

²⁴ *See id.*

²⁵ *See, e.g.*, Applications of Dale J. Parsons, Jr., 10 FCC Rcd 2718, 2720 (1995) (“Parsons”) (noting the Commission would “accommodate the determination of the [bankruptcy] court that the assets and license of KLHI-FM should be assigned to the Receiver,” and denied the objections and granted the application seeking such assignment). Petitioners’ own reliance on the Parsons decision is misplaced. *See* Petition at 3, n.7. The Commission noted its disfavor of a bankruptcy court’s action ordering a receiver to “operate” the station at issue, *see* Parsons, 10 FCC Rcd at 2720-21, but Petitioners have not proffered any evidence that similar facts exist in the instant proceeding. Moreover, the Commission in Parsons found extraordinary circumstances to excuse the receiver in that case from operating the station prior to receipt of Commission approval to the assignment of the license. *See id.* *See also*

(continued...)

IV. CONCLUSION

9. We find that the Petition is procedurally defective. In complaining that the Assignment Application was prematurely filed by the Receiver and prematurely accepted for filing by the Commission, Petitioners have raised an issue they previously raised in a related proceeding and which the Commission has already addressed and rejected as meritless. Petitioners have not presented any new facts, nor have they raised a single substantive argument to suggest that the underlying grant of the Assignment Application was erroneous. Based on our review of the record, we do not find anything to support vacating the Order and requiring the Applicants to resubmit the Assignment Application. We thus affirm the Division's grant of the Assignment Application.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and Section 1.106(j) of the Commission's rules, 47 C.F.R. § 106(j), the Petition for Reconsideration filed by Alpine PCS, Inc. an Alpine Operating LLC on June 13, 2005, is DENIED.

11. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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Applications of D.H. Overmyer Telecasting Co., Inc., *Memorandum Opinion and Order*, 94 FCC 2d 117, 123 (1983).