

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Toshiaki Saito)	
Petitioner,)	
)	
v.)	Case No. 14-71611
)	
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

MOTION TO DISMISS

The Federal Communications Commission (“FCC” or “Commission”) respectfully moves the Court to dismiss this case for lack of jurisdiction. Petitioner Toshiaki Saito has petitioned for review of a Memorandum Opinion and Order issued by the FCC’s General Counsel – a staff-level action taken under delegated authority. *See Pendleton C. Waugh, et al.*, Memorandum Opinion and Order, 2014 WL 1410218 (OGC April 11, 2014) (“*Order*”) (attached as Exhibit A). But the Communications Act plainly states that “[t]he filing of an application for review” with the full Commission is “a condition precedent to judicial review” of any action taken by Commission staff “pursuant to a delegation” of FCC authority. 47 U.S.C. § 155(c)(7). Saito did not file a timely application with the Commission for review of the *Order*. Therefore, the Court should dismiss this case for lack of

jurisdiction. *See Int'l Telecard Ass'n v. FCC*, 166 F.3d 387 (D.C. Cir. 1999); *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997).

BACKGROUND

On July 20, 2007, the FCC commenced a hearing proceeding before an administrative law judge (“ALJ”) to determine whether Commission licensees Preferred Acquisitions, Inc. (“PAI”), its parent company, Preferred Communications Systems, Inc. (“PCSI”) (collectively “Preferred”), and three individuals that the FCC believed owned and controlled those licensees (Pendleton C. Waugh, Jay R. Bishop, and Charles M. Austin), were qualified to remain Commission licensees. *See Pendleton C. Waugh, et al.*, Order to Show Cause, 22 FCC Rcd 13363 (2007). The Order to Show Cause designated the FCC’s subordinate Enforcement Bureau as a party to the proceeding, and assigned the Bureau the burden of proving that Preferred’s licenses should be revoked.¹ *Id.*, 22 FCC Rcd at 13385. As provided by the FCC’s rules, *see* 47 C.F.R. § 1.221(b), it was published in the Federal Register on August 1, 2007. *See* 72 Fed. Reg. 42088 (Aug. 1, 2007), correction published at 72 Fed. Reg. 45049 (Aug. 10, 2007).

After discovery, but prior to the administrative hearing, all of the parties other than Waugh reached a settlement agreement. *See* Joint Request for Approval

¹ The Enforcement Bureau “[s]erve[s] as trial staff in formal hearings conducted pursuant to 5 U.S.C. § 556 regarding applications, revocation, forfeitures and other matters designated for hearing.” 47 C.F.R. § 0.111(b).

of Settlement Agreement and Termination of Proceeding, EB Docket No. 07-147 (filed Aug. 5, 2009). Among other requirements, the settlement agreement provided that Waugh “shall not work for, contract for, consult for, or hold any ownership interest (outright or beneficial interests through stocks, warrants, voting trusts, or any other mechanism) in PCSI, PAI, any Affiliate of PCSI, and/or any Affiliate of PAI.” Pet., Ex. E, Attachment (¶ 21). Shortly thereafter, the ALJ released an order approving the settlement agreement and terminating the hearing proceeding. *See Pendleton C. Waugh, et al.*, Order, FCC 09M-51 (ALJ Aug. 6, 2009).

Waugh immediately objected on the basis that he was not invited to participate in settlement negotiations. In response, the ALJ required the Enforcement Bureau to submit additional pleadings describing Waugh’s participation (or non-participation) in settlement discussions, and an explanation for why it would be in the public interest to leave unresolved the issues involving Waugh. *See Pendleton C. Waugh, et al.*, Memorandum Opinion and Order, FCC 09M-53 (ALJ Aug. 20, 2009). After reviewing the Bureau’s submissions, the ALJ renewed his approval of the settlement and once again terminated the hearing proceeding. *See Pendleton C. Waugh, et al.*, Memorandum Opinion and Order, FCC 09M-57 (ALJ Sept. 25, 2009). However, on October 1, 2009, a group of

Preferred shareholders appealed the ALJ's decision to the full Commission, and on October 26, 2009, Waugh followed suit. *Order* ¶ 3.

While the administrative appeals were pending, Petitioner Toshiaki Saito filed a letter with the FCC claiming that he is a creditor of, and was defrauded by, Waugh. In his August 13, 2010 letter, Saito urged the FCC to revoke the licenses held by PCSI and PAI, auction those licenses, and from the proceeds repay Saito the amounts he claims to be owed by Waugh. *Order* ¶ 5.

On September 9, 2011, Waugh's counsel informed the FCC that Waugh had died. *Id.* ¶ 4.

On January 27, 2012, Saito filed a Petition to Intervene in the Preferred license revocation proceeding. *See* Pet., Ex. B. The petition renewed the arguments set forth in his August 13, 2010 letter. *Id.*

In its role as trial staff, the Enforcement Bureau filed an opposition to Saito's petition, arguing that his request for intervention was untimely. *See* Enforcement Bureau's Opposition to Petition to Intervene and Revoke Licenses, EB Docket No. 07-147 (filed Feb. 13, 2012) ("*Bureau Opp.*"). The Bureau noted that under the FCC's rules, *see* 47 C.F.R. § 1.223(b), petitions to intervene must be filed within 30 days of Federal Register publication of the hearing designation order or a summary thereof. Accordingly, the Bureau argued, Saito should have

filed by August 31, 2007 (*i.e.*, 30 days after the August 1, 2007 publication of the Order to Show Cause in the Federal Register). *Bureau Opp.* 2-3.

The Bureau also opposed the grant of Saito's petition under section 1.223(c) of the FCC's rules, 47 C.F.R. § 1.223(c), which provides that a petition to intervene beyond the 30-day limit must "set forth the interest of the petitioner in the proceeding, show how such petitioner's participation will assist the Commission in the determination of the issues in question, ... and must set forth reasons why it was not possible to file a petition within the time prescribed" by the rule. *Bureau Opp.* 3-4. The Bureau found no merit to Saito's claim that he was unaware of the ongoing proceeding, noting that the Order to Show Cause was duly published in the Federal Register. *See* 47 C.F.R. § 1.221(b). Saito thus had constructive notice, even if he did not have actual notice. *Bureau Opp.* 4. The Bureau further asserted that Saito failed to articulate an "interest" in the hearing proceeding. The Bureau acknowledged that Saito, as a creditor, may have an interest in recouping his investments. *Id.* 3. But because the purpose of the license revocation proceeding was to determine whether Preferred had the requisite qualifications to hold FCC licenses under the Communications Act, 47 U.S.C. § 301, *et seq.*, and the Commission's rules, the Bureau argued that the hearing was the wrong forum to provide Saito's requested relief. *Bureau Opp.* 3-4.

Subsequently, both Waugh's estate and the Preferred shareholders withdrew their appeals to the settlement agreement and asked the FCC to terminate the license revocation proceeding. *Order* ¶ 4. The Enforcement Bureau concurred in those requests. *Id.*

On April 11, 2014, the FCC's General Counsel, acting on authority delegated by the Commission,² dismissed the appeals and terminated the license revocation proceeding involving Preferred. *Order* ¶¶ 4, 9, 24. In the same Memorandum Opinion and Order, the General Counsel "also dispose[d] of certain collateral matters" – including Saito's letter and petition to intervene. *Id.* ¶ 5. The General Counsel first declined to "entertain Saito's August 13 letter, which" he found "is not authorized by [the FCC's] rules inasmuch as Saito was not a party to the hearing proceeding below." *Id.* ¶ 6 (citing 47 C.F.R. § 1.302(a)) (granting only parties to a proceeding the right to appeal an ALJ's ruling terminating a hearing proceeding). The General Counsel then denied Saito's untimely petition to intervene, explaining that it "was filed more than four years after the *Order to Show Cause* was published in the Federal Register," and that "Saito ha[d] not shown why it was not possible for him to seek intervention earlier." *Id.* Finally,

² See 47 C.F.R. § 0.251(c) ("The General Counsel is delegated authority in adjudicatory hearing proceedings which are pending before the Commission en banc to act on all requests for relief, and to issue all appropriate orders, except those which involve final disposition on the merits of a previously specified issue concerning an applicant's basic qualifications or two or more applicants' comparative qualifications.").

the General Counsel found that “Saito has not shown that he has standing to intervene.” *Id.*

ARGUMENT

Saito seeks judicial review of a Memorandum Opinion and Order issued by the FCC’s General Counsel, which denied Saito’s late-filed petition to intervene in a license revocation hearing. The Court lacks subject matter jurisdiction to review that staff-level ruling.

Section 5(c)(7) of the Communications Act sets forth an exhaustion requirement. That provision makes the filing of an application for review by the full Commission “a condition precedent to judicial review” of action by the agency’s staff. 47 U.S.C. § 155(c)(7). Section 5(c)(7) prohibits the Court from exercising jurisdiction over an FCC staff decision unless the litigant seeking relief both has asked for and has obtained a final Commission-level order reviewing that decision. *Int’l Telecard Ass’n*, 166 F.3d 387. Simply put, Congress ““did not intend that the court review a staff decision that has not been adopted by the Commission itself.”” *Id.* at 388 (quoting *Richman Bros. Records*, 124 F.3d at 1304).

Saito acknowledges that he has not filed an application for review, but sets forth several arguments to excuse his failure to satisfy the statutory exhaustion requirement in section 5(c)(7). Each lacks merit.

First, Saito asserts that the Court should not strictly enforce the statutory exhaustion requirement because the FCC did not serve him by mail with a copy of the *Order*. Pet. 11-14. However, the FCC's rules provide that "orders of the Commission, or its staff acting on delegated authority, are mailed *or* delivered by electronic means...." 47 C.F.R. § 0.445(a) (emphasis added). Consistent with that rule, the FCC emailed the *Order* to Saito's counsel of record (Kevin W. Herring and Steven R. Gray of Ashford & Wriston) on April 16, 2014. *See* Exhibit B.

Saito contends that "such potential electronic means of delivery may only be allowed upon consent of the parties" – consent that Saito allegedly did not grant. Pet. 13 & n.18. In support, Saito relies on Rule 1.47(d), which provides "[d]ocuments that are required to be served must be served in paper form, even if documents are filed in electronic form *with the Commission*, unless the party to be served agrees to accept service in some other form." 47 C.F.R. § 1.47(d) (emphasis added). Saito's reliance on that rule is misplaced. Subsection (d) of Rule 1.47 imposes service requirements on *parties* to FCC proceedings, not the FCC itself. This is made clear by subsection (a) of the same rule, which (consistent with Rule 0.445(a)) provides that "[d]ocuments that are required to be served *by the Commission* in agency proceedings (*i.e.*, not in the context of judicial proceedings, Congressional investigations, or other proceedings outside the

Commission) may be served in electronic form.”³ 47 C.F.R. § 1.47(a) (emphasis added). Subsection (a) does not mention, let alone require, service by mail. The FCC’s reasonable interpretation of its own rules is entitled to deference. *Talk Am. Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011); *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Saito never claims that he lacked timely, actual notice of the *Order* – only that he was not served with the *Order* by mail. *See* Pet. 11-14. This is an important distinction, because courts have held that “a defect in mailing notification will have legal consequence only where the delay in notification in fact makes it impossible reasonably for the party to comply with the filing statute.” *Gardner v. FCC*, 530 F.2d 1086, 1092 n.24 (D.C. Cir. 1976) (finding the FCC improperly rejected a petition for rehearing on grounds of untimeliness when the late filing was due, in substantial measure, to the agency’s failure to give petitioner personal notice of any kind); *see also Energy Probe v. U.S. Nuclear Regulatory Comm’n*, 872 F.2d 436, 438 (D.C. Cir. 1989) (declining to waive statutory

³ In “amend[ing] Section 1.47 of [its] rules to allow the agency to serve parties to a proceeding in an electronic format,” the FCC expressed a desire to “streamline Commission processes and improve efficiency.” *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, 26 FCC Rcd 1594, 1603 (¶ 22) (2011); *see also id.* n.69 (explaining that the FCC will “make conforming changes to Section 0.445” of its rules). Those efficiency gains would be lost if the agency was also required to serve parties by mail, as Saito contends it must.

deadline where agency's delay providing notice did not prevent petitioner from filing a timely petition for review).

Saito has failed to make that showing. Under the FCC's rules, the deadline for filing an application for review was May 11, 2014, or 30 days after the April 11, 2014, release of the *Order*.⁴ Saito does not dispute that he received actual notice of the *Order* on April 16, 2014, *see* Exhibit B, leaving him a substantial amount of time (approximately 26 days) to file an application for review.

Second, Saito argues that the Court should excuse the statutory exhaustion requirement because he would face "irreparable injury" if forced to file an application for review with the FCC. Pet. 14-16. Saito contends that it will take "an additional several years for the Commission to 'pass on' the matter," which "would diminish exponentially the value of any eventually received relief." *Id.* 15. However, in the event Saito properly filed an application for review and the agency unreasonably delayed ruling upon it, Saito could file a petition for a writ of mandamus to compel agency action. *See In re: California Power Exchange Corp.*, 245 F.3d 1110, 1124-25 (9th Cir. 2001) (in determining whether mandamus relief is warranted, the court "consider[s]," among other factors, "the nature of the interests prejudiced by delay") (internal citation omitted). Given this means of

⁴ *See* 47 C.F.R. § 1.115(d) ("the application for review ... shall be filed within 30 days of public notice of such action, as that date is defined in section 1.4(b)"); 47 C.F.R. § 1.4(b)(2) (holding that the "release date" is the date of public notice for non-rulemaking documents).

relief, the mere possibility of agency delay does not excuse his failure to exhaust his administrative remedies, as required by statute.

Third, Saito argues that it would be futile to file an application for review with the FCC, because the full Commission is biased toward affirming the settlement agreement proffered by the Enforcement Bureau. Pet. 16-18. Saito's reliance on out-of-circuit precedent notwithstanding, *id.* 18-20, this Court has held that there is no futility exception to statutory exhaustion requirements like section 5(c)(7) of the Communications Act. *See Fones4All Corp. v. FCC*, 550 F.3d 811, 818 (9th Cir. 2008) ("Because the Telecommunications Act does require exhaustion, [the Court] cannot rely on a judicially created futility exception to evade the statutory exhaustion requirement" in 47 U.S.C. § 405), *reh'g denied*, *Fones4All Corp. v. FCC*, 561 F.3d 1031 (9th Cir. 2009); *accord*, *In re: FCC 11-161*, 2014 WL 2142106, *116 (10th Cir. May 23, 2014) (courts may not "read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise") (quoting *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)).

In any event, Saito's claim is unavailing. On multiple occasions, the full Commission, after reviewing the record before it, has taken a position contrary to that of its subordinate Bureaus. *See, e.g., Hometown Media, Inc.*, 11 FCC Rcd 19677 (1996) (denying exceptions filed by the Mass Media Bureau to an ALJ's

initial decision granting a license renewal); *James A. Kay, Jr.*, 17 FCC Rcd 1834, 1850-53 (2002) (denying exceptions filed by the Wireless Telecommunications Bureau to an ALJ's initial decision finding that a licensee did not violate certain FCC rules). Saito offers no basis for his assertion that the Commission would be biased toward approving the Enforcement Bureau's settlement agreement with Preferred. Saito thus cannot overcome this Court's "presum[ption] that the agency [will] act[] with regularity." *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1077 n.2 (9th Cir. 1994) (citing *Louisiana Ass'n of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1118-19 (D.C. Cir. 1992)).

Finally, Saito contends that the statutory "exhaustion requirement should not be strictly enforced here because the *Opinion and Order* approving the Settlement Agreement conflicts with the statutory prohibition that the General Counsel lacks authority to issue an order involving 'final disposition on the merits of a previously specified issue concerning an applicant's basic qualifications.'" Pet. 21 (citing 47 C.F.R. § 0.251(c)).⁵ Saito's argument is baseless, because the General Counsel did not exceed the authority delegated to him by the FCC's rules. The General Counsel merely consented to withdrawal of the appeals filed by the Preferred

⁵ Saito cites judicial precedent that permits interlocutory review when an agency exceeds its statutory authority or violates a petitioner's constitutional rights. Pet. 20-21. Here, however, Saito alleges that the General Counsel exceeded a limitation on his authority set forth in section 0.251(c) of the FCC's *rules*. *Id.* As such, the precedent relied upon by Saito is inapposite.

shareholders and Waugh. *Order* ¶¶ 4, 9. Finding no opposition to the settlement agreement, he then administratively terminated the license revocation proceeding. *Id.* ¶¶ 4, 24. Moreover, the settlement agreement does not constitute either adjudication on the merits, or a factual or legal determination by the FCC, regarding Preferred's compliance or noncompliance with the requirements of the Communications Act or the Commission's rules or orders.⁶ Because neither the settlement agreement nor the *Order* addressed Preferred's "basic qualifications" to hold FCC licenses, the General Counsel did not issue a "final disposition on the merits" of the issues designated for hearing, in violation of Rule 0.251(c), when he terminated the Preferred license revocation proceeding.

In sum, the Communications Act makes clear that an application for review of a staff-level action must be filed with and resolved by the Commission before that action can be challenged in court. 47 U.S.C. § 155(c)(7). Saito failed to satisfy this fundamental jurisdictional prerequisite. His petition for review should therefore be dismissed for lack of jurisdiction.

⁶ *See* Pet., Ex. E, p. 1-2 ("The Parties agree that each of the non-government parties by signing the Settlement Agreement, have not made any admission of any violations of the Act or of any Commission Rule arising from the actions, omissions, admissions as described in the Order to Show Cause.") & Attachment, p. 5 (¶ 12) ("The Parties agree that this Settlement Agreement is for settlement purposes only and that signing does not constitute an admission by PCSI, PAI, Charles M. Austin, and Jay R. Bishop of any violation of the Act or the Commission's Rules arising from their actions or admissions as described in the Order to Show Cause.").

CONCLUSION

The Court should dismiss this case forthwith.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

David M. Gossett
Acting Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/Maureen K. Flood
Maureen K. Flood
Counsel
Federal Communications Commission
Washington, DC 20554
(202) 418-1753

July 3, 2014

Exhibit A

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

In the Matter of)	
)	
PENDLETON C. WAUGH, CHARLES M. AUSTIN, and JAY R. BISHOP)	EB Docket No. 07-147
)	
PREFERRED COMMUNICATION SYSTEMS, INC.)	File No. EB-06-IH-2112 NAL/Acct. No. 200732080025
)	
Licensee of Various Site-by-Site Licenses in the Specialized Mobile Radio Service.)	FRN No. 0003769049
)	
PREFERRED ACQUISITIONS, INC.)	FRN No. 0003786183
)	
Licensee of Various Economic Area Licenses in the 800 MHz Specialized Mobile Radio Service)	

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2014

Released: April 11, 2014

By the General Counsel:

I. INTRODUCTION

1. By this memorandum opinion and order, we dismiss appeals filed by the late Pendleton C. Waugh (Waugh)¹ and by a group of Preferred Communications Systems, Inc. (PCSI) shareholders led by Michael D. Judy² (Shareholders). The appeals seek review of a Memorandum Opinion and Order by Chief Administrative Law Judge Richard L. Sippel (ALJ) that approved a settlement agreement and terminated a license revocation proceeding.³ Waugh's estate and the Shareholders have withdrawn their appeals. We also deny a petition by an individual named Toshiaki Saito to intervene in this proceeding and dismiss as moot a petition to modify the protective order in this proceeding.

II. BACKGROUND AND DISCUSSION

2. The Commission initiated this proceeding⁴ to determine whether Commission

¹ See Appeal from Presiding Officer's Final Ruling, filed October 26, 2009, by Waugh (Waugh Appeal). See also Enforcement Bureau's Opposition to Pendleton Waugh's Appeal, filed November 10, 2009; Opposition to Pendleton Waugh's Appeal, filed November 10, 2009, by PCSI; and Reply to Oppositions, filed November 20, 2009, by Waugh.

² See Appeal, filed October 1, 2009, by Michael D. Judy (Shareholders Appeal). See also Enforcement Bureau's Opposition to Michael D. Judy's Appeal, filed October 14, 2009.

³ See *Pendleton C. Waugh*, Memorandum Opinion and Order, FCC 09M-57 (ALJ Sept. 25, 2009) (*Final Termination Order*).

⁴ See *Pendleton C. Waugh*, Order to Show Cause and Notice of Opportunity for Hearing, 22 FCC Rcd 13363, 13363 ¶ 1 (2007) (*Order to Show Cause*).

licensees Preferred Acquisitions Inc. (PAI) and its parent company PCSI, and three individuals that the Commission believed owned and controlled those licensees, Waugh, Jay R. Bishop (Bishop), and Charles M. Austin (Austin), were qualified to remain Commission licensees.⁵ The *Order to Show Cause* designated the Enforcement Bureau (EB) as a party to the proceeding.⁶

3. Following discovery, the parties engaged in settlement negotiations. On August 5, 2009, EB, joined by the parties other than Waugh, filed a settlement agreement with the ALJ for approval.⁷ On August 6, 2009, the ALJ released an order approving the settlement agreement and terminating the hearing.⁸ In response to objections by Waugh, the ALJ, on August 20, 2009, ordered further proceedings,⁹ and, upon conclusion of these further proceedings, the ALJ, on September, 25, 2009, issued the *Final Termination Order*, which renewed his earlier order approving the settlement agreement. Subsequently, two sets of parties filed appeals to the *Final Termination Order*. On October 1, 2009, the Shareholders filed an appeal, and, on October 26, 2009, Waugh filed an appeal, both appeals challenging the approval of the settlement agreement.

4. On September 9, 2011, Waugh's counsel informed the Commission that Waugh had died on August 27, 2011.¹⁰ Subsequently, Waugh's estate and Shareholders both filed pleadings withdrawing their appeals and asking the Commission to terminate this proceeding.¹¹ Both pleadings report that EB concurs in the dismissal of the appeals and the termination of the proceeding. Good cause having been shown, we grant the requested relief.

5. We also dispose of certain collateral matters. On August 13, 2010, a creditor of Waugh's named Toshiaki Saito (Saito) filed a letter claiming that Waugh defrauded him and owes him substantial sums of money.¹² He urges the Commission to revoke the PSCI and PAI licenses, auction them off, and transfer the proceeds to Saito for amounts owned by Waugh. Subsequently, on January 27, 2012, Saito filed a Petition to Intervene, making the same arguments.¹³

6. We will not entertain Saito's August 13 letter, which is not authorized by our

⁵ PAI and PCSI hold licenses in the Specialized Mobile Radio Service, which was established by the Commission to provide land mobile communications on a commercial basis and is governed by Part 90 of the Commission's Rules. The Commission evaluates the character qualifications of licensees pursuant to 47 U.S.C. § 308(b). *See generally Character Qualifications*, 102 FCC 2d 1179 (1986).

⁶ *See Order to Show Cause*, 26 FCC Rcd at 13386 ¶¶ 60, 63.

⁷ *See Joint Request for Approval of Settlement Agreement and Termination of Proceeding*, filed August 5, 2009, by EB, PCSI, PAI, Austin, and Bishop. The settlement agreement is reprinted as an attachment to *Pendleton C. Waugh*, Order, FCC 09M-51 (ALJ Aug. 12, 2009).

⁸ *See Pendleton C. Waugh*, Order, FCC 09M-51 (ALJ Aug. 6, 2009).

⁹ *See Pendleton C. Waugh*, Order, FCC 09M-53 (ALJ Aug. 20, 2009).

¹⁰ *See Letter from William D. Silva to Joel Kaufman, Esquire, Associate General Counsel* (Sept. 9, 2011).

¹¹ *See Notice of Withdrawal of Appeal of Estate of Pendleton C. Waugh*, filed February 12, 2014; *Notice of Withdrawal of Appeal and Request to Terminate Proceeding*, filed February 12, 2014, by Shareholders.

¹² *See Letter from Toshiaki Saito to Julius Genachowski* (Aug. 13, 2010).

¹³ *See Petition to Intervene and Revoke Licenses*, filed January 27, 2012, by Saito (Petition to Intervene). *See also Enforcement Bureau's Opposition to Petition to Intervene and Revoke Licenses*, filed February 13, 2012; *Petitioner's Reply to Enforcement Bureau's Opposition to Petition to Intervene and Revoke Licenses*, filed February 21, 2012, by Saito; *Enforcement Bureau's Motion to Strike [the reply]*, filed February 20, 2012; *Petitioner's Opposition to Enforcement Bureau's Motion to Strike Enforcement Bureau's Opposition*, filed March 6, 2012, by Saito.

rules inasmuch as Saito was not a party to the hearing proceeding below.¹⁴ Moreover, the Commission is not the proper forum for litigating Saito's claims against Waugh (or potentially his estate). We also deny Saito's Petition to Intervene. Saito's petition is untimely.¹⁵ The petition was filed more than four years after the *Order to Show Cause* was published in the Federal Register, and Saito has not shown why it was not possible for him to seek intervention earlier. Further, Saito has not shown that he has standing to intervene.¹⁶

7. As an additional matter, on June 23, 2010, PCSI, PAI, and Austin filed a petition seeking to release in a judicial proceeding certain documents that are subject to the protective order in this administrative proceeding.¹⁷ In their petition, PCSI, PAI and Austin explain that they are defendants in a civil lawsuit filed in the State of Delaware and that the Delaware judge has ordered them to provide the documents to the plaintiffs. The petition, however, is unnecessary, because the Protective Order does not prevent the petitioners from complying with the state court order. We therefore dismiss the petition as moot.

III. ORDERING CLAUSES

8. ACCORDINGLY, pursuant to the authority delegated by 47 C.F.R. § 0.251(c), IT IS ORDERED, That the Petition to Intervene and Revoke Licenses, filed January 27, 2012, by Saito IS DENIED.

9. IT IS FURTHER ORDERED, That the Appeal from Presiding Officer's Final Ruling, filed October 26, 2009, by Waugh; and the Appeal, filed October 1, 2009, by Michael D. Judy on behalf of the Shareholders ARE DISMISSED.

10. IT IS FURTHER ORDERED, That the Petition to Release Documents that are Subject to Protective Order," filed June 23, 2010, by PCSI, PAI and Austin IS DISMISSED as moot.

24. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Jonathan B. Sallet
Acting General Counsel

¹⁴ See 47 C.F.R. § 1.302(a) (granting only parties to a proceeding the right to appeal an administrative law judge's ruling terminating a hearing proceeding). See also *The Trustees of the University of Pennsylvania Radio Station WXPN(FM) Philadelphia, Pennsylvania*, 69 FCC Rcd 1394, 1430 n.80 (1978) (nonparty may not file exceptions to an initial decision).

¹⁵ 47 C.F.R. § 1.223(b) (petitions to intervene must be filed within 30 days after publication of the hearing designation order).

¹⁶ The provisions of 47 C.F.R. §§ 1.223(b) and (c) require petitions to intervene to show the petitioner's interest in the proceeding.

¹⁷ See Petition to Release Documents that are Subject to Protective Order, filed June 23, 2010, by PCSI, PAI and Austin. See also See Comments in Support of Petition to Release Documents that Are Subject to Protective Order, filed June 28, 2010, by Waugh; Enforcement Bureau's Response to Petition to Release Documents that are Subject to Protective Order and Supporting Comments" (July 6, 2010).

Exhibit B

Dwayne Hamblin

From: David Senzel
Sent: Monday, June 16, 2014 9:10 AM
To: David Senzel
Subject: FW: Pendleton C. Waugh (EB Docket No. 07-147)
Attachments: Waugh order.pdf

Privileged FCC Document
Non-Public: For Internal Use Only
Attorney Work Product of David S. Senzel

-----Original Message-----

From: David Senzel
Sent: Wednesday, April 16, 2014 11:45 AM
To: 'whitneywaugh@aol.com'; 'barclay.knapp@gmail.com'; 'jaybishop@aol.com'; 'kherring@awlaw.com'; 'sgray@awlaw.com'; Gary Oshinsky; Anjali Singh
Cc: Richard Sippel; Austin Randazzo; Mary Gosse
Subject: Pendleton C. Waugh (EB Docket No. 07-147)

Dear Parties:

Please be advised that the Office of General Counsel has released the attached order.

David S. Senzel
Attorney
Office of General Counsel

14-71611

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Toshiaki Saito,
Petitioner**

v.

**Federal Communications Commission and the
United States of America,
Respondents.**

CERTIFICATE OF SERVICE

I, Maureen K. Flood, hereby certify that on July 3, 2014, I electronically filed the foregoing Motion To Dismiss with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Adam G. Lang
Durrett, Rosehill & Ma, LLP
Suite #1101
841 Bishop Street
Honolulu, HI 96813
Counsel for: Toshiaki Saito

/s/ Maureen K. Flood