

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

In re Applications of
TV ACTIVE, LLC
WINCOM CORP.
U.S. TELEMETRY-MANSFIELD, INC.
U.S. TELEMETRY-JACKSON, INC.
U.S. TELEMETRY-LIMA, INC.
U.S. TELEMETRY-SPRINGFIELD, INC.
For Consent to the Assignment of Licenses for
Stations KIVD0136, KIVD0249, KIVD0311 and
KIVD0340 in the 218-219 MHz Service
FCC File No. 0000334630

ORDER ON RECONSIDERATION

Adopted: October 26, 2001

Released: October 26, 2001

By the Assistant Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Reconsideration filed by TV Active, LLC (TV Active);<sup>1</sup> an Opposition to Petition for Reconsideration filed jointly by U.S. Telemetry-Mansfield, Inc., U.S. Telemetry-Jackson, Inc., U.S. Telemetry-Lima, Inc., and U.S. Telemetry-Springfield, Inc. (U.S. Telemetry);<sup>2</sup> and a Reply to Opposition filed by TV Active.<sup>3</sup> TV Active seeks reconsideration pursuant to Section 1.106 of our Rules<sup>4</sup> of the decision of the Licensing and Technical Analysis Branch (Branch) of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, granting the above-captioned application to assign four 218-219 MHz Service licenses from TV Active to U.S. Telemetry.<sup>5</sup> For the reasons that follow, we deny the Petition and affirm the Branch's decision.

1 Petition for Reconsideration filed by TV Active, LLC, on February 23, 2001 (Petition).

2 Opposition to Petition for Reconsideration filed by U.S. Telemetry-Mansfield, Inc., U.S. Telemetry-Jackson, Inc., U.S. Telemetry-Lima, Inc., and U.S. Telemetry-Springfield, Inc., on March 8, 2001 (Opposition).

3 Reply to Opposition filed by TV Active, LLC, on March 20, 2001 (Reply).

4 47 C.F.R. § 1.106.

5 FCC File No. 0000334630. The application was granted on January 22, 2001, and public notice of this action was provided on January 24, 2001. See Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications – Action, Public Notice, Report No. 762, at 41 (rel. Jan. 24, 2001) (Public Notice).

## II. BACKGROUND

2. TV Active acquired the subject licenses as a successful high bidder in the Federal Communications Commission's (FCC or Commission) July 1994 auction of Interactive Video and Data Service (IVDS) licenses.<sup>6</sup> In 1997, TV Active entered into an agreement with Wincom Corporation (Wincom) whereby TV Active agreed to sell its interest in the subject licenses, and TV Active executed FCC Form 1046 applications seeking Commission approval of such assignments.<sup>7</sup> According to TV Active, this transaction was never consummated.<sup>8</sup> Prior to the filing of any application to assign the licenses from TV Active to Wincom, the latter company filed for bankruptcy protection.<sup>9</sup> Although Wincom initially filed for protection under Chapter 11 of the Bankruptcy Code, the proceeding was converted to a Chapter 7 liquidation, and Mr. Patrick Malloy III was appointed the Trustee by the United States Bankruptcy Court for the Northern District of Oklahoma (Bankruptcy Court).

3. On October 7, 1999, U.S. Telemetry submitted a formal offer to purchase the Wincom bankruptcy estate's interest in sixty-six 218-219 MHz licenses, including the subject licenses.<sup>10</sup> An evidentiary hearing on the Trustee's motions to sell the estate's interest in the 218-219 MHz licenses to U.S. Telemetry occurred on December 16, 1999.<sup>11</sup> Although TV Active did not attend that hearing, a number of other 218-219 MHz licensees that had entered into similar asset purchase agreements with Wincom did attend,<sup>12</sup> and they objected to the proposed disposition of the 218-219 MHz licenses covered by those agreements, claiming that Wincom had defaulted in paying for the licenses because the preferred stock with which Wincom had purchased the licenses was not as valuable as represented and/or the various stock exchanges were not completed.<sup>13</sup>

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<sup>6</sup> See Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, Mimeo 44160 (rel. Aug. 2, 1994). In 1998, the IVDS was redesignated as the 218-219 MHz Service and the rules governing the service were amended. See Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, WT Docket No. 98-169, 13 FCC Rcd 19064 (1998).

<sup>7</sup> In re Winco Corp., D. Heusch Corp., Lincoln Distributing, Wincom Corp., Consolidated Case Nos. 98-01647-R, 98-03493-R, 98-03494-R and 98-02066-R, *Memorandum Opinion* at 5-6 (Bankr. N.D. Okla. Jan. 10, 2000) (slip op.) (*January 10 Opinion*).

<sup>8</sup> Petition at 1; Reply at 3.

<sup>9</sup> In the Petition, TV Active asserts that, prior to the filing of the instant application, the parties had requested and received Commission consent for the assignment of the licenses from TV Active to Wincom. Petition at 1. This assertion, however, appears to be in error. U.S. Telemetry states that, although it has copies of FCC Form 1046 applications to effectuate that earlier assignment that were executed by TV Active (and appends same as Attachment A to the Opposition), it has found no record that the applications were ever filed or granted. Opposition at 3-4 n.4. Our licensing database does not indicate that any such applications were filed or granted.

<sup>10</sup> See Letter from K. Steven Roberts, Esq., to Patrick J. Malloy III, Trustee, dated October 7, 1999 and attached as Exhibit C to the Trustee's Motion to Sell filed with the Bankruptcy Court on October 14, 1999. The purchase offer was from Lynx Network, Inc. and 218 Telemetry Inc., which together own U.S. Telemetry. The licenses were to go to U.S. Telemetry as the purchasers' designee. Some of these licenses had canceled automatically and were therefore not eligible to participate in the restructuring plan. Wireless Telecommunications Bureau Announces Revised Election Date (January 31, 2001) and Amended Eligibility List for 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 5937 (2001).

<sup>11</sup> *January 10 Opinion* at 1.

<sup>12</sup> *Id.* at 1-2.

<sup>13</sup> *Id.* at 6.

4. On January 10, 2000, the United States Bankruptcy Court for the Northern District of Oklahoma (Bankruptcy Court) issued a Memorandum Opinion holding that, pursuant to contract law, Wincom had acquired an interest in the licenses, including the right to apply to the FCC for approval of the assignment of the licenses.<sup>14</sup> The Bankruptcy Court also held that under these circumstances, the Trustee would be permitted to apply to the FCC for approval of the assignment of the licenses.<sup>15</sup> At the same time, the Bankruptcy Court made clear that its order was not intended to infringe in any way on the FCC's authority over assignments of FCC licenses.<sup>16</sup> In subsequent orders, the Bankruptcy Court again emphasized that its determination of the contractual rights among the parties and its application of bankruptcy law to this case:

shall in no way be construed as this Court's having made any finding, determination, conclusion of law or decision as to the status, grant or assignment of any of the licenses or licensee [sic] or any other parties' rights or obligations under (1) those licenses, (2) the Communications Act of 1934, as amended, and (3) any applicable FCC rules, regulations and/or orders; nor shall this Order have any effect on the FCC's exclusive jurisdiction to determine whether grant of applications for assignment of the licenses ... serves the public interest, convenience, or necessity, 47 U.S.C. §§ 301, 309, and 310(d) ....<sup>17</sup>

It further specified that the purchasers must assume all outstanding indebtedness owing to the FCC with respect to the licenses.<sup>18</sup> It authorized and instructed the Trustee "to immediately prepare and file with the FCC any and all forms and documents ... required to assign and transfer the title to the licenses [to U.S. Telemetry] and to seek the approval of the FCC of said assignment and transfer ...."<sup>19</sup>

5. The applications to assign the subject licenses to U.S. Telemetry were filed with the Commission on June 28, 2000. The Trustee submitted contemporaneously three sets of applications to request FCC approval of the transaction. First, the Trustee filed FCC Form 600 and FCC Form 1046<sup>20</sup> to request approval for the involuntary assignment of the licenses by operation of law from TV Active to Wincom (Step 1 Application). Second, the Trustee filed FCC Form 703 to request approval for the

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<sup>14</sup> *Id.* at 17-19. The Bankruptcy Court also found that the price offered by U.S. Telemetry for the licenses was fair and reasonable. *Id.* at 18.

<sup>15</sup> *Id.* at 17.

<sup>16</sup> The Bankruptcy Court stated, "The FCC's interest in regulating the transfer of licenses, including its right to approve, or not, any transfer of any license for any reason is not affected by this order. The sale to the Purchasers is *contingent* upon FCC approval as stated in the Trustee's Motions ...." *Id.* at 19 (emphasis in original).

<sup>17</sup> See *In re Winco Corp., D. Heusch Corp., Lincoln Distributing, Wincom Corp., Consolidated Case Nos. 98-01647-R, 98-03493-R, 98-03494-R and 98-02066-R, Second Amended Order* at 2 (Bankr. N.D. Okla. May 12, 2000) (slip opinion) (*Second Amended Order*).

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Currently, applications to assign 218-219 MHz licenses or transfer control of 218-219 MHz licensees must be filed on FCC Form 603. See 47 C.F.R. § 1.913(a)(3). However, the use of FCC Form 603 for this purpose did not become mandatory until March 20, 2001. See Wireless Telecommunications Bureau Implements Phase I of a Three-Phased Deployment of the Universal Licensing System for Land Mobile Radio Services on September 19, 2000, *Public Notice*, 15 FCC Rcd 18945 (2000).

involuntary transfer of control of Wincom by operation of law to the Trustee (Step 2 Application).<sup>21</sup> Third, the Trustee filed FCC Form 600 and FCC Form 1046 to request approval for the voluntary assignment of the licenses from the Trustee to U.S. Telemetry (Step 3 Application).<sup>22</sup> The filings were structured in this manner, U.S. Telemetry explained, to permit the Commission's licensing records to reflect accurately the three discrete stages of the overall transaction.<sup>23</sup> The applications all bear the signature of Patrick J. Malloy III as Trustee. Of most significance to this case, Mr. Malloy signed on behalf of the assignor, TV Active, in the Step 1 Application. The Branch consented to the transaction on January 22, 2001, and TV Active's timely filed Petition for Reconsideration followed.<sup>24</sup>

### III. DISCUSSION

6. TV Active argues that neither Wincom nor U.S. Telemetry can assert any claim to these 218-219 MHz licenses, and that granting the U.S. Telemetry applications facilitates the perpetration of a fraud against TV Active and is otherwise contrary to the public interest.<sup>25</sup> TV Active adds that it would be inappropriate for the Commission to defer to the Bankruptcy Court's findings and legal conclusions in this case.<sup>26</sup> In response, U.S. Telemetry asserts that TV Active lacks standing to seek reconsideration of the Branch's action.<sup>27</sup> It also contends that the Petition is procedurally defective because it does not contain specific allegations of fact supported by affidavits of persons with personal knowledge of those facts.<sup>28</sup> An additional procedural flaw in the Petition, according to U.S. Telemetry, is that it apparently addresses only the one license for Mansfield, Ohio, and thus presents no basis for overturning the Commission's consent to the other captioned applications.<sup>29</sup> In addition to interposing these procedural challenges to the Petition, U.S. Telemetry states that the Petition is without substantive merit. Specifically, it contends that TV Active is raising issues that must be resolved by the courts, not the Commission, and that the approval of its assignment applications is consistent with the Commission's duty to accommodate bankruptcy law.<sup>30</sup> We address each of these issues in turn, beginning with the procedural issues.

#### A. *Standing.*

7. U.S. Telemetry says that TV Active has not demonstrated that it has standing to contest the grant of the assignment applications. TV Active's Petition fails the "redressability" criterion for standing, according to U.S. Telemetry, because TV Active seeks relief from its "supposedly invalid agreement with Wincom" and only the Bankruptcy Court can redress that alleged injury.<sup>31</sup> TV Active counters that its

<sup>21</sup> We believe the transaction between Wincom and the Trustee represents an assignment of the licenses, rather than a transfer of control. However, the characterization of the transaction as either an assignment or transfer of control does not bear on our analysis of the legal issues in this case.

<sup>22</sup> Although there is only one Step 1 application and one Step 2 application, there are four Step 3 applications to account for the different U.S. Telemetry affiliates proposed as assignees.

<sup>23</sup> Letter from Stephen Díaz Gavin, Esq., Patton Boggs LLP, to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, dated June 28, 2000, at 3 (Cover Letter to U.S. Telemetry Applications).

<sup>24</sup> *See* n.5, *supra*.

<sup>25</sup> Petition at 1-2; Reply at 2-3, 6-7.

<sup>26</sup> Reply at 7.

<sup>27</sup> Opposition at 6-8.

<sup>28</sup> *Id.* at 8-9.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 11-12.

<sup>31</sup> *Id.* at 6-8.

injury would indeed be redressed by a favorable Commission decision because “rescission of FCC consent would absolutely prevent the fraud upon TV Active from being consummated . . . .”<sup>32</sup> TV Active also argues that it has standing here because the factual basis for claiming that TV Active acquiesced to the assignment is its execution of an FCC filing form.<sup>33</sup> In addition, TV Active says that the Commission has authority to review this matter pursuant to Section 4(i) of the Act,<sup>34</sup> and that it should do so, regardless of whether TV Active is deemed to have standing, because of the substantial public interest and equitable considerations that attend this matter.<sup>35</sup>

8. We reject U.S. Telemetry’s argument that TV Active lacks standing to seek reconsideration of the grant of the subject assignment applications. The action sought by TV Active is rescission of the Commission’s approval of the assignment of the licenses to U.S. Telemetry. If we grant the Petition, TV Active will be restored as the licensee of record. As the licensee of record, TV Active would have a status that confers certain rights and privileges that it does not have now. We believe, therefore, that TV Active has sustained a meaningful injury that is “fairly traceable” to the Branch’s consent to the assignment of the licenses to U.S. Telemetry, and that this injury will be redressed by granting reconsideration. This establishes TV Active’s standing.<sup>36</sup>

*B. Affidavit requirement.*

9. U.S. Telemetry faults the Petition for its failure to provide specific allegations of fact supported by affidavit, as specified in Section 309(d) of the Communications Act (Act).<sup>37</sup> TV Active responds that this argument confuses the requirements associated with petitions to deny with those associated with petitions for reconsideration.<sup>38</sup> TV Active is correct. The affidavit requirement in Section 309(d) of the Act applies to petitions to deny, not to petitions for reconsideration. The relevant requirements for petitions for reconsideration are contained in Section 1.106(d) of our Rules,<sup>39</sup> and the Petition satisfies these requirements.

*C. Scope of requested relief.*

10. U.S. Telemetry observes that the Petition, as written, appears to contest only the assignment of the one license for the Mansfield, Ohio MSA, which was listed in the *Public Notice* as the lead application. “So, to the extent that TV Active has not properly and timely sought reconsideration of the other three Licenses,” U.S. Telemetry states, “it is now time barred from seeking such reconsideration.”<sup>40</sup> TV Active responds to this argument by stating, “As evidenced by the caption and overall argument in the

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<sup>32</sup> Reply at 5.

<sup>33</sup> *Id.*

<sup>34</sup> 47 U.S.C. § 154(i). Section 4(i) provides, “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”

<sup>35</sup> Reply at 5-6.

<sup>36</sup> See *In the Matter of Daniel R. Goodman, Receiver; Dr. Robert Chan, Order on Reconsideration*, 14 FCC Rcd 20547, 20549 ¶ 4 (1999); Chris C. Hudgins, *Order on Reconsideration*, 16 FCC Rcd 7941, 7944 ¶ 8 (WTB PSPWD 2001); MCI Communications Corp., *Memorandum Opinion and Order*, 10 FCC Rcd 1072, 1074 ¶ 11 (CCB 1994).

<sup>37</sup> Opposition at 8-9 (citing 47 U.S.C. § 309(d)).

<sup>38</sup> Reply at 5 n.9.

<sup>39</sup> 47 C.F.R. § 1.106(d).

<sup>40</sup> Opposition at 9.

opposition, that is not the case.”<sup>41</sup> It adds that the caption of the Petition mirrored the wording of the *Public Notice*. Given that we are denying TV Active’s Petition on the merits, the outcome is the same whether the Petition addresses all four licenses or only the Mansfield license. We therefore consider this issue moot.

*D. Propriety of the Branch’s action.*

11. According to TV Active, it never closed on its anticipated transaction with Wincom and thus neither Wincom nor U.S. Telemetry can assert any rights with respect to the licenses.<sup>42</sup> It says that the Bankruptcy Court’s inclusion of TV Active’s licenses in the Wincom bankruptcy estate was apparently based on a mistaken belief that Wincom had actually closed on its transaction with TV Active.<sup>43</sup> In view of this, TV Active continues, FCC consent to the assignment of the licenses to U.S. Telemetry does not serve the public interest.<sup>44</sup> TV Active adds that the approval of these assignment applications is particularly inappropriate given that the licenses are for 218-219 MHz facilities.<sup>45</sup>

12. TV Active also rejects the notion that it is in effect asking the Commission to pass on issues of contract law. It terms U.S. Telemetry’s arguments regarding the impropriety of the Commission attempting to adjudicate contractual rights as nothing more than “red herrings.”<sup>46</sup> It adds that it is Wincom and U.S. Telemetry that have asserted contractual rights regarding the licenses, whereas TV Active’s position is simply that it is the licensee.<sup>47</sup> TV Active further states that any contract-based issues that may have been raised before the Commission in this dispute deal only with the question of whether contractual rights exist, and do not require a determination of the scope and nature of any such rights. TV Active concludes, “This last distinction is critically significant in that it demonstrates why the question of contract interpretation that could complicate the Commission’s processes is not here present.”<sup>48</sup>

13. U.S. Telemetry says that TV Active’s argument is based on contract law in that TV Active contends that it never consummated the anticipated transaction with Wincom and that, as a consequence, Wincom (and by extension U.S. Telemetry) can claim no right to the licenses. U.S. Telemetry contends these contract-based claims lie within the jurisdiction of the Bankruptcy Court and have already been litigated in that forum. In the view of U.S. Telemetry, if TV Active seeks to challenge the propriety of the Bankruptcy Court’s rulings on this matter, it must turn to the federal judiciary, not the Commission.<sup>49</sup>

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<sup>41</sup> Reply at 2 n.3.

<sup>42</sup> Petition at 1-2.

<sup>43</sup> Reply at 3.

<sup>44</sup> Petition at 2. TV Active says it did not litigate these issues before the Bankruptcy Court and, as a consequence, is raising these issues for the first time in the Petition because it never received timely actual notice that U.S. Telemetry was seeking to acquire the licenses. *Id.*; Reply at 3-4 n.7.

<sup>45</sup> TV Active says that permitting the assignment of its licenses on the basis of an unconsummated transaction is particularly inappropriate because (a) the Commission has acknowledged the need to extend assistance to 218-219 MHz Service licensees, and (b) TV Active is a legitimate small business owner. Reply at 2. TV Active further argues that the grant of the U.S. Telemetry assignment applications does not serve the public interest because “TV Active would lose any pecuniary interest it had in the licenses ... [and] U.S. Telemetry would have obtained licenses subject to competitive bidding without obtaining them through competitive bidding and without the Licenses legitimately being traded in the aftermarket.” *Id.* at 6-7.

<sup>46</sup> *Id.* at 7.

<sup>47</sup> *Id.* (stating TV Active’s position as being that “it, and not Wincom, *owns* the licenses.”) (Emphasis in original).

<sup>48</sup> *Id.*

<sup>49</sup> Opposition at 9-11.

14. U.S. Telemetry also asserts that approval of the assignment applications is consistent with the Commission's public interest responsibility to reconcile its policies under the Communications Act with those of the bankruptcy laws.<sup>50</sup> U.S. Telemetry cites the U.S. Court of Appeals decision in *LaRose v. FCC*<sup>51</sup> holding that the Commission is required to consider other federal policies, such as the bankruptcy laws, when fulfilling its mandate to ensure that licensees operate in the public interest.<sup>52</sup> According to U.S. Telemetry, the Commission has previously permitted what would otherwise be unorthodox filing procedures in order to protect innocent creditors of bankrupt entities.<sup>53</sup> In this case, U.S. Telemetry adds, it was within the jurisdiction of the Bankruptcy Court to decide the Wincom estate's rights under the Wincom agreement with TV Active, and the Commission, in keeping with precedent and its consistent practice, should defer to such a judicial determination regarding the validity of contracts between licensees and others.<sup>54</sup>

15. Commission precedent allows us to defer to a court of competent jurisdiction with respect to its legal and factual conclusions regarding a contract dispute.<sup>55</sup> In granting the assignment applications, the Branch deferred to the Bankruptcy Court's determination that the contract granted Wincom the right to apply for the assignment of the four licenses and that the Trustee was the appropriate party to exercise such a right.<sup>56</sup> U.S. Telemetry has been found qualified to be a Commission licensee, as reflected in the grant of a number of applications to assign licenses to U.S. Telemetry. Thus, the Branch's approval of the assignment of the four licenses in issue to U.S. Telemetry was consistent with our rules and policies, and with our obligation under Section 309(a) of the Act to grant applications only when the "public interest, convenience, and necessity will be served."

16. TV Active contends that we should not defer to the Bankruptcy Court nor seek to accommodate its rulings because the Bankruptcy Court erred in finding that the right to apply to the FCC for the assignment of the TV Active licenses belonged to the Wincom bankruptcy estate. The challenged Bankruptcy Court rulings, however, involve the application of contract law to the facts of this case, as determined by the court with the benefit of an evidentiary hearing. We will not relitigate those issues here.<sup>57</sup> If TV Active believes that the Bankruptcy Court erred, it must seek a remedy through the judicial process rather than at the Commission.<sup>58</sup>

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<sup>50</sup> *Id.* at 11-14.

<sup>51</sup> 494 F.2d 1145 (D.C. Cir. 1974) (*LaRose*).

<sup>52</sup> Opposition at 11-12.

<sup>53</sup> *Id.* at 12 (citing D.H. Overmyer Telecasting Co., Inc., *Memorandum Opinion and Order*, 94 FCC 2d 117 (1983) (*D.H. Overmyer*)).

<sup>54</sup> *Id.* at 12-13.

<sup>55</sup> See *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (holding that the Commission is not the proper forum to litigate contract disputes between licensees and others); In re Applications of Arcibo Radio Corporation, *Memorandum Opinion and Order*, 101 FCC 2d 545 (1985) (*Arcibo*).

<sup>56</sup> *January 10 Opinion* at 17-19.

<sup>57</sup> See Station KDEW(AM), *Memorandum Opinion and Order*, 11 FCC Rcd 13683, 13687 ¶ 10 (1996), and cases cited therein (explaining that the Commission will not undertake an independent investigation of allegations that there were "mistakes, illegalities, and irregularities" in a bankruptcy court's decision, but rather will leave such disputes for resolution by tribunals specifically charged with reviewing such matters on appeal).

<sup>58</sup> TV Active states that it did not receive notice of the hearing regarding disposition of the 218-219 MHz Service licenses, and therefore was unable to present its arguments to the Bankruptcy Court. The court, however, expressly determined that, under the Bankruptcy Code, adequate notice of the hearing was provided, *January 10 Opinion* at 3, and we defer to the court on this question. We note, moreover, that TV Active does not challenge the assertion by U.S. Telemetry that the certificate of service states that the Trustee mailed a copy of the Sale Notice to TV Active at the address then contained in the Commission's records, which was in care of its then counsel. Opposition at 3-4. While TV Active asserts that the address was more than two years out of date, Reply at 3-4 n.8, the responsibility for updating the information in the Commission's records is TV Active's. See 47 C.F.R. §§ 1.5, 1.65.

17. TV Active claims that by effectively taking away its licenses against its will, the grant of the U.S. Telemetry applications has worked an injustice – a fraud, in TV Active’s words – and that the grant of the U.S. Telemetry applications must therefore be deemed to be contrary to the public interest. We disagree. As set forth below, the Commission has on several occasions approved applications to assign a license without the licensee’s consent in order to accommodate court decisions that did not encroach on the Commission’s jurisdiction.

18. In *Arecibo*, for example, applications for involuntary assignment of two broadcast licenses from the licensee to a third party were signed, pursuant to court directive, by the Marshall of the Superior Court of Puerto Rico, rather than by an officer of the licensee. The Commission approved the assignments, rejecting the licensee’s contention that a license may be assigned without the incumbent licensee’s consent only when the incumbent licensee is legally disabled from holding the license.<sup>59</sup> The Commission held that, given its policy of deferring to courts of competent jurisdiction in the interpretation and enforcement of contracts, it was proper to accept and process the assignment applications under the Marshall’s signature since the licensee, in refusing to sign the applications, was defying an order of the court concerning a matter clearly within the court’s jurisdiction.<sup>60</sup> The Commission also determined that the court’s actions had not interfered with the licensee’s right to assert before the Commission any argument regarding the assignment applications, and specifically and appropriately left to the Commission the determination of public interest issues raised by the applications.<sup>61</sup> In addition, to permit the assignment to go forward, the Commission waived the Part 73 rule requiring that a duly authorized corporate officer sign the assignment applications.<sup>62</sup>

19. Similarly, in *In re Application of O.D.T. International (O.D.T. International)*,<sup>63</sup> the Commission upheld the action of the Mass Media Bureau in granting an application filed by a bankruptcy court-appointed trustee for involuntary assignment of a license to the trustee, and dismissing a *pro forma* assignment application covering the same license that was filed by the licensee of record. According to the Commission, “[t]he Bureau appropriately took into account the existence of the Bankruptcy Court order ... in making its decision to grant the [trustee’s] application.”<sup>64</sup> Although the licensee in *O.D.T. International* was in bankruptcy, and thus distinguishable on that ground from TV Active, which is not bankrupt, the case remains instructive as precedent. In *O.D.T. International*, the licensee sought to assign the license to another, commonly-owned entity and objected to an application for the involuntary assignment of the license to the Trustee for the estate in bankruptcy. In that instance, the Commission stated that even if it assumed that the licensee was financially qualified, “approval of [the licensee’s] proposal would appear to sanction an evasion of federal policies under the bankruptcy laws. Unless a public interest determination compels a different result, the Commission attempts to accommodate such policies.”<sup>65</sup>

20. In *In re Applications of Dale J. Parsons (Parsons)*,<sup>66</sup> as here, the licensee of record was not in bankruptcy. Rather, the former licensee, who had earlier sold the station to the licensee with Commission

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<sup>59</sup> *Arecibo*, 101 FCC 2d at 549 n.12.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 549 ¶ 10.

<sup>62</sup> *Id.*

<sup>63</sup> *In re Application of O.D.T. International, Memorandum Opinion and Order*, 9 FCC Rcd 2575 (1994).

<sup>64</sup> *Id.* at 2576 ¶ 7.

<sup>65</sup> *Id.* at 2576 ¶ 8.

<sup>66</sup> *In re Application of Dale J. Parsons, Memorandum Opinion and Order*, 10 FCC Rcd 2718 (1995) (*Parsons*), *aff’d per curiam*, 93 F.3d 986 (D.C. Cir. 1996).



approval, had filed for bankruptcy protection. The court-appointed trustee filed an Adversary Proceeding alleging that the licensee's purchase of the station from the now-bankrupt former licensee had been tainted by fraud, and that the licensee had defaulted on its payment obligations to the former licensee. Subsequently, a court-appointed receiver took control of the station and filed applications to assign the license from the licensee to the receiver, and then from the receiver to a purchaser. In consenting to the applications, the Commission held that a license may be assigned without the licensee's consent, and without first affording the licensee a revocation hearing under Section 312 of the Act,<sup>67</sup> as an accommodation to bankruptcy law.<sup>68</sup> To the extent the licensee disputed the rulings of the Bankruptcy Court, the Commission stated, the licensee's remedy was to appeal those rulings to the appropriate federal court.<sup>69</sup>

21. We conclude that there is no basis for departing here from judicial and Commission precedent regarding the treatment of applications for involuntary assignment submitted by officers of the bankruptcy court with the court's authorization.<sup>70</sup> In this case, we believe the public interest, convenience and necessity was served by granting the U.S. Telemetry applications.<sup>71</sup>

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<sup>67</sup> 47 U.S.C. § 312. Section 312 lists seven discrete grounds for revoking a license and requires that a hearing precede revocation.

<sup>68</sup> *Parsons*, 10 FCC Rcd at 2721 ¶ 17.

<sup>69</sup> *Id.* at 2720 ¶ 13.

<sup>70</sup> We find unpersuasive TV Active's argument that approval of the U.S. Telemetry applications contravenes Commission policy because it will cause TV Active to suffer a pecuniary loss and it will permit U.S. Telemetry to acquire these licenses without competitive bidding and without the licenses "legitimately being traded in the aftermarket." Reply at 6-7. Neither the fact that TV Active was a licensee in the 218-219 MHz Service nor TV Active's small business status provides any basis for overriding our general policy of deferring to decisions of courts of competent jurisdiction. Further, TV Active has not identified any reason to treat licenses initially acquired through competitive bidding differently from other licenses for purposes of processing applications for an involuntary assignment of the license or an involuntary transfer of control of the licensee. The cases cited by TV Active do not support such a distinction. Section 309(j)(6)(C) and (D) of the Communications Act, 47 U.S.C. §§ 309(j)(6)(C)-(D), makes clear that the use of competitive bidding in spectrum allocation does not diminish the Commission's authority to regulate spectrum licenses. The Commission has made clear, moreover, that "the general Part 1 transfer and assignment procedures apply to all 218-219 MHz Service licensees, regardless of how they obtained their license." Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration*, WT Docket No. 98-169, 15 FCC Rcd 25020, 25043 ¶ 49 (2000); see also 47 C.F.R. § 95.819(a) (cross-referencing 47 C.F.R. § 1.948 as the rule governing assignment and transfer of control applications in the 218-219 MHz Service).

<sup>71</sup> U.S. Telemetry requested a waiver of Section 1.913(a) of our Rules, 47 C.F.R. § 1.913(a), to the extent needed for acceptance of the Step 1 application because the application is signed by the Trustee rather than an officer, director or duly authorized employee of TV Active. Cover Letter to U.S. Telemetry Applications at 7. However, it is Section 1.917(a), 47 C.F.R. § 1.917(a), that governs who may sign FCC applications. Since the Trustee does not fit squarely into any of the enumerated classes of eligible signatories, we will grant a waiver of Section 1.917. This comports with the waiver granted by the Commission in *Arecibo*. See ¶ 18, *supra*.

**IV. CONCLUSION AND ORDERING CLAUSES**

22. For the reasons set forth above, we deny the petition for reconsideration. The Branch correctly granted the applications to assign the subject licenses from TV Active to U.S. Telemetry.

23. ACCORDINGLY, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, IT IS ORDERED that the petition for reconsideration filed by TV Active on February 23, 2001 IS DENIED.

24. 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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