

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

In re Applications of
INTERACTIVE CONTROL TWO, INC.
WINCOM CORP.
U.S. TELEMETRY-NEW BRUNSWICK, INC.
U.S. TELEMETRY-LANCASTER, INC.
For Consent to the Assignment of Licenses for
Stations KIVD0063 and KIVD0247 in the
218-219 MHz Service
and
INTERACTIVE CONTROL TWO, INC.
SYN-TEL LANCASTER, LLC
SYN-TEL NEW BRUNSWICK, LLC
For Consent to the Assignment of Licenses for
Stations KIVD0063 and KIVD0247 in the
218-219 MHz Service
FCC File No. 0000334962
FCC File No. 0000334985
FCC File No. 0000334966

ORDER ON RECONSIDERATION

Adopted: October 26, 2001

Released: October 26, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us two petitions for reconsideration and reinstatement nunc pro tunc, one filed jointly by U.S. Telemetry-New Brunswick, Inc. and U.S. Telemetry-Lancaster, Inc. (U.S. Telemetry) and one filed jointly by Syn-Tel Lancaster, LLC and Syn-Tel New Brunswick, LLC (Syn-Tel), as well as related pleadings. The petitioners seek reconsideration pursuant to Section 1.106 of our Rules of the

1 Petition for Reconsideration and Reinstatement Nunc Pro Tunc filed by U.S. Telemetry on February 16, 2001 (U.S. Telemetry Petition); Petition for Reconsideration and Reinstatement Nunc Pro Tunc filed by Syn-Tel on March 2, 2001 (Syn-Tel Petition).

2 The additional pleadings are a Motion to Accept Late-Filed Opposition to Syn-Tel Petition for Reconsideration and Reinstatement Nunc Pro Tunc, filed by U.S. Telemetry on March 16, 2001 (U.S. Telemetry Motion); an Opposition to Syncom [sic] Petition for Reconsideration and Reinstatement Nunc Pro Tunc, filed by U.S. Telemetry on March 16, 2001 (U.S. Telemetry Opposition); a Supplement to Petition for Reconsideration and Reinstatement (continued....)

dismissal by the Licensing and Technical Analysis Branch (Branch) of the Public Safety and Private Wireless Division of their respective above-captioned applications,⁴ and they request the reinstatement of those applications *nunc pro tunc*.⁵ Because the petitions raise interdependent issues, and the resolution of either petition will necessarily affect the resolution of the other, we have consolidated these matters and we address both petitions in this *Order on Reconsideration*. For the reasons set forth below, we grant both the U.S. Telemetry Petition and the Syn-Tel Petition insofar as each seeks reversal of the dismissals of the captioned applications, and we reinstate the applications *nunc pro tunc*. In addition, we grant the U.S. Telemetry applications⁶ and dismiss the Syn-Tel applications⁷ pursuant to Section 1.934(d)(2) of the Rules.⁸

II. BACKGROUND

2. Interactive Control Two, Inc. (Interactive) acquired the subject licenses as the successful high bidder in the Federal Communications Commission's (FCC or Commission) July 1994 auction of Interactive Video and Data Service (IVDS) licenses.⁹ In 1995, Interactive entered into an agreement with

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Nunc Pro Tunc, filed by U.S. Telemetry on March 19, 2001 (U.S. Telemetry Supplement); a Motion for Extension of Time [to File a Reply to the U.S. Telemetry Opposition], filed by Syn-Tel on March 20, 2001 (Syn-Tel Motion); a Petition for Waiver of Page Limitation, filed by Syn-Tel on April 9, 2001 (Syn-Tel Waiver Request); and a Reply to Opposition to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc*, filed by Syn-Tel on April 9, 2001 (Syn-Tel Reply). In light of the unusual circumstances of this case, where we have what are in effect mutually exclusive applications to assign the same licenses, we will grant the U.S. Telemetry Motion, the Syn-Tel Motion, and the Syn-Tel Waiver Request, waive the relevant rules, and consider all of the referenced pleadings in order to develop as complete a record as possible in this matter. We note that neither party has objected to any of the other party's procedural requests. We nonetheless remind litigants before the Commission that we will not routinely grant extensions of time for the filing of pleadings, accept late-filed pleadings, or waive the page limitations for pleadings.

³ 47 C.F.R. § 1.106.

⁴ On January 22, 2001, the Branch gave consent to the applications to assign the licenses to U.S. Telemetry. On January 23, 2001, however, the Branch set aside its consent to those applications, and they were subsequently dismissed.

⁵ Public notice of the dismissals was given on January 31, 2001. Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications – Action, *Public Notice*, Report No. 767, at 31-32 (rel. Jan. 31, 2001). On February 16, 2001, the Branch sent letters to the parties explaining the reason for the dismissals. Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Wayne L. Rogers, Syn-Tel New Brunswick LLC (sent by facsimile transmission on February 16, 2001); Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Wayne L. Rogers, Syn-Tel Lancaster LLC (sent by facsimile transmission on February 16, 2001); and Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to K. Steven Roberts, U.S. Telemetry New Brunswick, Inc. (sent by facsimile transmission on February 16, 2001) (collectively, Dismissal Letters).

⁶ Application to Assign the Licenses for Call Signs KIVD0063 and KIVD0247 from Interactive Control Two, Inc. to U.S. Telemetry New Brunswick, Inc., FCC File No. 0000334962, filed February 7, 2000.

⁷ Application to Assign the License for Call Sign KIVD0247 from Interactive Control Two, Inc. to Syn-Tel Lancaster, LLC, FCC File No. 0000334985, filed May 23, 2000; and Application to Assign the License for Call Sign KIVD0063 from Interactive Control Two, Inc. to Syn-Tel New Brunswick LLC, FCC File No. 0000334996, filed May 23, 2000.

⁸ 47 C.F.R. § 1.934(d)(2).

⁹ 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

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Wincom Corporation (Wincom).¹⁰ Although the agreement contemplated that Interactive would assign the subject licenses to Wincom,¹¹ and Interactive executed FCC Form 1046 applications seeking Commission approval of such assignments,¹² Wincom filed for protection under Chapter 11 of the Bankruptcy Code before any assignment applications were filed. The case was subsequently converted to a Chapter 7 liquidation, and Mr. Patrick Malloy III was appointed the Trustee.¹³

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.¹⁴ 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, 1999.¹⁵ Although Interactive 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,¹⁶ 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.¹⁷

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.¹⁸ 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 instant licenses.¹⁹

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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).

¹⁰ The referenced agreement was entered into by World Interactive Network, Inc., the predecessor in interest to Wincom. In addition, subsequent to the agreement, Wincom was consolidated into Winco, Inc. *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, *Memorandum Opinion*, at 4-5, 7 n.2 (Bankr. N.D. Okla. Jan. 10, 2000) (slip opinion) (*January 10 Opinion*). These corporate changes have no relevance to the legal issues before us, and we will refer to the company as Wincom throughout this *Order on Reconsideration* in the interest of clarity.

¹¹ *January 10 Opinion* at 5; *see also* Agreement for Purchase and Sale of Assets, dated August 31, 1995, attached as Exhibit C to the U.S. Telemetry Petition (*Asset Purchase Agreement*).

¹² *January 10 Opinion* at 5-6.

¹³ *See* Letter from Stephen Díaz Gavin, Esq., Patton Boggs LLP, to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, dated February 4, 2000, at 2 (Cover Letter to U.S. Telemetry Applications).

¹⁴ *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).

¹⁵ *January 10 Opinion* at 1.

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 6.

¹⁸ *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.

¹⁹ *Id.* at 17.

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.²⁰ 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)²¹

It further specified that the purchasers must assume all outstanding indebtedness owing to the FCC with respect to the licenses.²² 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"²³

5. The applications to assign the subject licenses to U.S. Telemetry were filed in February 2000. The Trustee submitted contemporaneously three sets of applications to request FCC approval of the transaction. First, the Trustee filed FCC Form 574 and FCC Form 1046²⁴ to request approval for the involuntary assignment of the licenses by operation of law from Interactive to Wincom (Step 1 Application). Second, the Trustee filed FCC Form 703 to request approval for the transfer of control of Wincom by operation of law to the Trustee (Step 2 Application).²⁵ Third, the Trustee filed FCC Form 574 and FCC Form 1046 to request approval for the voluntary assignment of the licenses from the Trustee to U.S. Telemetry (Step 3 Application).²⁶ 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

²⁰ 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).

²¹ 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*).

²² *Id.* at 3-4.

²³ *Id.* at 3.

²⁴ Currently, applications to assign 218-219 MHz licenses 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).

²⁵ 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.

²⁶ Although there is only one Step 1 application and one Step 2 application, there are two Step 3 applications to account for the different entities – U.S. Telemetry-New Brunswick, Inc. and U.S. Telemetry-Lancaster, Inc. – which are proposed as assignees.

the overall transaction.²⁷ The applications all bear the signature of Patrick J. Malloy III as Trustee. Of most significance to this case, Mr. Malloy signed the Step 1 Application on behalf of the assignor, Interactive.

6. On May 23, 2000, while the U.S. Telemetry applications remained pending, the applications to assign the same licenses from Interactive to Syn-Tel were filed. These Syn-Tel applications were signed on behalf of the assignor by Martin Quinn, President of Interactive, who is listed in the Commission's Universal Licensing System database as the contact for the licensee of record.

7. On January 23, 2001, both the U.S. Telemetry applications and the Syn-Tel applications to assign the licenses for stations KIVD0063 and KIVD0247 were dismissed by the Branch, and public notice of the dismissals was provided on January 31, 2001.²⁸ On February 16, 2001, the Branch issued the Dismissal Letters, informing the parties that their applications were dismissed in accordance with Section 1.934 of the Rules because of the apparent conflict between them. "Since the Commission has received two apparently valid applications for assignment of this call sign to different entities," the Branch stated in each case, "your application can not be processed."²⁹ Both U.S. Telemetry and Syn-Tel submitted timely-filed applications for reconsideration and reinstatement *nunc pro tunc*.

III. DISCUSSION

8. U.S. Telemetry and Syn-Tel both contend that Section 1.934 provides no basis for the dismissal of their applications.³⁰ U.S. Telemetry further argues that the Branch erred in dismissing its applications because the Branch did not contemporaneously specify the reasons for the dismissal,³¹ and because the dismissal runs afoul of the directive in Section 310(d) of the Communications Act (Act)³² that, in reviewing an assignment application, the Commission may not consider the qualifications of a party other than the proposed assignee.³³ Although conceding that Syn-Tel's applications are not subject to dismissal under Section 1.934 any more than are its own, U.S. Telemetry says that Syn-Tel's applications are nonetheless subject to dismissal as inconsistent or conflicting applications under Section 1.937(d).³⁴ Syn-Tel argues, on the other hand, that neither set of applications is subject to dismissal at this stage, and that the applications must therefore be designated for hearing.³⁵

9. U.S. Telemetry and Syn-Tel also address the merits of their applications. Citing the U.S. Court of Appeals decision in *LaRose v. FCC*,³⁶ as well as other court and FCC decisions, U.S. Telemetry asserts that its applications should be processed, and Syn-Tel's applications dismissed or denied, because of the Commission's duty to reconcile its licensing decisions with those of bankruptcy courts to the

²⁷ Cover Letter to U.S. Telemetry Applications at 3.

²⁸ *See* n.4, *supra*.

²⁹ Dismissal Letters at 1.

³⁰ U.S. Telemetry Supplement at 2-3; Syn-Tel Petition at 5-7.

³¹ U.S. Telemetry Petition at 5-6.

³² 47 U.S.C. § 310(d).

³³ U.S. Telemetry Petition at 10.

³⁴ U.S. Telemetry Opposition at 7-8 (citing 47 C.F.R. § 1.937(d)).

³⁵ Syn-Tel Petition at 3-5.

³⁶ 494 F.2d 1145 (D.C. Cir. 1974) (*LaRose*) (holding that, in light of the public interest in protecting innocent creditors of bankrupt entities, as embodied in the Commission's *Second Thursday* doctrine, the Commission abused its discretion by rejecting on grounds of administrative finality a petition for reconsideration filed by a receiver in bankruptcy seeking the renewal and assignment of a broadcast license).

greatest extent compatible with its statutory public interest responsibilities.³⁷ Syn-Tel argues, on the other hand, that granting U.S. Telemetry's applications on the basis of the Bankruptcy Court's decision would give undue weight to that decision.³⁸ According to Syn-Tel, the U.S. Telemetry applications are not valid because (1) there is no legal basis for the Step 1 involuntary assignment applications; (2) Interactive and Wincom had consummated or attempted to consummate an assignment without Commission authorization; (3) U.S. Telemetry is itself guilty of wrongdoing in connection with this matter; and (4) Wincom is not financially qualified to be a licensee.³⁹ We address these arguments in turn.

A. *Validity of dismissal pursuant to Section 1.934(a).*

10. None of the grounds for dismissal set forth in Section 1.934(a) apply to the case at hand, U.S. Telemetry asserts.⁴⁰ Syn-Tel concurs that dismissal of the applications cannot be predicated on Section 1.934.⁴¹ Syn-Tel adds, moreover, that nowhere in the Commission's Rules is there a provision permitting "the perfunctory dismissal of two 'apparently valid' assignment applications" for wireless licenses.⁴²

11. We agree with U.S. Telemetry and Syn-Tel that their applications were not subject to dismissal under Section 1.934 of our Rules. Section 1.934(a) specifies five discrete grounds for dismissing applications: at the request of the applicant; if the application is mutually exclusive with another application that is selected or granted in accordance with the Part 1 rules; for failure to prosecute or if the application is found to be defective; if the requested spectrum is not available; or if the application is untimely filed.⁴³ The Branch's dismissals could not be predicated on any of these grounds. Although this may be that exceedingly rare instance in which two assignment applications before the Commission may be deemed to be mutually exclusive, neither was selected or granted, and this precluded the dismissal of either application under Section 1.934 for reasons of mutual exclusivity. Accordingly, we grant the U.S. Telemetry and Syn-Tel Petitions insofar as they seek reconsideration of the dismissal of their respective applications, and we direct the Branch to reinstate the applications *nunc pro tunc*.⁴⁴

B. *Propriety of dismissing Syn-Tel applications pursuant to Section 1.937.*

12. According to U.S. Telemetry, the Syn-Tel applications should be dismissed pursuant to Section 1.937(d), which provides that, during the pendency of an application, "any subsequent inconsistent or conflicting application submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee will not be accepted for filing."⁴⁵ U.S. Telemetry argues that since the Syn-Tel applications are inconsistent with the previously filed U.S. Telemetry applications, they are subject to

³⁷ U.S. Telemetry Petition at 6-10; U.S. Telemetry Opposition at 8-13.

³⁸ Syn-Tel Petition at 8-10; Syn-Tel Reply at 7-8.

³⁹ Syn-Tel Petition at 10-15; Syn-Tel Reply at 9-23.

⁴⁰ U.S. Telemetry Supplement at 2-3.

⁴¹ Syn-Tel Petition at 5-7.

⁴² *Id.* at 3.

⁴³ 47 C.F.R. § 1.934(a).

⁴⁴ This action renders moot the issues raised by U.S. Telemetry regarding the adequacy and timing of the Branch's notification of the applicants as to the reasons for the dismissals. It also renders moot U.S. Telemetry's argument that dismissing its applications due to the filing of the Syn-Tel applications contravened the directive in Section 310(d) of the Act that the Commission consider only the qualifications of the proposed assignee and not some third party.

⁴⁵ 47 C.F.R. § 1.937(d).

dismissal under Section 1.937(d).⁴⁶ Syn-Tel disputes that Section 1.937(d) is a basis for dismissing its applications. Section 1.937, Syn-Tel says, is intended to prevent repetitious and vexatious filings by parties who have had earlier applications dismissed, implementing the legal principle *res judicata*.⁴⁷ Thus, it does not apply in these circumstances, Syn-Tel continues, because when it filed its applications, there were no pending or conflicting applications “submitted by, on behalf of, or for the benefit” of Interactive. For the Commission to place its imprimatur on U.S. Telemetry’s construction of Section 1.937(d), Syn-Tel argues, would convert the provision, untenably, into a first-to-file rule.⁴⁸

13. We disagree with U.S. Telemetry that the Syn-Tel applications are subject to dismissal under Section 1.937(d) of the Rules. To be deemed repetitive of, or in conflict with, a pending application under this provision, the later-filed application(s) must be “submitted by, on behalf of, or for the benefit of the same applicant [or] its successor or assignee.”⁴⁹ Here, although Interactive is nominally a proposed assignor in both sets of applications, the true parties in interest clearly are not the same, and it would elevate form over substance to view the Syn-Tel applications as having been filed by, on behalf of, or for the benefit of the parties in interest to the U.S. Telemetry applications. The cases cited by U.S. Telemetry to support the applicability of Section 1.937(d) to the Syn-Tel applications fail to carry its argument. *Big Wyoming Broadcasting Corp.*⁵⁰ and *Jersey Shore Broadcasting Corp. v. FCC*⁵¹ are both inapposite because the inconsistent applications dismissed in those cases, unlike the Syn-Tel applications in the instant case, were filed by precisely the same parties in interest who had filed the earlier applications with which they conflicted.

C. *Need for a hearing.*

14. Syn-Tel argues that the Commission must designate the U.S. Telemetry and Syn-Tel applications for hearing.⁵² According to Syn-Tel, where the Commission is unable to make a determination on the existing record as to which of two or more competing applications should be granted, the Commission is required under Section 309(e) and Section 310(d) of the Act⁵³ to hold a hearing to resolve the matter. Syn-Tel cites *Citizens Committee to Save WEFM v. FCC*⁵⁴ for the proposition that a hearing is mandated by Section 309(e) whenever “the Commission ‘for any reason’ is unable, on the basis of the application, pleadings and officially noticeable materials, to make the requisite finding that the public interest would be served.”⁵⁵

15. We disagree with Syn-Tel that the hearing requirements of the Act provide the appropriate avenue for resolution of this dispute. We can discern no “substantial and material questions of fact” that require resolution in a hearing.⁵⁶ We defer to the factual findings of the Bankruptcy Court insofar as they provide the factual underpinnings of the court’s application of contract law to the dispute before it in the

⁴⁶ U.S. Telemetry Opposition at 6-8.

⁴⁷ Syn-Tel Reply at 4-5.

⁴⁸ *Id.* at 5-6.

⁴⁹ 47 C.F.R. § 1.937(d).

⁵⁰ *Big Wyoming Broadcasting Corp., Memorandum Opinion and Order*, 2 FCC Rcd 3493 (1987).

⁵¹ 37 F.3d 1531 (D.C. Cir. 1994).

⁵² Syn-Tel Petition at 3-5.

⁵³ 47 U.S.C. §§ 309(e), 310(d).

⁵⁴ 506 F.2d 246, 259 (D.C. Cir. 1974).

⁵⁵ Syn-Tel Petition at 4.

⁵⁶ *See* 47 U.S.C. § 309(d)(2), (e).

*January 10 Opinion.*⁵⁷ We therefore decline Syn-Tel's invitation to relitigate factual matters concerning, for example, the existence, legitimacy, and nature of any contract between Interactive and Wincom. The only other disputed factual matter pertains to whether an unauthorized assignment of the subject licenses occurred. As discussed below, we find that those allegations do not warrant a hearing, and that this licensing dispute can indeed be resolved on the basis of the applications and pleadings.

D. Allegations that an unauthorized assignment of the licenses occurred.

16. Syn-Tel says the U.S. Telemetry applications are not valid applications because the transaction between Interactive and Wincom resulted in a consummated assignment without the requisite prior approval of the Commission.⁵⁸ It points to the statement by the Bankruptcy Court that “*all conditions to the Agreements [between the original 218-219 MHz licensees and Wincom] were resolved to the satisfaction of the licensee or were otherwise waived; that the consideration had been exchanged; and that the assignments of licenses had occurred.*”⁵⁹ Syn-Tel argues that these circumstances, and particularly the release by the escrow agent of the stock certificate representing Interactive's ownership interest in Wincom preferred stock, evince an unauthorized assignment or at least an attempt to complete an unauthorized assignment. Syn-Tel contends that the Commission “has expressly stated that releasing documents and funds from escrow prior to approval is a violation of section 310(d) of the Act,”⁶⁰ citing *Oyate, Inc.*⁶¹ Syn-Tel adds that, under Commission precedent, an assignment is considered to be consummated on the date reflected in the documents associated with the transaction, citing *In re Kevin Hackler*⁶² as an example.⁶³ Syn-Tel also argues that where documents have not been executed, the Commission has found that a transaction was consummated when consideration and ownership of the license had passed.⁶⁴ Syn-Tel concludes that, under these precedents, an unauthorized assignment or attempted assignment of the licenses from Interactive to Wincom occurred on the closing date of the asset purchase agreement between those parties.⁶⁵ Finally, Syn-Tel says U.S. Telemetry may not invoke the *Second Thursday* doctrine to permit the transaction to go forward despite evidence of wrongdoing because a condition precedent to the invocation of the *Second Thursday* doctrine is that the transferor of the subject licenses be in bankruptcy, whereas in this case Interactive is solvent, and because U.S.

⁵⁷ See ¶¶ 28-31, *infra*.

⁵⁸ Syn-Tel Petition at 10-11.

⁵⁹ *Id.* at 11 (citing *January 10 Opinion* at 13) (emphasis in *January 10 Opinion*).

⁶⁰ Syn-Tel Reply at 10.

⁶¹ *Oyate, Inc., Memorandum Opinion and Order*, 3 FCC Rcd 6759 (1988) (*Oyate*). In *Oyate*, Syn-Tel observes, the Commission held that “[b]ecause [it] had not yet approved the sale of [the station], the certificates should not have been taken out of escrow.” *Id.* at 6762 ¶ 25.

⁶² *In re Kevin Hackler, Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 12928 (EB 2000) (*Hackler*).

⁶³ Syn-Tel Petition at 12.

⁶⁴ *Id.* at 12-13 (citing *Voice of Reason, Decision*, 37 FCC 2d 686, 692-93 ¶¶ 15-16 (Rev. Bd. 1972) (*Voice of Reason*)).

⁶⁵ *Id.* at 13. Syn-Tel adds that Wincom apparently had a motive to consummate the transaction for financial reporting purposes. It alleges, among other things, that Wincom represented itself prematurely as the licensee in certain written communications; that Wincom and affiliated companies made material misrepresentations to licensees with which they contracted; and that Wincom wanted to make its interests in all of the 218-219 MHz licenses appear less contingent than they were in order to give a favorable impression of its financial condition to accountants and/or the Securities and Exchange Commission. Syn-Tel Reply at 15-19.

Telemetry may itself be guilty of wrongdoing.⁶⁶

17. U.S. Telemetry denies that there was an unauthorized assignment or transfer of the licenses at any point. It says that the Bankruptcy Court findings relied upon by Syn-Tel in making this claim indicate only the existence of a contract pursuant to which Wincom acquired the right to seek assignment of the licenses.⁶⁷ U.S. Telemetry further argues that even if it could be concluded that there had been an unauthorized transaction, the involuntary assignment of the licenses to Wincom is permissible under the Commission's *Second Thursday* doctrine because no Wincom principal would benefit from the ultimate assignment of the licenses to U.S. Telemetry or play any role in the ultimate assignees.⁶⁸

18. We conclude that Syn-Tel has failed to establish a *prima facie* case warranting further inquiry into the question of whether an unauthorized assignment of the licenses from Interactive to Wincom had occurred.⁶⁹ During the Bankruptcy Court proceeding, the issue was whether Wincom had acquired *rights to seek FCC approval* for assignment of the licenses,⁷⁰ and the need to secure advance FCC approval for the assignment was acknowledged by the parties from the beginning and was also explicit in the Bankruptcy Court's *January 10 Order*.⁷¹ Accordingly, the Bankruptcy Court's statements from the *January 10 Opinion* cited by Syn-Tel pertain only to the contractual relations between the parties, and are not a conclusion that the parties had circumvented the requirement for the Commission's advance approval to a license assignment. Based on the record before us, we can discern no basis to inquire further into this matter.

⁶⁶ Syn-Tel Reply at 11-13. See *Second Thursday Corp., Memorandum Opinion and Order*, 22 FCC 2d 515, *recon. granted*, 25 FCC 2d 112 (1970) (*Second Thursday*). The *Second Thursday* doctrine is an exception to the general rule that if basic qualifications issues have been designated against a licensee, the licensee may not assign or transfer its licenses until the matter has been resolved and the licensee has been found qualified to hold those licenses. Under *Second Thursday*, when such a licensee has gone into bankruptcy, the license may be assigned, usually by a trustee in bankruptcy, if it is established that "the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefits from favorable action on the applications or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors." *Second Thursday*, 22 FCC 2d at 516 ¶ 5.

⁶⁷ U.S. Telemetry Opposition at 13-14.

⁶⁸ *Id.* at 14.

⁶⁹ We observe at the outset that if an unauthorized assignment of the licenses had indeed occurred, it would reflect on the basic qualifications not only of Wincom but also of Interactive. The designation of a basic qualifications issue against Wincom would seem to necessitate designation of a basic qualifications issue against Interactive as well. Under our *Jefferson Radio* policy, which precludes the approval of a license assignment when designated issues regarding the basic qualifications of the licensee remain unresolved, this would present an obstacle to the grant of the Syn-Tel applications at least as great as it would to the U.S. Telemetry applications. See *Jefferson Radio Co. v. FCC*, 340 F. 2d 781 (D.C. Cir. 1964).

⁷⁰ See, e.g., *January 10 Opinion* at 18 (concluding that "the Trustee met his burden of showing that the estate possesses an interest in the licenses, that being the right to apply for FCC approval of the assignments...")

⁷¹ *January 10 Opinion* at 19 (holding that "[t]he sale to the purchasers is *contingent* upon FCC approval, as stated in the Trustee's motions ...") (emphasis in original); *Asset Purchase Agreement* at 2 (specifying that "[i]mmediately upon receipt of FCC approval for the transfer of the Licenses, Seller shall deliver to Purchaser possession of the Licenses and the Transfer Documents (the 'Approval Date')." (emphasis added). Throughout the *Asset Purchase Agreement*, the parties make clear that the transaction is not to be consummated without FCC approval and is to be subject to any conditions imposed by the Commission in conjunction with that approval. See, e.g., *Asset Purchase Agreement* at 5 (Clause 9(b), Procurement of FCC Approvals, and Clause 9(d), Special FCC Conditions). Of course, in determining whether an unauthorized assignment of a license may have occurred, we must look to the actual conduct of the parties as well as the terms of the agreement between them. Here, however, the record is devoid of any allegation that Wincom had assumed any control of any operating facilities authorized by the subject licenses or otherwise exercised the prerogatives of a licensee.

19. The cases cited by Syn-Tel do not persuade us otherwise. In none of the cited cases did the Commission purport to establish a principle of general applicability as to when an assignment or transfer of control is to be deemed consummated for purposes of determining whether there has been a violation of Section 310(d) of the Act and the implementing rules. In all of the cited cases, the decision was clearly fact-specific, holding at most only that, under the particular circumstances under review, an unauthorized transaction had occurred. These cases are readily distinguishable from the instant one, moreover, because here there is an agreement between the parties specifically contemplating that the requisite applications would be filed with the Commission, and there is no evidence that Wincom asserted control of an operating facility prior to Commission approval.⁷² In sum, the cases relied upon by Syn-Tel do not provide a basis for finding that an unauthorized assignment occurred in the circumstances of this case.

E. Allegations against U.S. Telemetry.

20. Syn-Tel alleges that there is sufficient evidence of wrongdoing on the part of U.S. Telemetry to warrant a hearing on its basic qualifications to be a licensee. Syn-Tel accuses U.S. Telemetry of actively suppressing the disclosure of information regarding Wincom's participation in the alleged unauthorized assignment of the licenses so that U.S. Telemetry might purchase the licenses from the Wincom estate at a favorable price.⁷³ Syn-Tel asserts that U.S. Telemetry "played a central and highly unusual role" in settlements between the Trustee and other 218-219 MHz licensees that resulted in the exclusion of certain licenses from the bankruptcy estate.⁷⁴ According to Syn-Tel, U.S. Telemetry apparently made payments to the estate in conjunction with these settlements. This circumstance, Syn-Tel argues, reflects U.S. Telemetry's recognition of the weakness of Wincom's, and by extension U.S. Telemetry's, claim to the licenses.⁷⁵

21. We find no basis for further inquiry into the basic qualifications of U.S. Telemetry. Syn-Tel's allegations against U.S. Telemetry are conjectural, and even if proven would not call into question U.S. Telemetry's qualifications to be a licensee. Syn-Tel says that the record suggests that U.S. Telemetry acted to conceal violations of the Commission's Rules, referring to the alleged unauthorized assignment of the licenses. We have determined, however, that the record does not support that allegation. Moreover, Syn-Tel offers no factual basis for its claim that U.S. Telemetry sought to suppress the disclosure of information regarding the transaction. Syn-Tel does not explain what U.S. Telemetry allegedly did, or omitted to do, to suppress disclosure of this information. Additionally, we note that, standing alone, an applicant's participation in the full or partial settlement of litigation after considering the possibility of an adverse decision would not reflect on its character. Accordingly, we reject Syn-Tel's

⁷² In *Hackler*, the Enforcement Bureau concluded only that a transfer of control occurred on or about the same date on which a licensee executed to another party lien documents conveying, among other things, all pertinent station equipment, accounts receivable, furniture, fixtures, and FCC licenses for an operating FM radio station. *Hackler*, 15 FCC Rcd at 12930 ¶ 6. Similarly, in *Voice of Reason*, the Review Board did not determine that the release of funds from escrow always constitutes an unauthorized transfer of control, but only that such a transfer of control had occurred in the particular circumstances of that case because, as consideration for the release, the party in question received and exercised actual day-to-day control of the station. *Voice of Reason*, 37 FCC 2d at 692-93 ¶¶ 15-16. Finally, when read in context, it is clear that the Commission's statement in *Oyate* that "[b]ecause the Commission had not yet approved the sale of [the station], the certificates should not have been taken out of escrow," *Oyate*, 3 FCC Rcd at 6762 ¶ 25, does not represent a Commission determination that the removal of the certificates from escrow constituted an unauthorized transfer of control, but only that it complicated the resolution of the matter for the interested parties.

⁷³ Syn-Tel Reply at 20-23.

⁷⁴ *Id.* at 20.

⁷⁵ *Id.* at 22.

request to designate a basic qualifications issue against U.S. Telemetry.⁷⁶

F. Wincom's financial qualifications.

22. Syn-Tel also challenges the Step 1 applications for assignment of the licenses from Interactive to Wincom on the ground that Wincom's bankruptcy precludes a finding that Wincom is financially qualified to be a licensee.⁷⁷ Syn-Tel cites *Tri-State Communications*⁷⁸ as an "analogous case," and argues that the U.S. Telemetry applications "fly in the face of the Commission's decision in *Tri-State*, seeking not only an assignment of a license to a bankrupt entity, but to a bankrupt entity that was already in bankruptcy the day the application was filed."⁷⁹ U.S. Telemetry says *Tri-State* is inapposite because it involved an applicant in a comparative hearing for a new broadcast facility, where the Commission was called upon to make a predictive judgment about which applicant was best qualified to operate the proposed station in the public interest.⁸⁰

23. We believe Syn-Tel's argument on this point is misplaced. To support its argument that Wincom's lack of financial qualifications precludes a grant of the U.S. Telemetry applications, Syn-Tel relies on a single case, *Tri-State Communications*. That case involved a comparative hearing to choose among mutually exclusive applicants for a new FM broadcast station, and does not suggest that the financial qualifications of an entity that does not intend to operate an FCC-licensed facility, such as Wincom, must be evaluated.⁸¹

24. Under previous license assignment methods, the Commission held that it is not necessary to evaluate the financial qualifications of an entity which is under the supervision of a bankruptcy court and is holding the license(s) only temporarily during the pendency of the bankruptcy proceeding.⁸² In addition, the Commission has made clear that this policy is not confined to receivers and trustees in bankruptcy but also applies to any entity that may be assigned the license temporarily in conjunction with a bankruptcy proceeding.⁸³ Under the three-step U.S. Telemetry applications, the assignment to Wincom

⁷⁶ Having determined that further inquiry into the basic qualifications of the parties is not warranted, we need not address their arguments regarding the applicability of the *Second Thursday* doctrine to this case.

⁷⁷ Syn-Tel Petition at 13-15.

⁷⁸ *Tri-State Communications, Summary Decision*, 4 FCC Rcd 6708 (ALJ 1989) (*Tri-State*).

⁷⁹ Syn-Tel Petition at 14.

⁸⁰ U.S. Telemetry Opposition at 15.

⁸¹ See *Tri-State*, 4 FCC Rcd at 6709 ¶¶ 9-10.

⁸² See, e.g., *Gulf Coast Radio, Inc., Memorandum Opinion and Order*, 45 FCC 1865, 1866 ¶ 4 (1964) (holding that the financial and other qualifications of a receiver in bankruptcy "require no detailed consideration" given that the assignment of the license to the receiver "by its very nature is a temporary measure."); *LaRose*, 494 F.2d at 1148 n.4. (observing with approval that the Commission's practice in cases involving an involuntary assignment to a receiver in bankruptcy is to treat the receiver's qualifications as irrelevant, and to focus on the qualifications of the ultimate assignee); *D.H. Overmyer Telecasting Co., Inc., Memorandum Opinion and Order*, 94 FCC 2d 117, 124 ¶ 10 (1983) (*D.H. Overmyer*) (reasoning that it is not necessary to consider the qualifications of an assignee where the assignee is to hold the license only temporarily, and under the supervision of the Bankruptcy Court, until the bankruptcy estate is settled and the ultimate licensee is approved.). This policy comports with the Communications Act; Section 308(b) of the Act does not mandate scrutiny of the financial qualifications of an applicant if the Commission "deems it irrelevant to its regulatory scheme." *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 645 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

⁸³ *D.H. Overmyer*, 94 FCC 2d at 124 ¶ 11 (stating "we find it inappropriate to accept [the] proposition that distinctions should be made between court appointed agents, ... debtors in possession, trustees and receivers. While each designation has its own significance under federal bankruptcy law, they all represent essentially the same basic

(continued....)

is an intermediate step. Ultimately, it is U.S. Telemetry, not Wincom, which proposes to operate the stations, and thus it is only the financial qualifications of U.S. Telemetry, not those of Wincom, that should concern us here. Furthermore, at the time the three-step transfer was approved, the estate had already made provision for the continued payment of the financial obligations associated with the license through its agreement with U.S. Telemetry. Consequently, the intermediate transfer to the estate did not raise any issue of the financial qualifications of the estate itself.⁸⁴

25. Syn-Tel's argument also fails to acknowledge that the Commission has determined that its interest in the financial integrity of assignees of auctioned licenses, such as the licenses at issue here, can be met through self-certifications and financial documents.⁸⁵ Where a licensee has signed a promissory note, the Commission requires that the assignor, the assignee, and the Commission execute loan documents, typically taking the form of an assignment and assumption agreement, including a self-certification on the part of the assignee.⁸⁶ Commission approval of the U.S. Telemetry applications will be conditioned on full compliance with these documentation requirements,⁸⁷ and this adequately addresses any concerns relating to the financial qualifications of any of the parties to those applications.

G. *Effect of Bankruptcy Court ruling.*

26. U.S. Telemetry argues that its applications should be processed over Syn-Tel's because to do otherwise would be inconsistent with the Commission's duty to reconcile its public interest responsibilities for radio licensing with the requirements of the Bankruptcy Code and the decision of the Bankruptcy Court.⁸⁸ 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.⁸⁹ In this case, U.S. Telemetry adds, it was within the jurisdiction of the Bankruptcy Court to decide Wincom's contract rights under its agreement with Interactive, 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.⁹⁰ According to Syn-Tel, its applications should be processed because Interactive, as the licensee of record, is the only party authorized to seek assignment of the licenses, and Interactive has chosen to assign the licenses to Syn-Tel.⁹¹ In what Syn-Tel terms "an obvious effort to

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situation with regard to the control of the licensee; *i.e.*, in each case a licensee is not an independent entity, but subject to the control of a court appointed and supervised officer.”)

⁸⁴ The result here may not hold true if we were presented with an involuntary assignment to an entity that lacked the ability to ensure payment of debt obligations associated with the license and make the required certifications pertaining to financial qualifications.

⁸⁵ See Applications for Assignment of Broadband Personal Communications Services Licenses, *Order*, 14 FCC Rcd 1126 (1998) (*Tritel Order*) (holding that execution of required documentation, including an Assignment and Assumption Agreement, strikes a reasonable balance in satisfying the Commission's interests in the financial integrity of a licensee in an auction context.) In the *Tritel Order*, the Commission noted the great weight it would place on certifications of solvency, and that a misrepresentation in that context may be grounds for a revocation of license. *Id.* at 1127 ¶ 3.

⁸⁶ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order of Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 15 FCC Rcd 15293, 15312 (¶ 32) (2000).

⁸⁷ See ¶¶ 34-35, *supra*.

⁸⁸ U.S. Telemetry Petition at 6 (citing *LaRose*).

⁸⁹ *Id.* at 6-7.

⁹⁰ *Id.* at 7-9.

⁹¹ Syn-Tel Petition at 7.

make too much of the decision of the United States Bankruptcy Court,” U.S. Telemetry is, in Syn-Tel’s view, asking the Commission to take the unprecedented step of approving the involuntary assignment of licenses from Interactive to Wincom.⁹²

27. Conceding that the Commission has a history of working with bankruptcy courts and trustees to effectuate license transactions that will benefit innocent creditors, Syn-Tel says the instant case is distinguishable from those earlier cases because Interactive is not itself in bankruptcy, and never lawfully transferred its license to Wincom. Should the U.S. Telemetry applications be granted, Syn-Tel says, a licensee who has not committed fraud or declared bankruptcy will have its license taken from it involuntarily.⁹³ Syn-Tel further asserts that, in the line of cases relied upon by U.S. Telemetry, “it appears that the Commission had not taken a hard look at the qualifications of the potential licensees, but instead deferred the vast majority of its review to the decision of the courts.”⁹⁴ Syn-Tel suggests that the Commission deferred to the courts in these cases because a failure to accommodate the court decision in the licensing process threatened a disruption of service. Because no service has been initiated under these 218-219 MHz licenses, there is no similar risk of disruption here, according to Syn-Tel.⁹⁵

28. In this instance, we have determined to defer to a court of competent jurisdiction with respect to its interpretation of a contract entered into by the parties, *i.e.*, Interactive and Wincom, and its attendant conclusion that Wincom acquired a right to apply to the Commission for the assignment of the subject licenses. We also acknowledge the Bankruptcy Court’s authority to allow the Trustee for Wincom to exercise such a right. Our actions are consistent with our obligation under Section 309(a) of the Act to grant applications only when the “public interest, convenience, and necessity will be served.”⁹⁶

29. In *Arecibo Radio Corporation*,⁹⁷ 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.⁹⁸ The Commission held that, given its policy of deferring to courts of competent jurisdiction in the

⁹² *Id.* at 8.

⁹³ Syn-Tel Reply at 7.

⁹⁴ *Id.* at 7-8.

⁹⁵ *Id.* at 8.

⁹⁶ Syn-Tel asserts repeatedly in its pleadings that we must not avoid our licensing responsibilities under the Act by giving too much weight to the Bankruptcy Court decisions. We defer to the Bankruptcy Court only with respect to matters within its jurisdiction, and we make here an independent determination that U.S. Telemetry is qualified to be a Commission licensee and that the public interest will best be served by the grant of the U.S. Telemetry applications. *See* ¶ 32 *supra*. In addition, to the extent that Syn-Tel claims that the Bankruptcy Court’s factual findings and legal conclusions are flawed because they are based on an incomplete record, we note that the Court determined that legally adequate notice had been provided to all interested parties. If Syn-Tel believes that its failure to participate in the Bankruptcy Court proceeding was due to legally insufficient notice, and that its participation would have resulted in a different decision by the Bankruptcy Court, it must turn to the federal courts, not the Commission, for relief from any such alleged legal error. Litigants complaining of unfairness in a Bankruptcy Court proceeding have available to them avenues of recourse within the judicial system. *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).

⁹⁷ *Arecibo Radio Corporation, Memorandum Opinion and Order*, 101 FCC 2d 545 (1985) (*Arecibo*).

⁹⁸ *Id.* at 549 n.12.

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.⁹⁹ 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.¹⁰⁰ Accordingly, we reject Syn-Tel's contention that the Step 1 application – the application for involuntary assignment of the licenses from Interactive to Wincom – is unprecedented and without legal basis.

30. As we have established above, Commission precedent allows us to recognize the contract right granted to Wincom, *i.e.*, the right to apply for the assignment of licenses. As we explain below, Commission precedent also allows us to give deference to the Bankruptcy Court's conclusion that such a right is part of the estate in bankruptcy and that the Trustee is authorized to exercise that right.

31. For example, the Commission has permitted a bankruptcy trustee, receiver or other court-appointed agent to file applications to assign licenses to himself/herself and then to a third party without the acquiescence of the licensee.¹⁰¹ The Commission accepted and processed such applications even when the licensee of record was not bankrupt or otherwise subject to financial disqualification.¹⁰² In doing so, the Commission rejected arguments that it may not permit assignment of a license without the licensee's consent in the absence of a revocation proceeding pursuant to Section 312 of the Act¹⁰³ or a finding that the licensee is under a legal disability.¹⁰⁴ We find, therefore, that the acceptance and grant of the Step 2 and Step 3 applications, like that of the Step 1 application, is consistent with precedent and in accord with established Commission policy.

32. 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.¹⁰⁵ 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, and there are no paramount policy considerations that would warrant denial of the U.S.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 549 ¶ 10.

¹⁰¹ See *O.D.T. International, Memorandum Opinion and Order*, 9 FCC Rcd 2575 (1994) (*O.D.T. International*); In the Matter 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).

¹⁰² In *Parsons*, the licensee was not in bankruptcy. *Parsons*, 10 FCC Rcd at 2720 ¶ 11. In *O.D.T. International*, moreover, the Commission stated that even if it assumed that the licensee in that case 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." *O.D.T. International*, 9 FCC Rcd at 2576 ¶ 8.

¹⁰³ 47 U.S.C. § 312. Section 312 lists seven discrete grounds for revoking a license and requires that a hearing precede revocation.

¹⁰⁴ See *Parsons*, 10 FCC Rcd at 2721 ¶ 17 (rejecting argument that licensee must be afforded a Section 312 hearing); *Arecibo*, 101 FCC 2d 549 n.12 (rejecting argument that legal disability of the licensee is a prerequisite).

¹⁰⁵ Syn-Tel also argues that the instant case is distinguishable from precedent because, in the earlier cases, the Commission paid deference to the Bankruptcy Court decisions at least partly out of a concern to avoid separating the license from the licensed facilities, which could result in a disruption of service. This concern, Syn-Tel says, is absent from the instant case. Syn-Tel Reply at 8. Syn-Tel, however, does not cite a case in which it was held that the concern about disruption of service was a significant decisional factor.

Telemetry applications.¹⁰⁶ Thus, we deny the Syn-Tel Petition insofar as it requests that we grant the Syn-Tel applications rather than the U.S. Telemetry applications.

33. Having determined that the grant of the U.S. Telemetry applications will serve the public interest, we dismiss the reinstated Syn-Tel applications under Section 1.934(d)(2) of the Rules.¹⁰⁷ Section 1.934(d)(2) provides, in pertinent part, that “[t]he Commission may dismiss without prejudice an application that it finds to be defective. An application is defective if: ... (2) [i]t requests an authorization that would not comply with one or more of the Commission’s rules” and does not seek a waiver to remedy this defect.¹⁰⁸ The Syn-Tel applications are defective within the meaning of Section 1.934(d)(2) because, as explained above, the Bankruptcy Court, based upon its determination that Wincom possessed the contract right to apply for the assignment of licenses, authorized the Trustee to file assignment applications for these licenses. Commission precedent allows us to defer to the Court’s decision in this regard. Therefore, the Syn-Tel assignment applications were signed by a party who was not authorized to seek assignment of the licenses. The lack of a valid authorized signature violates Section 1.917 of our Rules.¹⁰⁹ Thus, the Syn-Tel applications are subject to dismissal for this failure to comply with Section 1.917.¹¹⁰ Accordingly, our decision here is supported by Commission precedent and comports with our rules.

34. We note that both the Wincom bankruptcy estate and Interactive filed elections for these licenses pursuant to the restructuring plan for the 218-219 MHz Service. Both elected the option of reamortization and resumption of payments. We accepted Interactive’s election and rejected the bankruptcy estate’s election because we accepted elections only from the licensees of record as of the election date.¹¹¹ In light of our decision herein, we reject Interactive’s election and accept the Wincom bankruptcy estate’s election *nunc pro tunc*. The payment obligations attending the resumption option continue to attach to these licenses. Accordingly, as an eligible licensee that elected resumption, Wincom must execute loan documents.¹¹²

¹⁰⁶ U.S. Telemetry requests 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 Interactive. Cover Letter to U.S. Telemetry Applications at 6-7. However, it is Section 1.917(a), 47 C.F.R. § 1.917(a), that specifies 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 § 1.917. This comports with the waiver granted by the Commission in *Arecibo*. See *Arecibo*, 101 FCC 2d at 549 ¶ 10 (waiving the Part 73 rule requiring that a duly authorized corporate officer of the licensee sign the assignment applications).

¹⁰⁷ 47 C.F.R. § 1.934(d)(2).

¹⁰⁸ *Id.*

¹⁰⁹ 47 C.F.R. § 1.917.

¹¹⁰ Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027, 21068 ¶ 89-90 (1998) (holding that an application is defective under Section 1.934(d) if it is filed “without a valid signature.”)

¹¹¹ Wireless Telecommunications Bureau Announces the Elections for the 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 5901 (2001).

¹¹² Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, WT Docket No. 98-169, 15 FCC Rcd 1497, 1524-25 ¶ 44 (1999) (*Restructuring Order*). In the *Restructuring Order*, the Commission adopted a restructuring plan for existing 218-219 MHz licensees that acquired their licenses through competitive bidding and met specified eligibility criteria. Under the restructuring plan, eligible licensees were permitted to choose (i) reamortization of principal and interest installment payments over a ten-year period; (ii) an amnesty option wherein the licensee would surrender any licenses it chose to the Commission for subsequent auction and, in return, have all of the outstanding

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35. In keeping with our general practice with respect to assignment applications involving 218-219 MHz licenses to which an indebtedness to the FCC attaches,¹¹³ we condition the grant of the U.S. Telemetry applications upon full and timely performance of the payment obligations under the installment payment plan. All installment payments must be current on the consummation date. Our approval of the U.S. Telemetry applications is further conditioned upon the execution of all Commission loan documents by the parties, and upon U.S. Telemetry's execution of the applicable financing statements (*i.e.*, the UCC-1 Forms) and payment of all costs associated with the preparation and recordation of the financing statements. It is further conditioned upon full payment of any required unjust enrichment payments on or before the consummation date.¹¹⁴ Upon receipt of the notification required by Section 1.948(d) of the Rules,¹¹⁵ and satisfaction of all requisite conditions, including execution of the appropriate documents, we will consider the assignment "complete" and will issue the licenses to U.S. Telemetry. Failure of the parties to comply with Section 1.948(d) or any specific condition described herein will result in automatic cancellation of the Commission's assignment approval, and dismissal of the applications.

F. CONCLUSION AND ORDERING CLAUSES

36. For the reasons set forth above, we grant the petitions for reconsideration insofar as they seek reinstatement *nunc pro tunc* of the subject assignment applications. We further determine that the public interest will be served by the grant of the U.S. Telemetry applications, rather than the Syn-Tel applications, and we accordingly dismiss the Syn-Tel applications.

37. 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 petitions for reconsideration filed by U.S. Telemetry and Syn-Tel on February 16, 2001 and March 2, 2001, respectively, ARE GRANTED IN PART insofar as they seek reinstatement of the applications *nunc pro tunc*.

38. IT IS FURTHER ORDERED that the Application to Assign the Licenses for Call Signs KIVD0063 and KIVD0247 from Interactive Control Two, Inc. to U.S. Telemetry New Brunswick, Inc., FCC File No. 0000334962, filed February 7, 2000; the Application to Assign the License for Call Sign KIVD0247 from Interactive Control Two, Inc. to Syn-Tel Lancaster, LLC, FCC File No. 0000334985, filed May 23, 2000; and the Application to Assign the License for Call Sign KIVD0063 from Interactive Control Two, Inc. to Syn-Tel New Brunswick LLC, FCC File No. 0000334996, filed May 23, 2000, are REINSTATED *nunc pro tunc*.

39. IT IS FURTHER ORDERED that the Application to Assign the Licenses for Call Signs KIVD0063 and KIVD0247 from Interactive Control Two, Inc. to Wincom, then to the Wincom bankruptcy state, and ultimately to U.S. Telemetry New Brunswick, Inc., FCC File No. 0000334962, filed February 7, 2000, is GRANTED, effective January 22, 2001, subject to the conditions set forth in paragraphs 34-35, *supra*.

40. IT IS FURTHER ORDERED that the Wincom Bankruptcy Estate is the licensee of record for Call Signs KIVD0063 and KIVD0247 for purposes of the 218-219 MHz Service Restructuring Plan, and

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debt on those licenses forgiven; or (iii) a prepayment option pursuant to which the licensee could retain or return as many licenses it desired *Id.* at 1518-1529 ¶¶ 33-54.

¹¹³ See, e.g., Wireless Telecommunications Bureau Grants Consent to Assign 218-219 MHz Service License, *Public Notice*, DA 01-865 (April 6, 2001).

¹¹⁴ See 47 C.F.R. § 1.2111(c), (d).

¹¹⁵ 47 C.F.R. § 1.948(d).

the Wincom Bankruptcy Estate's election pursuant to the 218-219 MHz Service Restructuring Plan is ACCEPTED *nunc pro tunc*, and Interactive Control Two's election pursuant to the 218-219 MHz Service Restructuring Plan is REJECTED *nunc pro tunc*.

41. IT IS FURTHER ORDERED that the Application to Assign the License for Call Sign KIVD0247 from Interactive Control Two, Inc. to Syn-Tel Lancaster, LLC, FCC File No. 0000334985, filed May 23, 2000, and the Application to Assign the License for Call Sign KIVD0063 from Interactive Control Two, Inc. to Syn-Tel New Brunswick LLC, FCC File No. 0000334996, filed May 23, 2000, ARE DISMISSED pursuant to Section 1.934 of the Rules, 47 C.F.R. § 1.934.

42. 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

Kathleen O'Brien Ham
Deputy Chief
Wireless Telecommunications Bureau