

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

AIRADIGM COMMUNICATIONS, INC.,
Debtor.

AIRADIGM COMMUNICATIONS, INC.,

Plaintiff,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Defendant.

ORDER

06-C-432-S

On June 30, 2006 plaintiff Airadigm Communications, Inc. commenced an adversary proceeding in the United States Bankruptcy Court for the Western District of Wisconsin against defendant Federal Communications Commission (hereinafter FCC) by filing a complaint seeking to determine the validity, priority, or extent of defendant's security interests in plaintiff's fifteen spectrum licenses. In connection with the adversary proceeding, the parties have filed cross-motions for summary judgment and the Bankruptcy Court has scheduled a hearing on said motions for September 27, 2006. The matter is presently before the Court on defendant's motion to withdraw the reference to the Bankruptcy Court of

plaintiff's adversary proceeding and complaint.¹ Jurisdiction is based on 28 U.S.C. § 1334 and 28 U.S.C. § 157(d).

Defendant asserts mandatory withdrawal of reference is required under 28 U.S.C. § 157(d) because the Communications Act of 1934 and its applicable regulations require interpretation of federal law. Specifically, defendant asserts that 47 U.S.C. §§ 301, 304, 309(j), and 310(d) as well as 47 C.F.R. §§ 1.2110, 24.708(a), 24.711, and 24.716 create a regulatory "full and timely" payment obligation and regulatory lien under 11 U.S.C. § 101(37) against plaintiff's spectrum licenses which requires the Court to either harmonize the law or determine the precedence of possibly conflicting federal law and the Bankruptcy Code. Alternatively, defendant asserts permissive withdrawal of reference is appropriate in the interest of judicial economy. Accordingly, defendant argues the Court should grant its motion to withdraw reference.

Plaintiff asserts mandatory withdrawal of reference is not required under 28 U.S.C. § 157(d) because the Communications Act of 1934, federal common law, and the Bankruptcy Code do not conflict with one another. Additionally, plaintiff asserts the Court is not required to interpret the Communications Act of 1934 to resolve the adversary proceeding because defendant's regulatory control over plaintiff's fifteen spectrum licenses is not affected by the

¹The United States of America filed the motion to withdraw reference on behalf of defendant FCC.

financial controversy presented in said proceeding. Finally, plaintiff argues permissive withdrawal is inappropriate because the two-level appeals process of 28 U.S.C. § 158 is not unduly burdensome to defendant. Accordingly, plaintiff argues that defendant's motion to withdraw reference should be denied.

Defendant's motion to withdraw reference is governed by 28 U.S.C. § 157(d) which reads as follows:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

The second sentence quoted above is commonly referred to as the mandatory withdrawal provision. Courts have overwhelmingly agreed that said provision cannot be given its broadest literal reading because sending every proceeding that requires consideration of non-bankruptcy law back to the district court would "eviscerate much of the work of the bankruptcy courts." In re Vicars Ins. Agency, Inc., 96 F.3d 949, 952 (7th Cir. 1996) (citation omitted). Additionally, such a reading would create an "escape hatch" by which bankruptcy matters could easily be removed to the district court. Id. Accordingly, the Seventh Circuit has determined that the mandatory withdrawal provision of 28 U.S.C. § 157(d) is to be narrowly construed. Id.

It necessarily follows that a party's motion to withdraw reference should be granted only if the proceeding cannot be resolved without "substantial and material consideration" of the non-Code federal law. Id. However, even where a non-title 11 issue is outcome determinative withdrawal is not necessarily required. Id. at 953. Rather, the guiding questions are whether such an issue requires interpretation as opposed to mere application of the non-title 11 statute or whether a court must engage in an analysis of "significant open and unresolved issues" concerning the non-title 11 law. Id. at 954. The legal questions involved need not be of "cosmic proportions" but they must involve more than mere application of existing law to new facts. Id. Additionally, the moving party bears the burden of demonstrating that the grounds for withdrawal are satisfied. Id. at 953. Defendant failed to meet this burden.

Defendant argues that 47 U.S.C. §§ 301, 304, 309(j), and 310(d) as well as 47 C.F.R. §§ 1.2110, 24.708(a), 24.711, and 24.716 create a regulatory "full and timely" payment obligation and regulatory lien under 11 U.S.C. § 101(37) against plaintiff's spectrum licenses which requires the Court to either harmonize the law or determine the precedence of possibly conflicting federal law and the Bankruptcy Code. Additionally, defendant argues that no Court has conducted such an analysis in the context of the facts presented by this action. However, defendant's argument does not

support mandatory withdrawal of reference because defendant failed to demonstrate how such an analysis requires anything more than applying existing law (such as the Communications Act of 1934 and the Bankruptcy Code) to a new factual situation. Id. at 954. Accordingly, mandatory withdrawal of reference is not required under 28 U.S.C. § 157(d). Id.

Alternatively, defendant asserts that permissive withdrawal of reference is appropriate in the interest of judicial economy. Additionally, defendant argues that permissive withdrawal of reference is appropriate because the Court's expertise is required to interpret the Communications Act of 1934 and its applicable regulations as well as to resolve any conflict that may exist between said Act and the Bankruptcy Code.

A district court may (on its own motion or on timely motion of any party) withdraw any case or proceeding for cause shown. 28 U.S.C. § 157(d). Factors a court considers when determining whether cause exists are: (1) judicial economy, (2) convenience, (3) a particular court's knowledge of the facts, (4) promotion of uniformity and efficiency of bankruptcy administration, (5) reduction of forum shopping and confusion, (6) conservation of debtor and creditor resources; and (7) whether parties requested a jury trial. In re Sevko, Inc., 143 B.R. 114, 117 (N.D.Ill. 1992) (citations omitted). The Court finds that these enumerated factors do not support permissive withdrawal of reference of plaintiff's adversary proceeding and complaint.

The Bankruptcy Court has scheduled a hearing on the parties cross-motions for summary judgment for September 27, 2006 which is in approximately ten days. Accordingly, judicial economy favors allowing the adversary proceeding to continue in the Bankruptcy Court where resolution of the matter can be quickly achieved. Additionally, the Court's expertise is not required to resolve the adversary proceeding because the Bankruptcy Court can competently address how the Communications Act of 1934 and its applicable regulations interact with provisions of the Bankruptcy Code. In fact, the Bankruptcy Court has previously addressed such a question. See In re Media Properties, Inc., 311 B.R. 244 (W.D.Wis. 2004) (discussing that under the Communications Act of 1934 a licensee's proprietary interest in a broadcast license does not allow any party to assert any rights contrary to the regulatory powers of the FCC). Accordingly, neither factor cited by defendant supports permissive withdrawal of reference of plaintiff's adversary proceeding and complaint.

Defendant failed to meet its burden of establishing that mandatory withdrawal of reference is required under 28 U.S.C. § 157(d). Additionally, defendant failed to meet its burden of establishing that cause for permissive withdrawal exists under said section. Accordingly, defendant's motion to withdraw the reference to the Bankruptcy Court of plaintiff's adversary proceeding and complaint must be denied.

ORDER

IT IS ORDERED that defendant Federal Communications Commission's motion to withdraw the reference to the Bankruptcy Court of plaintiff's adversary proceeding and complaint is DENIED.

Entered this 18th day of September, 2006.

BY THE COURT:

s/

JOHN C. SHABAZ
District Judge