

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

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In Re:

AIRADIGM COMMUNICATIONS, INC.,

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AIRADIGM COMMUNICATIONS, INC.,

Appellant/Appellee,

v.

MEMORANDUM AND ORDER  
07-C-307-S

FEDERAL COMMUNICATIONS COMMISSION,

Appellee/Appellant.

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These are appeals from the final order of the Bankruptcy Court determining that the Federal Communications Commission ("FCC") is entitled to interest as part of its claims relating to the debtor's purchase of licenses to use the electromagnetic spectrum to deliver wireless telephone services. This Court has jurisdiction over the appeals pursuant to 28 U.S.C. § 158(a)(1). The following is a summary of relevant undisputed facts and proceedings before the Bankruptcy Court.

BACKGROUND

In 1997 debtor was the successful bidder on 15 licenses ("licenses") that permit it to provide wireless communication services. Debtor made a down payment to the FCC and agreed to pay

future installments on the balance due. The FCC retained security interests in the licenses and filed UCC financing statements for the security interests.

In 1999 debtor filed a chapter 11 bankruptcy petition ("1999 petition"). The FCC took the position that the licenses had been automatically cancelled as a result of the bankruptcy filing. Debtor filed a petition to waive the automatic cancellation or reinstate the licenses. The FCC filed a single proof of claim for all fifteen licenses listing the total amount of the claim at \$64,219,442.55. The notes relating to the licenses were attached to the proof of claim. Attachment B to the FCC proof of claim provided:

The Federal Communications Commission (FCC) takes the position that the 15 licenses in question have cancelled automatically pursuant to FCC rules. Therefore, the claim is unsecured. Under FCC rules, the debtor is responsible for the full amount of the winning bid, notwithstanding the licenses' subsequent cancellation, including applicable interest and late fees, and including any interest payments previously suspended by the FCC.

However, in the event that it is later determined, either by the FCC or by a court, that the licenses have not cancelled, the debt is secured by the licenses. Evidence of the security interest is therefore attached.

In response to the portion of the claim form directed to "Amount of arrearage and other charges at time case filed included in the secured claim," the FCC referenced Attachment C which identified a

preliminary determination that "suspension interest" was \$701,155.43.

On November 1, 2000 a confirmation hearing was held on the debtor's plan. At the hearing testimony was presented making clear that under the proposed plan in the event licenses were reinstated, the FCC would be paid in full with interest on any reinstated licenses. It was also undisputed at the time of the confirmation hearing the value of the licenses was several times the present value of the FCC claim. In general, it was understood that the FCC would realized the full value of its debt, including interest, either because it would reinstate the license and be paid in full under the terms of the plan or because the licenses would remain cancelled and the FCC would re-auction them at market value, while retaining an unsecured claim in the bankruptcy.

The Bankruptcy Court confirmed debtor's proposed reorganization plan ("2000 plan") over the FCC's objection. The confirmed 2000 plan did the following: (1) defined "allowed claim" as any claim for which a proof of claim was filed and which was allowed after objection; (2) provided payment in full of allowed claims or payment of all obligations under the FCC license purchase agreements in accordance with their terms (including interest and late fees) in the event licenses were reinstated by the FCC by June, 2002; (3) provided for payment in full of allowed claims for non-reinstated licenses; (4) made no express provision for the

possibility that the licenses would not be reinstated but would nevertheless remain as assets of the bankruptcy estate.

The FCC did not act on the reinstatement petition by June 2002. TDS acquired the non-license assets in accordance with the alternate plan. On January 27, 2003 the United States Supreme Court issued a decision in F.C.C. v. Nextwave Personal Communications, Inc., 537 U.S. 293, invalidating the FCC's automatic cancellation rule. On August 8, 2003 the FCC denied debtor's petition for reinstatement as moot, ruling that based on Nextwave the licenses had never been cancelled.

On August 29, 2003, Oneida Enterprise Development Authority (OEDA), an Airadigm creditor, filed an objection to the FCC's claim. OEDA argued that the FCC's delay in reinstating the licenses prejudiced them and that the FCC's claim should be disallowed for inequitable conduct, deemed waived, or subordinated to the claims of other creditors. The objection to claim included the following position:

23. It now appears that the Buyers deny any obligation to make the Reinstatement Loan under the Collective Plan, on the theory that the Backup Transfer Date occurred prior to the Reinstatement Date. If the Buyers are correct that they have been relieved of their obligations, Airadigm has nobody to whom it can sell its licenses. Furthermore, at current market rates, OEDA believes the licenses are worth less than the debt (with accrued interest) owed to the FCC.

The FCC moved to dismiss the objection to its claim arguing that its conduct was appropriate in all respects and that there was no legal basis to disallow or subordinate its claim. Agreeing with the FCC, the Bankruptcy Court granted the motion to dismiss the objection. On May 20, 2004 the Bankruptcy Court signed an order in the form drafted by the FCC granting the motion to dismiss and further ordering "that the FCC's claim is allowed in the amount of \$64,219,442.55."

On May 8, 2006 debtor filed a second chapter 11 bankruptcy petition. On June 6, 2006, the parties entered a stipulation agreeing, among other things, that "The FCC's Allowed Claim in the 1999 Bankruptcy Case shall be allowed in the 2006 Bankruptcy Case." In exchange for this agreement the FCC agreed not to object to the closing of the 1999 case and the opening of the 2006 case. The stipulation further provided that "all other rights of the parties hereto (including without limitation, the right of the FCC and TDS to seek the inclusion and allowance of interest on their Allowed Claims ... are expressly reserved." On June 12, 2006 the Bankruptcy Court determined that the 2000 plan had been substantially consummated and ordered the 1999 estate closed.

On June 13, 2006 debtor filed an amended plan of reorganization ("2006 plan"). Under the terms of the 2006 plan the FCC is to be paid in cash the secured amount of its claims as determined by the bankruptcy court. Upon such payment the FCC's

liens are released. Alternatively, if the FCC exercises its right under 11 U.S.C. § 1111(b) it will retain its lien and be paid proceeds of U.S. Treasury securities or "A" rated insurance annuity contracts purchased with the cash equivalent of the licenses' value as determined by the Bankruptcy Court so that the FCC will receive over 30 years, deferred cash payments totaling the full amount of its secured claim, of a value of the licenses as of the effective date. On October 31, 2006 the Bankruptcy Court confirmed the 2006 plan over the objections of the FCC. This Court subsequently affirmed the plan confirmation on appeal.

On June 30, 2006 debtor commenced an adversary proceeding to determine the validity, priority or extent of the FCC liens on the licenses. Debtor contended that the liens were avoidable pursuant to 11 U.S.C. § 544(a) because they were unperfected by virtue of failure to file timely financing statement extensions. Alternatively, debtor argued that the liens had been extinguished by the 2000 plan. The FCC opposed both positions, raised numerous defenses and counterclaimed for a declaration that it had an independent regulatory priority right to receive the full amount of its claim and that the total amount of the claim should be treated as secured. The parties agreed that there were no material factual disputes relevant to the issues presented.

On October 27 2006 the Bankruptcy Court issued a memorandum decision resolving all issues in the adversary proceeding. The

Bankruptcy Court held that the FCC retained a perfected security interest in the licenses which had not been extinguished by the 1999 bankruptcy. It further held that the FCC's claims were partially secured, were subject to bifurcation pursuant to 11 U.S.C. § 506(a) and, pursuant to a previous finding, the amount of the FCC's allowed secured claim was \$33,009,164. The decision of the Bankruptcy Court was affirmed by this Court on appeal.

On September 14, 2006 the FCC filed a claim for each of the 15 licenses, seeking the principal amounts owed on the license purchases (totaling \$64,219,442.55) and accrued interest on the claims through the 2006 petition date (totaling \$42,361,627.62). TDS and debtor objected to the FCC's claims, arguing that pursuant to the terms of the 2000 plan all interest stopped accruing on the 1999 petition date because: (1) the FCC waived its right to interest because its 1999 proof of claim indicated that the claim was unsecured and the 2004 order affirming its claim did not include interest; (2) The 2000 plan did not provide for interest payments; and (3) as a matter of equity the FCC should be denied interest because of its failure to act promptly on the reinstatement request. They also argue that no prepetition interest be awarded because none was included in the proof of claim or the 2003 OEDA order.

On February 23, 2007 the Bankruptcy Court held a final hearing on the objection to the FCC's claims. At the conclusion of the

hearing the Bankruptcy Court found that the FCC had a \$64,219,442.55 secured claim in the 1999 bankruptcy. The Bankruptcy Court denied the FCC interest for the period prior to the November 15, 2000 confirmation date, finding that the FCC was bound by its submission and the Court's 2003 order setting the amount of the secured claim. The Bankruptcy Court further found that the 2000 plan implicitly entitled the FCC to postconfirmation interest at the contract rate. Finally, as to the two licenses whose value the Bankruptcy Court found sufficient to render the related notes oversecured, the Court awarded post-2006 petition interest at the contract rate. A final order reflecting these rulings was entered and the parties cross appeal.

#### MEMORANDUM

Debtor and TDS appeal the inclusion of any interest in the FCC's 2006 allowed claim contending that the 2000 plan did not provide for interest on the claim, that the plan cannot be modified or amended to provide it, and that the FCC has waived any right to seek interest. The FCC appeals the denial of its asserted entitlement to interest for the period prior to the confirmation of the 2000 plan. The Court evaluates de novo the legal issues resolved by the Bankruptcy Court in its final orders. Mungo v. Taylor, 355 F.3d 969, 974 (7th Cir. 2004). Findings of fact are accepted unless clearly erroneous. Id. The primary dispute in



this case - the interpretation of the 2000 plan with regard to its provision for pre or postconfirmation interest - initially appears to be a question of law, and debtor and TDS urge the Court to treat it as such and to apply de novo review. However, the 7th Circuit Court of appeals has expressly considered the issue and held that although interpretation of a confirmed plan is similar to interpretation of a contract, a bankruptcy court's interpretation of a plan it confirmed is subject to full deference as an interpretation of its own order and may be overturned only if the record shows an abuse of discretion in the interpretation. Matter of Weber, 25 F.3d 413, 416 (7th Cir. 1994).

#### Pre-1999 Petition Interest

The Bankruptcy Court correctly limited the FCC's allowed 1999 claim to \$64,219,442.55. The process for allowing claims is governed by 11 U.S.C. §§ 501 and 502. The amount of the allowed claim is determined as of the date of the filing of the bankruptcy petition. 11 U.S.C. § 502(b). Aradigm filed its bankruptcy petition on July 28, 1999 and the FCC filed its proof of claim pursuant to § 501 on March 8, 2000. Notwithstanding that the FCC had more than seven months to calculate accrued interest and late fees as of the petition date, its proof of claim made only vague reference to a preliminary estimate of "suspension interest" of \$701,155.43. Because prepetition interest and late fees would

properly be part of the FCC claim whether its status was secured or unsecured, the ambiguity of its status had no impact on the amount which could properly have been included in the proof of claim.

\_\_\_\_\_The amount of the allowed claim was finally determined in accordance with § 502(b) following resolution of OEDA's § 502(a) objection. Although OEDA took the position in its objection that the FCC claim should be disallowed in its entirety, the order following the hearing on the objection necessarily required that the Bankruptcy Court determine the allowed amount of the claim as of the petition date. Consistent with the requirements of § 502(b) the FCC, after prevailing at the hearing on the objection and at the invitation of the bankruptcy court, drafted the allowance order expressly allowing the claim in the amount of \$64,219,442.55. At the time the final allowance order was entered the FCC had more than three years to calculate the interest and late fees owed as of the 1999 petition date. There is no justification for changing the amount of the allowed claim entered as a final order of the Bankruptcy Court. Certainly the vague reference to \$700,000 in estimated suspension interest in the original proof of claim cannot be the basis to augment the claim by the more than \$7 million presently sought by the FCC. There is no justification to alter the amount of the allowed claim as provided in the final order of the FCC's own drafting.

### Post-2000 Plan Confirmation Interest

The Bankruptcy Court's interpretation of the plan it confirmed is entitled to deference unless it was an abuse of discretion. Id. However, even if it were not entitled to such deference, the determination that the intent and meaning of the plan was to provide interest to the FCC on its oversecured claim is the only reasonable interpretation of the plan. As the Bankruptcy Court noted, § 1129(b)(2)(A)(i) required that the plan provide for payment of interest as a condition of confirmation in light of the FCC's opposition. Section 5.1 of the confirmed plan provided that as to reinstated licenses, payments would cure all defaults and pay all obligations according to the terms of the loans.

Additionally, testimony by the debtor's representative at the confirmation hearing left no doubt that in the event the FCC claim was to be treated as a secured claim, full interest would be paid under the terms of the plan:

- Q. Addressing Section 1129(a)(1) and the concern raised by Mr Miller about classification, does the plan separately classify in Class 1A and Class 1B the contingent secured claim of the FCC and the unsecured claim of the FCC?
- A. Yes.
- Q. Can you tell me what would happen on account of the FCC's secured claim in the event the minimum licenses are reinstated?
- A. It would be paid in full with interest.

Nov. 1, 2000, Confirmation hearing transcript, p.25, Testimony of Robert J. Galle.

Discourse at the time of confirmation repeatedly referred to the FCC's claim as either secured or unsecured. While the parties contemplated that the claim would become secured as a result of reinstatement, there is no reason to find that the claim was to be treated differently if it became secured by virtue of a binding legal decision. Not only was payment in full with interest compelled by the bankruptcy code, it was clearly contemplated by the plan proponents. It is also clear that the Bankruptcy Court's choice of the contract rates as representative of market interest is consistent with the terms of the plan.

Taking a broader view, the debtor has had continuous possession and use of the licenses whose value exceeded the FCC's claim during the period of the first reorganization. It is the intent of the bankruptcy code and was the clear contemplation of the parties that such a creditor receive payment for the asset with interest under those circumstances. Depriving the FCC of both the right to reacquire the licenses and the right to receive interest on its claim would be contrary to the intentions of plan proponents, the carefully crafted statutory scheme of the bankruptcy code and fundamental fairness. Accordingly, the order of the Bankruptcy Court determining that the amount of the FCC's allowed claim includes interest from the 2000 plan confirmation

date to the 2006 petition date at contract rates must be affirmed.

### Section 506(b) Interest

\_\_\_\_\_The remaining issues concern postpetition interest provided by 11 U.S.C. § 506(b). The FCC contends that the Bankruptcy Court improperly failed to include in its allowed claim interest accruing after the filing of the 1999 petition and before the confirmation of the 2000 plan. TDS contends that the Bankruptcy Court erred when it included 506(b) interest in the FCC's 2006 claims secured by the F block licenses. Recovery of postpetition, preconfirmation interest is governed by 11 U.S.C. § 506(b):

To the extent that an allowed secured claim is secured by property the value of which ... is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs or charges provided for under the agreement or State statute under which the claim arose.

Although the status of the FCC claim was ambiguous at the time of the 1999 petition, it is now undisputed that it was in fact a secured claim at all times and that the value of the licenses securing the claim were, at the time of the 1999 petition, far greater than the amount of the allowed claim. As a result, 506(b) entitled the FCC to interest on the claim pursuant to the purchase contract from the date of the filing of the petition.

The Bankruptcy Court in its oral decision did not separately address the recovery of post-1999 petition 506(b) interest other

than to note that except as otherwise provided in the 2000 plan, preconfirmation debts are discharged. See 11 U.S.C. § 1141(d). Thus, the Bankruptcy Court implicitly found that while the 2000 plan provided for payment of postconfirmation interest, it did not provide for payment of postpetition 506(b) interest. There is nothing in the reasoning of the Bankruptcy Court or in the confirmation record which would sustain the distinction. The Bankruptcy Court's primary basis for finding entitlement to postconfirmation interest was the fact that § 1129 required it for a successful cram down. However, like postconfirmation interest, the right to 506(b) interest augments the allowed claim and payment thereof is also an entitlement of an objecting secured creditor in order to cram down a plan under § 1129. In re Milham, 141 F.3d 420, 423 (2d Cir. 1998). Accordingly, the FCC's right to recover 506(b) interest on its secured claim cannot be distinguished from the right to postconfirmation interest on the basis of 1129(b)(2) entitlement. Neither can it be distinguished on the basis of the plan provision or confirmation hearing transcript. The 2000 plan contemplates payment of both pre and postconfirmation interest at § 5.1 and the transcript confirms this intent.

Another possible basis to distinguish entitlement to 506(b) interest from postconfirmation interest is to find that the FCC waived its right to 506(b) interest. TDS and debtor pursue waiver based on the FCC's failure to include the interest in the 2004

order denying OEDA's objection and on its delay in pursuing 506(b) interest. Concerning the first of these arguments, the 2004 order was unmistakably an order resolving an objection to claim pursuant to § 502, which specifies that in the event of an objection the court "shall determine the amount of such claim in lawful currency of the United States as of the date of filing of the petition, and shall allow such claim in such amount...." (emphasis added). Accordingly, while the amount of the allowed claim entered after notice and hearing precludes the addition of any prepetition interest, it is not intended to address postpetition 506(b) interest. See also proof of claim form part 5.1 (expressly limiting secured claims to arrearage and other charges at time case filed). Of course, specifically including a provision for postpetition interest in the claim determination (as the Court did in the 2006 case) might resolve future controversy, but a failure to refer to it cannot be a waiver given the language of § 502(b). See Matter of Chappell, 984 F.2d 775, 782 n.2 (7th Cir. 1993) (discussing the desirability of including reference to interest in a claim but declining to hold that exclusion constitutes waiver.)

The right to 506(b) interest can be waived in the context of plan confirmation and performance. Id. Debtor and TDS argue that Chappell controls here and precludes recovery of post-1999 petition 506(b) interest. Chappell is readily distinguishable from the present case. The lender in Chappell failed to object to the

proposed plan or to appear at the confirmation hearing. Furthermore, it raised no issue concerning its entitlement to interest until after it was fully paid in accordance with the plan.

It is important to note that [the creditor] learned that it was not receiving interest on the second mortgage while the plan was still in effect. Yet no effort was made to bring this fact to the attention of the bankruptcy court. Instead, [creditor] sought relief only after the Chappells were discharged and the case closed.

The facts here are dramatically different. The FCC was not paid under the terms of the 2000 plan and the 2000 plan was deemed substantially consummated and closed only based on the express stipulation of the parties that the FCC's claims under the 2000 plan were in no way prejudiced by the closure and the rights of the FCC "to seek the inclusion and allowance of interest on their Allowed Claims ... are expressly reserved." Furthermore, the Bankruptcy Court found that the stipulation had the effect of preserving the FCC's position from the 2000 plan and did not waive any rights. Since the Court has previously determined that the FCC's right to 506(b) interest as well as postconfirmation interest was preserved in the 2000 plan, it follows from the stipulation that the right has not been waived by subsequent events.

The final issue on appeal concerns the Bankruptcy Court's determination that the FCC is entitled to post-2006 petition 506(b) interest on obligations secured by two F block licenses, whose value continues to exceed the secured claim amounts. Debtor



contends that confirmation of the 2000 plan eliminated the underlying notes, therefore interest is not "provided for under the agreement" as required by § 506(b). The argument misapprehends the statute. The requirement of an "agreement" in § 506(b) applies only to "fees, costs and charges"; interest is available regardless of whether an agreement underlies the lien.

The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs and charges provided for in that agreement. Recovery of postpetition interest is unqualified.

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989). Accordingly, even if debtor were right that the agreement under which the lien arose could no longer be considered under § 506 the FCC would nonetheless be entitled to interest on its oversecured claim pursuant to § 506(b).

#### CONCLUSION

The FCC is bound by the 2004 order it drafted and the Bankruptcy Court entered specifying the amount of its 1999 allowed claim. The 2000 plan, as properly interpreted by the Bankruptcy Court and as required by § 1129(b)(2), provided for the payment of interest on the FCC's claims, all of which were oversecured. That interpretation necessarily also includes post-1999 petition 506(b)

interest. The FCC remains entitled to post-2006 petition 506(b) interest on its two oversecured claims.

ORDER

IT IS ORDERED that the decision of the bankruptcy Court is REVERSED insofar as it excluded from the FCC's allowed claim \$6,565,678.44 in post-1999 petition, pre-2000 plan confirmation interest, and in all other respects is AFFIRMED.

Entered this 28th day of September, 2007.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge