



SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 19, 2014

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**MARITIME COMMUNICATIONS/
LAND MOBILE, LLC,**

CASE NO. 11-13463-NPO

DEBTOR.

CHAPTER 11

**ORDER DENYING SOUTHERN CALIFORNIA
REGIONAL RAIL AUTHORITY'S MOTION TO
CONFIRM MARITIME COMMUNICATIONS/LAND
MOBILE, LLC'S AUTHORITY TO ASSIGN LICENSE TO SOUTHERN
CALIFORNIA REGIONAL RAIL AUTHORITY AND FOR OTHER RELIEF**

This matter came before the Court for hearing on December 8, 2014 (the "Hearing") on the Southern California Regional Rail Authority's Motion to Confirm Maritime Communications/Land Mobile, LLC's Authority to Assign License to Southern California Regional Rail Authority and for Other Relief (the "Motion") (Dkt. 1205) filed by Southern California Regional Rail Authority ("SCRRA"); the Skytel Parties' Amended Objection to Southern California Regional Rail Authority's Motion to Confirm Maritime Communications/Land Mobile LLC's Authority to Assign License to Southern California Regional Rail Authority (the "Objection") (Dkt. 1223) filed by Warren Havens, Skybridge Spectrum Foundation, Verde Systems LLC (formerly called Telesaurus, VPC LLC), Environmental LLC (formerly called AMTS Consortium, LLC), Intelligent Transportation and

Monitoring LLC, and Telesaurus Holdings GB LLC (collectively, “SkyTel”); the Southern California Regional Rail Authority’s Reply to Skytel Parties’ Amended Objection to Motion to Confirm Maritime Communications/Land Mobile, LLC’s Authority to Assign License to Southern California Regional Rail Authority (Doc. No. 1223) (Dkt. 1229) filed by SCRRA; and the Answer and Response of Debtor (the “Response”) (Dkt. 1228) filed by Maritime Communications/Land Mobile, LLC (“Maritime”) in the above-referenced bankruptcy case (the “Bankruptcy Case”). At the Hearing, Jim F. Spencer, Jr. represented SCRRA, Edward J. Currie, Jr. represented Skytel, Craig M. Geno represented Maritime, and Derek F. Meek represented Warren Averett, LLC.

SCRRA asks the Court to confirm the authority of Maritime to proceed with the \$7,178,000.00 sale of certain spectrum licenses to SCRRA in light of the *Memorandum Opinion and Order* released by the Federal Communications Commission (the “FCC”) on September 11, 2014 (the “FCC Order”) in *In re Maritime Communications/Land Mobile, LLC*, 29 FCC Rcd. 10871 (2014). For the reasons that follow, the Court finds that it lacks jurisdiction to consider the Motion because the issues raised in the Motion are premature and involve appeals pending in the District Court.

Jurisdiction

This Court has jurisdiction over the parties to this proceeding. The Court’s subject matter jurisdiction is discussed below. These are core proceedings under 28 U.S.C. § 157(b)(2)(A), (N) & (O). Notice of the Motion was proper under the circumstances.

Facts

1. In 2005, Maritime acquired four Automated Maritime Telecommunications System (“AMTS”)¹ spectrum licenses at a public auction.

2. On February 5, 2010, Maritime and SCRRA entered into a Partitioned License Purchase Agreement (the “SCRRA Purchase Agreement”) in which Maritime agreed to sell a portion of its radio spectrum licenses to SCRRA for \$7,178,000.00, subject to the approval of the sale by the FCC. On March 11, 2010, Maritime and SCRRA filed a joint application (the “SCRRA Application”) seeking FCC approval. The SCRRA Application was one of several applications filed by Maritime between 2008 and 2011 proposing to assign portions of its licenses to various other entities. The present Motion concerns only the SCRRA Application.

3. On April 19, 2011, the FCC issued the *Order To Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing* (“HDO”) in *In re Maritime Communications/Land Mobile, LLC*, 26 FCC Rcd. 6520 (2011), initiating a hearing before an administrative law judge to determine whether Maritime’s licenses should be revoked because of a lack of “basic character qualifications” and whether the pending SCRRA Application should be granted. (*Id.*). In that regard, the FCC has adopted a standard, known as the *Jefferson Radio* policy, that precludes the assignment of a license when the licensee’s qualifications to hold the license are in issue. *Jefferson Radio Co. v. F.C.C.*, 340 F.2d 781 (D.C. Cir. 1964). In footnote 7 of the HDO, the FCC suggested that it might sever the SCRRA Application from the ambit of the

¹ AMTS is a maritime service that provides for the communication needs of vessels at sea.

hearing on Maritime's basic character qualifications because of public policy reasons.² *Maritime*, 26 FCC Rcd. at 6523 n.7.

4. Maritime commenced its Bankruptcy Case on August 1, 2011. (Dkt. 1). An order authorizing Maritime to assume the SCRRA Purchase Agreement was entered on October 31, 2012 (the "SCRRA Sale Order") (Dkt. 768). SkyTel filed a Notice of Appeal (Dkt. #768) (Dkt. 854) of the SCRRA Sale Order on November 13, 2012.³

5. On January 11, 2013, Maritime's First Amended Plan of Reorganization (the "Plan") (Dkt. 669) was confirmed pursuant to the Order Confirming Plan of Reorganization (the "Confirmation Order") (Dkt. 980). Under the confirmed Plan, Maritime would sell substantially all of its spectrum licenses to Choctaw Telecommunications, LLC ("Choctaw"). Maritime and Choctaw then would seek FCC approval of those sales. After obtaining FCC approval, Choctaw would market and sell those licenses subject to FCC approval of these additional sales. The Plan does not become effective until the Confirmation Order becomes final. On January 25, 2013, SkyTel filed a Notice of Appeal (Dkt. #s 973, 980) (Dkt. 999) of the Confirmation Order.

6. With respect to the SCRRA Sale Order, the Plan provides for the sale of *all* spectrum licenses from Maritime to Choctaw subject to FCC approval, including "all current or future contracts to sell FCC Spectrum Licenses . . . assumed by the Debtor." (Dkt. 669 at 23). In

² See Rail Safety Improvement Act of 2008, H.R. 2095, 110th Cong. §§ 104, 108 (2008) (setting December 31, 2015 deadline for certain railroads to install Positive Train Control systems).

³ Initially, an order authorizing Maritime to assume the SCRRA Purchase Agreement was entered on December 29, 2011 (the "Initial SCRRA Sale Order") (Dkt. 260), but because of problems relating to a hearing transcript, a re-hearing was held that resulted in the entry of a second SCRRA Sale Order on October 31, 2012. SkyTel filed a Notice of Appeal on January 12, 2012 as to the Initial SCRRA Sale Order but later voluntarily dismissed that appeal. Only the appeal of the second SCRRA Sale Order on November 13, 2012 remains pending regarding the Maritime's assumption of the SCRRA Purchase Agreement.

that regard, the Plan contemplates performance of the SCRRA Purchase Agreement by Choctaw, not Maritime. “Each Executory Contract . . . [that] the Court has previously approved the Debtor’s request to assume, shall vest in and be fully enforceable by Choctaw.” (Dkt. 669 at 23).

7. As an important step in implementing the confirmed Plan, Maritime and Choctaw filed an assignment application with the FCC (the “Choctaw Application”) on January 23, 2013⁴ and asked the FCC to terminate the hearing initiated by the HDO pursuant to the *Second Thursday* exception to the *Jefferson Radio* policy. *In re Second Thursday Corp.*, 22 F.C.C. 2d 515, 516, *recon. granted in part*, 25 F.C.C. 2d 112 (1970). The *Second Thursday* doctrine allows the FCC to approve the assignment of a license, even if the licensee’s basic character qualifications are in issue, if the licensee is in bankruptcy and the assignment will not benefit the individuals charged with misconduct.

8. On March 21, 2013, the FCC stayed the hearing with respect to basic character qualification issues, noting that a decision on the application of the *Second Thursday* exception could moot those issues.

9. On September 11, 2014, the FCC released the FCC Order, ruling that the Choctaw Application did not meet the criteria for *Second Thursday* relief. As a result, the FCC withheld action on the Choctaw Application pending determination of Maritime’s basic character qualifications.

10. Also in the FCC Order, the FCC removed the SCRRA Application from the ambit of the HDO for public policy reasons and ordered its Wireless Bureau to process the SCRRA Application.

⁴ Apparently, the FCC will not consider a debtor’s application for assignment or transfer of a license prior to approval of the proposed transaction by the bankruptcy court. (Dkt. 973-1 at 17).

11. The SCRRA asks this Court in its Motion to confirm that it may proceed with the purchase of the spectrum license from Maritime. SCRRA also asks the Court to order that the sales proceeds be placed in an interest bearing escrow account with Maritime's counsel pending final resolution of all appeals of the FCC Order. In support of the relief it requests, the SCRRA points out that the Court approved Maritime's assumption of the SCRRA Purchase Agreement in the SCRRA Sale Order *before* entry of the Confirmation Order.

12. In its Response, Maritime agrees that SCRRA should be allowed to close and consummate the transaction as soon as the Wireless Bureau processes and approves the SCRRA Application. Maritime disagrees that the sales proceeds should be held in escrow pending final resolution of all FCC appeals.

13. In its Objection, Skytel opposes the Motion for the following reasons: (1) this Court lacks jurisdiction to consider the Motion because the Confirmation Order is currently on appeal; (2) this Court does not have jurisdiction to render an advisory opinion regarding the effect and meaning of the Confirmation Order; (3) the Motion attempts to modify and amend the Confirmation Order that is on appeal by effectively approving the transfer of the license to SCRRA without FCC approval and requiring the sales proceeds to be placed in escrow; and (4) the Court does not have authority to approve the assignment of the license to SCRRA.

Lack of Jurisdiction

A. Impermissible Advisory Opinion

As of the Hearing, the FCC had not yet approved the SCRRA Application. Until regulatory approval of the sale of the licenses to SCRRA, any ruling by this Court confirming the sale between Maritime and SCRRA and the deposit of net sales proceeds in an escrow account

would be premature. SCRRA, nevertheless, asks the Court to confirm a sale that may never actually take place.

Article III of the U.S. Constitution limits the exercise of judicial power to “cases” and “controversies.” To be ripe for decision, a case or controversy must be justiciable and not premature or speculative. *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000). To be justiciable, a controversy “must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *Rowan Cos. v. Griffin*, 876 F.2d 26, 27-28 (5th Cir. 1989). Accordingly, federal courts, including bankruptcy courts, do not have jurisdiction to render “advisory opinions.” As explained by the U.S. Supreme Court, federal courts “may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical state of facts.” *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quotation & citation omitted).

It has been noted that the definition of an advisory opinion is less clear in the bankruptcy context because bankruptcy judges are often asked to enter prophylactic orders, especially in chapter 11 cases where debtors and creditors prefer to act with some measure of certainty about future events. See Gregory W. Werkheiser, *When Do Court Orders Become Improper Advisory Opinions?* 33 AM. BANKR. INST. J. 36 (Apr. 2014). For example, the U.S. Court of Appeals for the Third Circuit in *In re Lazy Days’ RV Center, Inc.*, 724 F.3d 418 (3d Cir. 2013) disposed of a “case or controversy” challenge to a bankruptcy court’s subject matter jurisdiction by concluding that “the Bankruptcy Court . . . was ‘well suited to provide the best interpretation of its own order.’” *Id.* at 423 (internal quotation omitted). Here, however, the Court is not being asked to “confirm” a prior order (notwithstanding the nomenclature in the Motion) but to decide a matter

not ripe for decision because the SCRRA Purchase Agreement without question is contingent upon FCC approval. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (the “case or controversy” requirement means that a matter must likely be redressed by a favorable judicial decision). The relief SCRRA requests requires an examination, if not modification, of the Confirmation Order and, by reference, the SCRRA Sale Order. Because the sale may never take place and the provisions of the SCRRA Sale Order may never ripen into an actual controversy, the Court concludes that it lacks jurisdiction to address the Motion at this time.

B. Divestiture of Jurisdiction

Even if the FCC had approved the SCRRA Application and the issue was ripe for this Court’s consideration, the Court would still lack jurisdiction to consider the Motion because SkyTel has appealed the Confirmation Order to the District Court. That appeal, along with Skytel’s appeal of the SCRRA Sale Order approving the assumption of the SCRRA Purchase Agreement,⁵ has been consolidated into Civil Action 1:13-cv-00180-SA. With respect to the Confirmation Order, SkyTel raises several issues on appeal (Dkt. 1019), including whether the Court erred when it held that the Plan satisfied the “feasibility” requirements of 11 U.S.C. § 1129(a)(11) and the “good faith” requirements of 11 U.S.C. § 1129(a)(3).

A district court sits in an appellate capacity as to final orders and judgments of a bankruptcy court. 28 U.S.C. § 158(a)(1). “An appeal from a judgment, order, or decree of a bankruptcy court to a district court . . . [is taken] by filing a notice of appeal.” FED. R. BANKR. P. 8003(a).⁶ The filing of a notice of appeal is an event of “jurisdictional significance.” *Griggs v.*

⁵ SkyTel appealed all other sales orders (or assumptions of executory contracts), and all of these appeals have been consolidated into Civil Action 1:13-cv-00180-SA as well.

⁶ Federal Rule of Bankruptcy Procedure 8003(a), effective December 1, 2014, is the renumbered and revised version of Rule 8001(a) of the Federal Rules of Bankruptcy Procedure.

Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982); *see Tex. Comptroller of Pub. Accounts v. Transtexas Gas Corp. (In re Transtexas Gas Corp.)*, 303 F.3d 571, 578-79 (5th Cir. 2002) (applying rule to bankruptcy cases). It divests a bankruptcy court of jurisdiction to act with respect to matters involved in the appeal. *Griggs*, 459 U.S. at 58. A bankruptcy court retains jurisdiction only to address elements of a bankruptcy case that are not the subject of that appeal. *Sullivan Cent. Plaza I, Ltd. v. BancBoston Real Estate Capital Corp. (In re Sullivan Cent. Plaza I, Ltd.)*, 935 F.2d 723, 727 (5th Cir. 1991). A bankruptcy court “may even continue to address matters indirectly implicated in the appeal” if doing so would not undermine the appeal process. *Scotia Dev. LLC v. Pac. Lumber Co. (In re Scopac)*, 624 F.3d 274, 280 (5th Cir. 2010).

At issue in the present matter is the jurisdictional significance of SkyTel’s Notice of Appeal of the Confirmation Order. SCRRA insists that it has no relevancy because the Motion does not seek to modify the SCRRA Sale Order or Confirmation Order. It is undisputed, however, that approval of the SCRRA Application by the FCC would require a modification of the Choctaw Application “to delete that portion of the license . . . that has been assigned to SCRRA.” (FCC Order at 18 n.116). It is also undisputed that the Choctaw Application is the lynchpin to the confirmed Plan. Upon FCC approval of the Choctaw Application and the SCRRA Application, Choctaw would assume the obligations in the SCRRA Purchase Agreement. The sale of the licenses to the SCRRA contemplated in the SCRRA Sale Order would produce the assets that Choctaw would liquidate under the Plan. It appears that SCRRA wants to change the Plan by allowing the sale of the licenses subject to the SCRRA Purchase Agreement to proceed directly with Maritime, that is, without Choctaw’s involvement. This strategy is understandable given the inclination of the FCC to carve out the SCRRA Application from the Choctaw Application because of public safety interests.

The Fifth Circuit has embraced a functional test in determining whether the issues involved in a pending appeal divest the bankruptcy court of jurisdiction over a particular matter. *See Scopac*, 624 F.3d at 280. Given that the SCRRA Purchase Agreement and the SCRRA Sale Order are integrated into the confirmed Plan, the Court finds that carving them out of the Plan for different treatment would interfere with the issues pending in the appeal of the Confirmation Order and, in particular, with the feasibility issue. “[O]nce an appeal is pending, it is imperative that a lower court not exercise jurisdiction over those issues which, although not themselves expressly on appeal, nevertheless so impact the appeal so as to interfere with or effectively circumvent the appeal process.” *Id.* (quotation & citation omitted).

The SCRRA maintains that it should be allowed to proceed with the sale because there is no stay pending the appeal of the SCRRA Sale Order. *Ginther v. The Ginther Trusts (In re Ginther Trusts)*, 238 F.3d 686, 688-89 (5th Cir. 2001) (upholding district court’s dismissal as moot of appeal of bankruptcy order authorizing a sale in absence of a stay of that sale). Even in the absence of a stay of the SCRRA Sale Order, however, the Court cannot unscramble the provisions of the Plan and thereby interfere with the issues on appeal.

The Court recognizes that the FCC has found that the sale of the licenses to SCRRA “would serve the public interest by significantly promoting rail safety of life and property.” (FCC Order at 13). SCRRA, however, may seek relief directly from the District Court or ask the District Court to return jurisdiction to this Court for a determination of the issues presented in the Motion at the appropriate time.

Conclusion

For the above and foregoing reasons, the Court concludes that it lacks jurisdiction to consider the Motion at this time because (1) any decision by the Court before FCC approval of

the sale of the license to SCRRA would be advisory in nature and (2) the appeal of the Confirmation Order has divested this Court of jurisdiction. The Court is not attempting through this Order or otherwise to superimpose its rulings or judgments on the FCC, and the Court expressly recognizes that the assignment of the licenses is contingent on the ultimate decision of the FCC.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied without prejudice.

##END OF ORDER##