In the United States Bankruptcy Court

for the Northern District of Iowa

KOCR-TV INC.	Bankruptcy No. 95-11128KC
Debtor(s).	Chapter 7

ORDER RE POST-BRIEFING DEADLINE FILINGS; MOTION TO REOPEN

On this 19th day of September, 1995, the above-captioned file is presented to the Court on a Motion to Reopen the Record filed by Creditors who filed the involuntary petition. The Motion to Reopen is resisted by Debtor in a responsive pleading filed September 6, 1995. The Court has examined the entire record, as well as the most recent filings, and concludes that oral argument would be of no benefit in this matter and that this pending Motion can be resolved without oral argument.

The file reflects that certain creditors filed this involuntary Chapter 7 petition on June 14, 1995. Debtor filed a Motion to Dismiss the Petition, or in the Alternative, a Motion to Abstain on July 7, 1995. Hearing was held on the Motion to Dismiss or Abstain on August 4, 1995. After presentation of evidence, and after considering oral arguments of counsel, the Court took the matter under advisement and allowed counsel until August 14, 1995 within which to file simultaneous briefs.

Debtor filed its brief timely on August 14, 1995. However, the brief refers to certain post-hearing involvement of a J.L. Gorski in soliciting creditors to support the involuntary petition. To support this position, a letter by Gorski is attached.

The creditors filed their post-hearing brief untimely on August 15, 1995. This brief refers to numerous matters "which have come to light" since the hearing. It refers to an alleged article in the Cedar Rapids Gazette the day after the hearing. It also refers to counsel for the creditors, and conferences with counsel for other creditors. It discusses conduct by the creditors since the hearing. Additionally, counsel for the creditors attaches his own affidavit regarding all of these various matters. Finally, in addition to the post-hearing brief, the creditors filed a supplement to their involuntary petition adding six additional creditors.

On August 18, 1995, Debtor filed a Motion to Dismiss the Petition as Amended. This Motion contains an affidavit of Debtor as well as an affidavit of the attorney for Debtor. Both affidavits and the Motion raise additional factual matters allegedly occurring since the time of the hearing. On August 23, 1995, Debtor filed an additional supplemental affidavit as did the attorney for Debtor. These supplemental affidavits raise additional factual matters not raised in the original hearing.

On August 31, 1995, the creditors added a second supplement to their involuntary petition by adding three additional creditors. Then, on September 1, 1995, the creditors filed a Motion to Reopen the Record. As a basis for reopening the record, they assert that since the hearing, they have added nine additional creditors to the petition. Additionally, all of the factual matters which have been raised in the various pleadings filed since the deadline for the filing of briefs now allegedly constitute matters which justify reopening the record to address the additional creditors' claims as well as these newly created factual disputes.

On September 6, 1995, Debtor filed a resistance to this Motion to Reopen the Record. The resistance does not assert that all of these various matters are untimely and should have been presented at the time of hearing, but rather, the resistance asserts additional factual matters occurring since the time of the hearing.

Though serious issues are raised by these multitudinous pleadings since the closing of the record on August 4, 1995, the

Court will enter its ruling on the basis of the Motion to Reopen the Record which constitutes a culmination of these various filings. The law is clear that a decision to reopen the record to consider additional evidence is committed to the sound discretion of the trial court. See In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 464 (8th Cir. 1991). In considering whether to grant a motion to reopen the record or a motion to supplement the record, the Court takes into consideration the character of the additional evidence and the effect of granting the motion. See S.E.C. v. Rogers, 790 F.2d 1450, 1460 (8th Cir. 1986). A motion to reopen the record should be granted only when the most unusual circumstances prevail and should not be granted on grounds of purely repetitious nature or predicated on factual or legal grounds that could or should have been presented at the original hearing. In re Johnston, 37 B.R. 361, 363 (Bankr. D. Vt. 1984). In considering whether to reopen a record, the Court considers the diligence of the parties in presenting these matters and possible prejudice to the other party. S.E.C. v. Rogers, 790 F.2d at 1460. Except for the most extraordinary circumstances, the original hearing is the moving party's opportunity to offer evidence, if any exists, and the record should not be reopened to merely rehash matters that could have been appropriately presented at the original hearing.

In the present record, both parties were offered a full and fair opportunity to present the issues framed in the Motion to Dismiss. At that time, the record was closed and the parties were offered an opportunity to present simultaneous briefs to be filed no later than August 14, 1995. Debtor's brief was timely but contained references to matters outside the record. The creditors' brief was untimely and also made reference to matters outside of the record established on August 4, 1995. As a general proposition, it is improper to refer to documents or matters occurring after the close of the record as if they were part of the record in the absence of a successful motion to reopen. In re Lease-A-Fleet, Inc., 151 B.R. 341, 347 (Bankr. E.D. Pa. 1993). It is also inappropriate to attach copies of, and argue from, documents which were not admitted into evidence at the time of hearing. In re Mirkin, 100 B.R. 221, 226 n.4 (Bankr. E.D. Pa. 1989). In this case, both parties have deviated completely from the record which existed at its closure on August 4, 1995. The matters raised in post-hearing briefs, affidavits and the Motion to Reopen, literally bear little, if any, resemblance to the evidence presented at the time of hearing. This is inappropriate.

The Court has reviewed this entire record again, and it is the conclusion of this Court that the Motion to Reopen addresses matters which have been generated after the close of the hearing. It is further the conclusion of this Court that the addition of creditors since the hearing does not and cannot change the issues which were framed and presented at the hearing on August 4, 1995. As such, the Motion to Reopen the Record should be and is hereby denied. Additionally, as the addition of affidavits and references to factual matters completely outside the record is inappropriate, it is the conclusion of this Court that all documents filed by either party since the close of the briefing schedule on August 14, 1995 will not be considered by the Court in any manner in ruling upon the original Motion to Dismiss or to Abstain.

WHEREFORE, the Motion to Reopen the Record is denied without oral argument.

FURTHER, all briefs and affidavits, as well as other factual matters outside the record raised by the parties in post-hearing briefs or filed since August 14, 1995, will be disregarded by the Court in ruling on the original Motion to Dismiss or Abstain. The Court's ruling on that Motion will be limited to factual matters raised at the time of hearing and legal arguments properly made on those facts.

SO ORDERED this 26th day of September, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge