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Ruling Raises Specter Of Unannounced PCS License Cancellations

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Late last month the FCC's Wireless Bureau issued a disturbing order in connection with a defaulting licensee's attempt to effect a work-out of its problems. The hapless licensee, Northstar Technology, LLC, had defaulted on an unpaid auction debt owed to the FCC in the early 2000's – the license was cancelled by the FCC in 2004 when the FCC found itself stiffed for \$996,588 plus accrued interest. Northstar apparently had other licenses, though, and it managed to secure financing from the Rural Utilities Service, the Federal Financing Bank and the Rural Telephone Bank. Northstar went into default on these obligations as well. One might imagine that Northstar had by now worn out its welcome at the federal trough, but Northstar negotiated a settlement with the Justice Department whereby some of the more than \$10 million dollars it owed to the various federal entities (including the FCC) would be repaid by the sale of the licenses and assignment of the proceeds to the United States.

However, a technical problem arose when Northstar finally went to file assignment applications and associated renewal applications for two of the licenses. It seems that the FCC's "red light" system automatically barred the applications from proceeding since the licensee was in debt to the FCC. This is the way the red light system is supposed to work, but in this case the process was preventing the Commission and its brethren agencies from getting their hands on the proceeds of the proposed sale that could not go through until the applications were accepted and processed. Take a guess as to whether the FCC granted a waiver of the red light rule so that the deal could go forward. So the renewals and the assignments were allowed to proceed, but the relief seems to apply only to this particular transaction and these particular licenses. The red light should come back on the next time Northstar files an FCC application.

Almost tangential to the main thrust of the Bureau's Order, however, was a new and surprising take on what constitutes "permanent discontinuance" of a license. One of the fundamental presumptions of radio licenseeship is that a licensee must either use its licensed spectrum or lose it. The operative rule codifying this principle just says that if you permanently discontinue service – a determination that is made by reference to the definition of permanent discontinuance set forth in the rules of each specific service –

your license will automatically be cancelled. For that reason, in virtually every other radio service that we can think of, the FCC specifies strict time frames regarding discontinuance, abandonment, or permanent cessation of service. A licensee that fails to use its spectrum for some specified period of time will normally be deemed to have permanently discontinued operation, and it must either turn in its license or have it cancelled by operation of law. The licenses involved here, however, were Personal Communications Service (PCS) licenses. By an odd quirk, there is no such definition applicable to PCS licensees. (We assume this was just an oversight by the Commission when the PCS service was established, as with several other common rules which apply to everyone else but, inexplicably, do not apply to PCS licensees.)

So until now, PCS licensees have taken the perfectly reasonable position that a licensee has not “permanently discontinued” operations until it has in fact ceased operations with no intent or possibility of ever resuming them. In the absence of a legal presumption established by a rule, the actual intent of the licensee to resume operations at a later point would seem to easily and satisfactorily rebut any contention that it had permanently discontinued operations. The situation might be likened to that treadmill down in your basement which has acquired a thick coating of dust since it was last used in 1989. If asked, you would truthfully insist that you have every intention of getting on that treadmill and getting back into shape. In fact, you seriously think about firing it up every couple of weeks, but some other annoying factor always prevents you from doing so. No way have you “permanently discontinued” use of that treadmill.

But the FCC would take your treadmill away. For in *Northstar*, the licensee acknowledged in its application that it had not been operating the system for at least two years. The FCC rather breezily noted that in its other services it deems permanent discontinuance to have occurred if a licensee ceases operations anywhere “from 90 days to up to one year or more.” Given the two- year inactivity period, the Northstar licenses were deemed to have cancelled automatically. This unsupported and unprecedented declaration is flabbergasting on several levels.

First and foremost – when did the automatic cancellation occur? There is absolutely no way that any licensee would have known that a secret alarm clock with a silent alarm was ticking. And if there was such an alarm clock, did it silently go off at 90 days, 180 days, one year, or “more” – all of which would be potential yardsticks to measure PCS against. The FCC does not say. All we know is that at the two-year point the alarm clock had definitely gone off unbeknownst to anyone, and the license had been cancelled without the FCC, the licensee or anyone else doing or saying anything. This is scary, since the law normally demands that people have some kind of notice before punitive sanctions are imposed.

Second, PCS licensees who are planning to sell their silent stations now face a quandary. If the station has been silent for any length of time (we assume you're safe if you were silent for less than 90 days, but who knows?), your buyer has no assurance that the license has not been automatically cancelled by operation of a law that is unstated. Communications lawyers called upon to opine to the "good standing" of PCS licenses will be hard put to issue such opinions. A dark cloud of uncertainty has been cast over a whole service.

Unfortunately, the applicants involved in the *Northstar* case are unlikely to seek review; the Commission waived the "permanent discontinuance" rule for them in order to facilitate the effectuation of the license sales. So they will suffer not at all from the novel application of the permanent discontinuance rule and would be foolish to challenge the ruling. Under ordinary principles, no other party has standing to seek review of the Bureau's decision. So even though the decision seems to this observer grossly, unequivocally and manifestly erroneous, it will sit there for a while until it can be revisited. (One avenue might be the periodic review of non-controversial rules that the FCC undertakes every few years. Such a proceeding is now open, and the Commission could remedy the effect of this decision by simply adopting a firm standard for measuring permanent discontinuance of service, prospectively applied.) In the meantime, forget about your treadmill and get that PCS system running.