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The Long Arm of the Red Light Rule **Reaching back into the past to undo things long done?**

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Sometimes “final” doesn’t mean final, at least when the FCC’s Red Light procedures are involved. As we commented way back in the December, 2002, *Memo to Clients*, when the Commission’s Red Light Rule was first proposed, the rule “could give a whole new meaning to the concept of ‘finality’ – or, more likely, it could deprive the notion of ‘finality’ of any meaning.” And sure enough, fast forward six years and we find that our fears were far from unfounded: the Commission has recently demonstrated its own view that it can reach back and undo actions that the affected private parties reasonably assumed were done deals long before.

The case involved the transfer of PCS licenses from Northstar Technology to Banana Communications. In 2001 Banana filed an application to assign the licenses to Northstar on the condition that Northstar make certain post-closing payments. When Northstar failed to make these payments, the parties filed an application with the Commission to assign the licenses back to Banana pursuant to the original agreement. The FCC staff processed and granted the assignment and the parties consummated the deal in December, 2004.

So far, so good.

But as it turned out, according to the FCC’s records, Northstar owed the Commission nearly \$1 million as of November, 2004. The Commission sent Northstar a notice of its delinquency, but it appears that Northstar ignored that notice. Much to the Commission’s embarrassment, so too did the FCC’s staff, which (as noted above) granted the 2004 assignment application (from Northstar to Banana) notwithstanding Northstar’s delinquency. The Commission’s Red Light policy, of course, ordinarily provides that applications filed by deadbeats (*i.e.*, folks who are delinquent on debts to the FCC) will not be acted on; in fact, if the delinquency isn’t cleared up promptly, such applications are subject to dismissal.

In PCS-land at the Commission, once an assignment has been consummated, the parties are required to file a consummation notice, which the FCC then ordinarily implements by modifying its ownership records to reflect the new owner and issuing that new owner its own licenses. In the Northstar/Banana case, because of the delinquency (which the staff apparently noticed shortly after the assignment was granted), the staff declined to implement the consummation notice. As a result, the licenses in question continued to be held by Northstar, at least as far as the FCC was concerned.

Even more troubling, though, was the fact that, in July, 2005, the Commission dismissed the underlying 2004 assignment application (which, it may be recalled, sought approval of a deal which the FCC had approved and which the parties had closed eight months earlier). The basis for the dismissal: Northstar's unpaid debt.

That could have been the end of the story, but we are, after all, dealing with the Commission here, next to whom the Keystone Kops occasionally seem as coordinated and disciplined as a Busby Berkeley production number. When it dismissed the application (in 2005), the FCC staff neglected to issue a public notice of the dismissal, so the dismissal technically didn't become effective. When this lacuna came to the staff's attention a year later, it reinstated the application. But by that time the Northstar debt to the FCC was well in excess of \$1 million, and Northstar wasn't returning the FCC's calls.

Banana, on the other hand, asked the FCC to waive its Red Light rule to let the deal go forward. But then another federal agency (the Rural Utilities Service, an office of the U.S. Department of Agriculture (USDA)) showed up, asking the Commission to deny the assignment application because, as it turned out, Northstar apparently owed USDA nearly \$8 million.

Things simmered away until April, 2007, when the PCS licenses at issue were scheduled to expire. Northstar re-surfaced with renewal applications. The FCC promptly notified Northstar that, because of its outstanding debt to the FCC, the renewals would not be granted and, if full payment weren't received within 30 days, the renewal applications would be dismissed.

That warning seems to have had the desired effect. Northstar negotiated a settlement arrangement with the U.S. government which addresses all of its nearly \$10 million in debts, including the FCC-related obligation. Largely because of that settlement, the Commission has now agreed to a "limited waiver" of the Red Light rule which will permit the assignment of the licenses to Banana (as had been contemplated four years ago) and the renewal of those licenses.

The waiver should not be interpreted as a signal that the Commission plans to soften up on its Red Light policy. To the contrary, the Commission stressed repeatedly that this waiver was based on the “unique circumstances” of this case and was “limited” in its scope. Essentially, the FCC made clear that, in its view, the case was a “purple cow” with little precedential effect. In other words, the Red Light Rule remains in place.

So while Northstar and Banana dodged this particular bullet, the fact remains that, at least in the Commission’s view, no FCC grant of an application is necessarily ever final if it turns out that one of the parties to the application was subject to the Red Light Rule when the application was acted on. Caveat emptor.