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Forgotten, But Not Gone (until now)

Biltmore Forest comparative FM proceeding finally put to rest

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When last we reported on the Biltmore Forest FM case, it was 2003. The economy was booming, our mission to Iraq had been “accomplished”, Barak Obama was an unknown state legislator in Illinois, and Paris Hilton and Nicole Ritchie were still BFFs. The times they do change, but what remains constant is the Biltmore Forest case, which turned 22 years of age this year. It’s disconcerting when a legal case is old enough to drink alcohol and possess firearms – it can already vote, get married without parental consent, and get a taxi driver’s license. But the case now seems to have come, at long last, to an end.

Readers with unusually retentive memories will recall that we administered last rites, sounded the death knell, and sat shiva for this case after its last visit to the Supreme Court in 2003.

Biltmore Forest Broadcasting FM, Inc. (BFB) had been one of 14 original applicants who filed for this Class A FM station outside Asheville, North Carolina in 1987. After a decade-long comparative hearing, the FCC’s original grant was reversed by the Court of Appeals, and the case went into the pool to be auctioned in 1997. Auction irregularities led to further appeals by disappointed auction bidders (including BFB) all the way to the Supreme Court. Along the way there was a settlement agreement that was rejected by the Commission, two different interim operators of the station, and a senatorial hold on the confirmation of Chairman-designate Bill Kennard by the late Jesse Helms (who was backing one of the applicants). Electromagnetic confusion reigned one day when two different operators on the licensed channel were broadcasting at the same time in the same city. Applicants sued each other in civil court; applicants died of old age; applicants divorced and re-married.

Eventually, however, the FCC’s errors were forgiven by the Court of Appeals, the Supreme Court denied cert, and we declared the case dead.

It turned out that the rumors of its demise were greatly exaggerated. When the winning applicant went to assign its license to someone else, another disappointed applicant

challenged the assignment, raising issues about the licensee that had been unknown prior to the grant of the license. Despite the gross untimeliness of the new charges, the FCC simply refused to finally resolve the matter, eventually driving the licensee to enter into a six figure settlement agreement with the protester. Again the case seemed to be ready for the archives. Not so fast.

Shortly before the six-year statute of limitations expired, BFB (represented by your author) filed a complaint with the Court of Federal Claims in Washington, alleging that the FCC had breached its contract with BFB by not awarding the license to the highest qualified bidder. The theory was that, while the license could no longer be granted to BFB, the FCC should at a minimum be forced to pay BFB damages for the agency's breach of the auction contract. Though the courts were sympathetic and did seem to acknowledge that a contract existed, controlling precedents divested the Claims Court of any jurisdiction over the contract claim – even though the only other court with jurisdiction could not award money damages. BFB duly presented its novel argument to the Federal Circuit Court *en banc* and then the Supreme Court, but justice, unfortunately, was not served.

Since the International Court of Justice at the Hague does not take jurisdiction over FCC rulings, the Biltmore Forest applicants have now exhausted all known avenues of appeal. The stake has finally been driven through the heart of this case. May it rest, again, in peace.