

12-1997

Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934

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Recommended Citation

Fishman, William L. (1997) "Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934," *Federal Communications Law Journal*: Vol. 50: Iss. 1, Article 2.

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Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934

William L. Fishman*

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* Of Counsel, Swidler and Berlin, Chartered. The Author has participated as counsel in a number of the matters discussed herein. He wishes to thank Professor Glen Robinson of the University of Virginia School of Law for helpful suggestions and Jane Maxwell for research assistance. The views expressed in this Article are those of the Author only.

I. INTRODUCTION

As we head into the twenty-first century, there are few industries more crucial to our lives than telecommunications. It has become part of the basic fabric of society, an irreducible element in our economy, our culture, and our daily activity. An even more basic element of Western society is the concept of property and the rights and obligations which flow therefrom. Given the central role of telecommunications, it is somewhat surprising that the fundamental notions of property and property rights in the context of telecommunications have not been more extensively considered by commentators.¹ This Article seeks to remedy that deficiency, at least in part, by focusing on rights, including justifiable reliance interests, which arise directly from federal regulation of interstate communications, as it has been practiced for the last sixty-odd years. After surveying the principal elements of such property rights in licenses as the Federal Communications Commission's (FCC or Commission) regulatees may enjoy, the Article addresses the extent to which the courts consider reliance interests, particularly in instances of retroactive rule making.²

It may be useful to state at the outset what is meant by the generic term "property rights." Broadly speaking, the term implies the ability to buy; hold; use; sell; dispose of, in whole or in part; or otherwise determine the status of an identifiable, separable, and discrete object, right, or privilege. There is, of course, no definition that is at once all-encompassing and meaningful in every context. Ultimately, a property right defines the relationship of an individual not to a thing, but to other individuals or owners in relationship to a thing.³ Among these other entities, of course, the gov-

1. Happily, as a consequence of the recent adoption of auctions as an alternative allocational method for certain portions of the spectrum, legal and economic commentators have begun to focus attention on the property aspects of FCC licenses. See, e.g., Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87 (1997); Howard Shelanski & Peter Huber, *The Attributes and Administrative Creation of Property Rights in Spectrum* (Sept. 1996) (unpublished paper, on file with author) (asserting that essential rights that constitute property have evolved administratively for spectrum licensees); see also Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 39 (1996) ("Because we have no markets in spectrum use, we have had to invent a method to create property rights in the spectrum.").

2. State jurisdiction over telecommunications, of course, is an important and indeed essential compliment to federal law and practice; but, the diversity of state law is too vast to permit its inclusion here. For similar reasons, intellectual property, trade secrets, privacy, and other related topics, although of increasing importance in a service economy, are not addressed.

3. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) (observing that property rights are relationships among an owner and other individuals in relationship to things).

ernment looms overwhelmingly by limiting the ability of an individual to control the ownership incidents of many, indeed of most, forms of private property. Many such limitations arise out of the undoubted police power to adopt and enforce, for example, environmental regulations or handgun controls. Even the FCC exercises such police power, as in the preemption of local regulations limiting the placement of radio reception apparatus.⁴ But the Commission's exercise of its police power and the "taking" or "due process" issues under the Fifth Amendment to the Constitution do not require extended analysis with respect to the scope of the regulatees' property rights based on physical goods such as utility poles⁵ or telephone plants.⁶ These cases are in principle no different from other claimed "takings." As a general rule, government has the right to take private property provided there is a legitimate public purpose and the compensation is fair.

Rather, the principal concern here is with property which is not a physical object or a contractual right, but a license. However thin or narrowly circumscribed their property rights as licensees may be, it is indisputable that those holding (or seeking) FCC authorizations are entitled to the protection of the Constitution. They are therefore entitled to claim due process, or equal protection rights, as against the Commission. But these protections arise only if there is an interest or a property right to be protected, and the latter is the question that must be resolved first. Certainly the overwhelming body of precedence is that FCC licensees do not have the sort of property right that is protected from an unconstitutional taking, in contrast to property rights in equipment, which are fully protected. But

4. See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 207, 110 Stat. 56, 114 (codified in scattered sections of 47 U.S.C.A. (West Supp. 1997)); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order*, 11 FCC Rcd. 5809, 2 Comm. Reg. (P & F) 723 (1996).

5. See, e.g., *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (holding that FCC's limit on pole attachment fees is not an unconstitutional taking of property because the property owner may withdraw permission for the use of its poles and the rate mandated by the FCC is not confiscatory).

6. *Federal Power Comm'n. v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15,499, 4 Comm. Reg. (P & F) 1, *Order on Reconsideration*, 11 FCC Rcd. 13,042, 4 Comm. Reg. (P & F) 1057, *Second Order on Reconsideration*, 11 FCC Rcd. 19,738 5 Comm. Reg. (P & F) 420, *aff'd in part and vacated in part sub nom. CompTel v. FCC*, 117 F.3d 1068 (8th Cir.), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir.), *clarified by Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, 1997 WL 469457 (Aug. 18, 1997). A recent instance of the Commission's exercise of its nonlicensing police power is discussed in *Cox Cable Communications, Inc. v. U.S.*, 866 F. Supp. 553 (M.D. Ga. 1994) (considering and rejecting constitutional challenges to 47 U.S.C. § 541(a)(1)).

closer inspection suggests important protections do exist. I therefore first address the FCC's pervasive licensing of private sector use of designated portions of the electromagnetic spectrum, specifically the extent to which such licensure has been deemed by the Commission and the courts to create protected property rights. Next I analyze the concept of reliance interests encompassing the enforceable legal or equitable right, whether created by statutory, regulatory, or judicial action, to rely upon FCC action or inaction. Finally, I analyze the licensee's right to assert such interests against the government.

Congress first enacted comprehensive regulation of the telecommunications industry in 1927, creating the Federal Radio Commission within the Department of Commerce.⁷ Thereafter, in 1934 the law was extensively expanded: the Communications Act (1934 Act) was passed, and the FCC was brought into existence as an independent agency.⁸ The 1934 Act has been amended from time to time, most recently and dramatically in the Telecommunications Act of 1996.⁹ This analysis will not focus on the various changes in the Communications Act since 1934 but instead will highlight the ways in which the fundamental notion of property, or property rights, has been treated both in the Communications Act, as amended from time to time, and by the FCC and the courts in their decisions implementing the law.

Exercising its sovereign rights, Congress assumed in writing the 1934 Act, that the radio frequency spectrum belonged to the federal government. As early as 1922, Secretary of Commerce Herbert Hoover expressed the view that the "ether" was a public possession.¹⁰ Whether the assumption was that the government owned the spectrum or simply had the obligation to police an otherwise inchoate opportunity is quite irrelevant to all that followed. A 1969 article claimed that the government's appropriation of the spectrum resource was grounded in the need to police spectrum in order to give it any value, and not in the government's assertion of a right to the wealth created by spectrum use. In any case, "[n]o doubt official opinion now regards the spectrum as government property, but the justification for this opinion is not self-evident."¹¹

7. Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102 (codified as amended at 47 U.S.C. § 602(a) (1994)). The first legislation affecting radio emissions was the Radio Act of 1912.

8. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West Supp. 1997)).

9. *See* Telecommunications Act.

10. *See* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 64 (Max D. Paglin ed., 1989).

11. Arthur S. De Vany et al., *A Property System for Market Allocation of the Electro-*

In recent testimony before the Subcommittee on Telecommunications, Trade, and Consumer Protection, FCC Chairman Reed Hundt alluded to Hoover's assertion of ownership and observed that the question whether spectrum is public or private property is not easily resolved.¹² He indicated that treating spectrum as public property assures that access is fairly distributed and that public benefits can be guaranteed, while treating spectrum as private property maximizes economic benefits. Faced with this dichotomy, Chairman Hundt suggested that the Commission has chosen a "third way" by amalgamating both approaches.¹³ Nevertheless, the Chairman clearly believes the spectrum belongs to the people: "Those who characterize public-interest obligations as encroachments on licensees' rights ignore the fact that licensees use precious public property for their own private gain."¹⁴ At least five members of the U.S. Court of Appeals for the D.C. Circuit are skeptical of the government's property interest in spectrum: "[U]nallocated spectrum is government property only in the special sense that it simply has not been allocated to any real 'owner' in any way."¹⁵ Debate about the origin and extent of government property rights in spectrum thus continues to the present. What is indisputable is that in allowing members of the public to use any particular portion of the spectrum, Congress was careful to specify that such authorization was temporary, limited, and subject to withdrawal in a wide variety of circumstances.

These doctrines have been critical to administration of the Communications Act and are little changed from 1934. They have given rise to a wide variety of problems for Commission licensees and may be expected to continue to do so. It is an interesting threshold question: What is meant when we say the government by law preserves its (assumed) right to regulate spectrum? Unlike land or water rights, offshore oil fields, or even air rights owned by the government, spectrum is not tangible. It is, at least to a physicist, a property (in its scientific sense) of nature; it has no tangible

magnetic Spectrum: A Legal-Economic-Engineering Study, 21 STAN. L. REV. 1499, 1531 (1969).

12. *Spectrum Management Policy: Hearing Before the Subcomm. on Telecomm., Trade and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 39 (1997) (statement of Reed E. Hundt, Chairman, FCC).

13. *Id.* at 2.

14. *Id.* at 21.

15. *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 727 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing en banc, with concurrence of Edwards, Silberman, Ginsburg, and Sentelle, JJ.). The dissenting opinion analogized unallocated spectrum to unappropriated water. The dissenters observed also that the government asserted its monopoly power over spectrum at a time when the relative unimportance of such resources made the assertion of power modest. *Id.*

being.¹⁶ It would probably be better, therefore, to say that the government regulates electromagnetic radiation in certain defined frequencies, rather than to say it regulates spectrum. Nevertheless, usage, by now hoary, is to the contrary, and that convention is adopted here.

There are three basic property concepts which are important to the administration of the Communications Act: (1) property rights in FCC licenses, such as the right to buy and sell or otherwise control licenses, (2) reliance interests of licensees and others, and (3) property rights which arise outside the Act but which are subject to the Act, such as ownership of assets used for the provision of authorized, but nonspectrum-based services.¹⁷ There is a good deal of overlap among these and in many instances the rights described in this Article may be implicated in all three. Only the first two are considered here.

II. PROPERTY RIGHTS IN FCC LICENSES

In a literal sense, no one owns an FCC license: not the licensee, nor any other private party, and not even the public.¹⁸ Although through the years there have been many careless declarations to the contrary, both the Commission and the courts have affirmed that licensees do have certain property rights in their licenses. Apart from the broad statutory provisions which limit such rights, virtually each of the FCC's regulations, by limiting a licensee's freedom of action in one way or another, may be considered a limitation of property rights. This Article does not cut such a wide swath—both because such a broad proposition is self-evident, but also because it does not appear particularly useful.¹⁹ The basic statutory provisions addressing licensees' rights are in Title III of the Communications Act. Section 301 of the Communications Act specifies, in part, that its purpose, among other things, is:

to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under li-

16. When propagation of radio frequency (RF) energy through space was first discovered, it was thought that something called "ether" was the transport medium. As a result of the Michelson-Morley experiments, we are now wiser, although the precise physical phenomena involved in RF propagation are still in dispute.

17. Physical assets used in licensed, spectrum-based activities, such as a radio transmitter, would also fall in the third category, but are not the focus of this Article.

18. *But see* Crowder v. FCC, 399 F.2d 569, 571 (D.C. Cir.) ("[broadcast frequency] belongs to the public, who through the Commission, award its use to a licensee to operate consistent with the public interest."), *cert. denied*, 393 U.S. 962 (1968).

19. See Shelanski & Huber, *supra* note 1, for an analysis of property rights of broadcast spectrum licensees based on the scope of their ability to use, alienate, subdivide, or transfer their spectrum authorizations.

censes granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.²⁰

If this were not clear enough, section 304 goes further by demanding that each prospective licensee relinquish any claims it may have to the frequency in question:

No station license shall be granted by the Commission until the applicant therefore shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.²¹

Section 316 of the Communications Act gives the FCC authority to modify any license if, in its judgment, such modification is required by the public interest, convenience, or necessity.²² Section 309(h)(1) provides that a “station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof”²³ Section 310(d) specifies that no license, or any rights thereunder “shall be transferred, assigned or disposed of” except upon Commission approval.²⁴

In *FCC v. Sanders Brothers Radio Station*,²⁵ the Court confirmed that FCC licenses are subject to suspension, modification, or revocation in the public interest and that licenses carry no vested property rights sufficient to protect the licensee against competition. “The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license.”²⁶ On the other hand, in *Yankee Network, Inc. v. FCC*, after acknowledging that the Communications Act specifically precludes application of the concept of common law rights to li-

20. Communications Act of 1934, ch. 652, § 301, 48 Stat. 1064, 1081 (codified at 47 U.S.C. § 301 (1994)).

21. 47 U.S.C. § 304. This provision, first appearing in the Radio Act of 1927, ch. 169, 44 Stat. 1162, was intended to address circumstances in which, prior to the adoption of any government regulation, private parties had begun radio transmission. These parties might have been expected to contend that by doing so some sort of equitable right in the nature of an implied easement or adverse possession had been established. In this context the provision might have been narrowly read to mean that the waiver is confined to a claim based on prior use; for example, use prior to the license grant for which the waiver is required. In fact, the waiver language has been far more broadly interpreted. *See, e.g.*, Revision of Rules and Policies for the Direct Brdcast. Satellite Serv., *Report and Order*, 11 FCC Rcd. 9712, para. 139, 1 Comm. Reg. (P & F) 928 (1995), [hereinafter *DBS Report and Order*], *aff'd sub nom. DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

22. 47 U.S.C. § 316.

23. *Id.* § 309(h)(1).

24. *Id.* § 310(d).

25. *Sanders Bros.*, 309 U.S. 470 (1940).

26. *Id.* at 475.

censes, the court observed that “the Act does definitely recognize the *rights* of license holders in express terms no less than seven times.”²⁷ The court added: “It is equally apparent that the granting of a license by the Commission creates a highly valuable property right, which, while limited in character, nevertheless provides the basis upon which large investments of capital are made and large commercial enterprises are conducted.”²⁸

This theme was repeated in *L.B. Wilson, Inc. v. FCC*, in which the court noted that licensees do have certain rights:

That private as well as public interests are recognized by the Act is not to be doubted. While a station license does not under the Act confer an unlimited or indefeasible property right—the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest—nevertheless the right under a license for a definite term to conduct a broadcasting business requiring—as it does—substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued [P]rovisions of the Communications Act itself . . . recognize that a broadcasting license confers a private right, although a limited and defeasible one.²⁹

The *L.B. Wilson* language has been widely cited subsequently but it is clear that the courts (principally the U.S. Court of Appeals for the D.C. Circuit) have wrestled somewhat unsatisfactorily with defining the scope of a licensee’s property rights. The much quoted *Greater Boston Television Corp. v. FCC* observes that the Act does not reflect the same degree of concern for “security of certificate” as do other laws.³⁰ In *Reuters Ltd. v. FCC*,³¹ the court rejected an FCC decision rescinding a grant as improvidently made in order to consider a later-filed, mutually exclusive application. In doing so the court observed that a properly granted radio license is a “vested interest.”³² And in *Orange Park Florida T.V., Inc. v. FCC*, the

27. *Yankee Network*, 107 F.2d 212, 216 (D.C. Cir. 1939).

28. *Id.* at 217.

29. *L.B. Wilson*, 170 F.2d 793, 798 (D.C. Cir. 1948) (citation omitted). A more overt narrowing of *Sanders Brothers* appears in *Atlantic Business and Community Development Corp.*, 994 F.2d 1069, 1073-74 (3rd Cir. 1993) (citation omitted):

We do not think *Sanders Brothers* holds that an FCC license has none of the attributes of property. The Communications Act itself seems to imply the existence of a limited property right in an FCC license once it is granted. Section 301 . . . implies the creation of rights akin to those created by a property interest limited only by the “terms, conditions and periods of the license.”

30. *Greater Boston TV Corp.*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

31. *Reuters*, 781 F.2d 946 (D.C. Cir. 1986).

32. *Id.* at 950 n.5; *cf.* *Central Fla. Enter., Inc. v. FCC*, 598 F.2d 37, 60 n.18 (D.C. Cir. 1978) (concluding that the 1934 Act disfavors vested license rights) (quoting *Citizens Comm. Ctr. v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971)).

same court, after quoting *Sanders Brothers* for the proposition that a broadcast license is not a full-fledged, indefeasible property interest since it is limited in duration and may be held only so long as the licensee operates in the public interest, went on to say that “[n]either is it a non-protected interest, defeasible at will. Indeed, to suggest as much would, among other things, throw considerable doubt on the Commission’s well-known recognition of a renewal expectancy that leads applicants to vie for licenses which, if awarded, will require a significant expenditure of resources.”³³ At the same time, broadcast licensees have commonly been referred to as public trustees or fiduciaries.³⁴

There has not been any definitive holding concerning the extent of property rights in an FCC-granted license. Nevertheless from the foregoing it would appear reasonable to conclude that the courts have recognized that licenses do indeed have certain incidents of property, more clearly perhaps vis-à-vis private parties but even as against the plenary power of the Commission in certain circumstances. The discussion which follows will help to illuminate the limits on a licensee’s property rights and judicial efforts to weigh such rights in the public interest balance.

33. *Orange Park Fla. T.V.*, 811 F.2d 664, 674 n.19 (D.C. Cir. 1987). This “renewal expectancy,” as set forth in *Cowles Broadcast, Inc., Decision*; 86 F.C.C.2d 993, para. 68, 49 Rad. Reg. 2d (P & F) 1138 (1981), *aff’d. sub nom. Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983), may be conceptualized as a future interest, based on the presumption, albeit rebuttable, that adequate performance warrants renewal. The extent to which the renewal expectancy could be construed as a legal right or equity, and the vicissitudes of the comparative renewal process, are summarized in *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1206-10 (D.C. Cir. 1971). The Commission has recognized that if a licensee is immune to challenges at renewal time it “would appear to create a property right in that frequency beyond the contemplation of both Congress and the courts . . .” *Carlisle Brdcst. Assocs., Memorandum Opinion and Order*, 59 F.C.C.2d 885, para. 12, 37 Rad. Reg. 2d (P & F) 777 (1976) (footnote omitted). One Commissioner in a dissenting statement to an earlier *Cowles* decision, *Cowles Florida Broadcast, Inc., Decision*, 60 F.C.C.2d 372, 37 Rad. Reg. 2d (P & F) 1487 (1976), alluded to the all but automatic renewal of broadcast licenses and commented that “[d]espite the legal theory of the Communications Act that a license is not a property right, the practical reality has been quite different, as all the world knows.” *Id.* at 435 (footnote omitted). Commissioner Robinson also suggested there should be legal recognition that a licensee has “a property right in its license which is defeasible only for serious misbehavior.” *Id.* at 442. Any other view “blink[s] reality.” *Id.* at 446. Some 20 years later the Telecommunications Act of 1996 enacted such a presumption into positive law. Telecommunications Act of 1996, sec. 204(a), § 309, 47 U.S.C.A. § 309 (West Supp. 1997). One commentator has characterized this law as creating “virtually perpetual licenses to all radio and television stations.” Krattenmaker, *supra* note 1, at 12.

34. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984); *Office of Comm. of United Church of Christ v. FCC*, 425 F.2d 543, 548 (D.C. Cir. 1969) (stating that broadcasters are fiduciaries of a public resource).

A. *Assignment and Transfer*

Sections 301, 304, and 309 of the Communications Act are the principal pillars upon which the Commission has erected its *corpus juris* dealing with assignment or transfer of Commission licenses.³⁵ Simply put, if a licensee entity wishes to assign or transfer its license to another party, Commission approval is required.³⁶ This constraint on one of the most elementary aspects of property alone goes far to limit property rights. It has generated an incalculable amount of work for the FCC, since each purchase, sale, assignment, or transfer of a licensed entity—or an entity controlling a licensed entity—has required Commission approval.³⁷ The need for prior approval is applicable even to *pro forma*,³⁸ or other nonsubstantive changes in ownership or control;³⁹ as well as to instances where two unrelated entities enter into an arm's length transaction, for example, the sale of a corporate entity holding an FCC license.

Although it is commonly said that Commission approval is required for the purchase or sale of an entity holding an FCC license, a more precise formulation is that prior Commission approval is required for the transfer of control of the licensee or assignment of the license. The 1934 Act prospectively declares that no license shall be assigned or transferred in violation of the Act, and no entity may hold a license without an affirmative Commission finding that the public interest would be served thereby.⁴⁰ As a practical matter, however, it is perfectly legal (if no other constraints exist) to sell an entity which holds an FCC license without prior Commission approval; in such a case, however, the license is not transferred legally to

35. Communications Act of 1934, ch. 652, §§ 301, 304, 309, 48 Stat. 1064, 1081-85 (codified as amended at 47 U.S.C.A. §§ 301, 304, 309 (West Supp. 1997)). There are other relevant provisions, however. Section 309(h), together with § 606, provide the President with plenary power to control radio licenses during time of war or in other instances of national emergency. They have not been relied upon much in recent history.

36. An admirably comprehensive review of this subject may be found in Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277 (1991).

37. Sale of controlling stock in a licensed entity would involve the transfer of control of the license to the new owner of the stock even if the licensee entity remains the same; sale of the licensee's assets, including the license, requires an assignment of the license to a new entity. *Contel Cellular, Inc., Memorandum Opinion and Order*, 9 FCC Rcd. 5309, 75 Rad. Reg. 2d (P & F) 1342 (1994). There are, of course, a plethora of reasons involving tax and other non-FCC issues for choosing to make an acquisition either by purchase of stock or purchase of assets.

38. 47 U.S.C.A. § 309(c)(2)(B). See *TeleCourier Comm. Corp., Memorandum Opinion and Order*, 10 FCC Rcd. 10,014 (1995).

39. *Hinton Tel. Co., Memorandum Opinion and Order*, 7 FCC Rcd. 6643, 71 Rad. Reg. 2d (P & F) 974 (1992).

40. 47 U.S.C.A. § 309(a).

the new owner who has neither the license nor any of the rights pertaining thereto. Proceeding in this fashion is unusual, indeed rare, because the FCC license is frequently the most valuable asset on the target entity's balance sheet and, in such circumstances, the license must be understood to be abandoned and forfeited.⁴¹ The need for Commission approval to assign or transfer an FCC license has sometimes inclined the parties to a transaction to structure it as a stock transaction rather than as an asset sale, since the notion of "selling" the assets, including the FCC license, may be thought to breach the 1934 Act's injunction against the possession of property rights in a license.

B. Sale of a "Bare" License

The assignment and transfer rules outlined above apply to instances in which a licensee is operating a facility pursuant to authority granted by the Commission. Frequently, however, the holder of a license (or construction permit) who has not yet constructed and operated the authorized facility wishes to divest itself of the license or the entity holding the license. In such instances, FCC parlance describes the purchase or sale of a "bare" license, and for many years the Commission has maintained a policy against the for-profit sale of unbuilt radio or television broadcast stations on the theory that to allow such sales would be to acknowledge that the license itself was an asset which could be bought and sold like any other.⁴² The policy, which applies across the board to all broadcast serv-

41. Perfection Music, Inc., *Memorandum Opinion and Order*, 30 Rad. Reg. 2d (P & F) 12 (1974). This doctrine of automatic forfeiture where a licensee assigns or transfers a license without Commission approval may be considered salutary by the transferee or assignee since in such cases §§ 501, 502, and 503 provide for forfeitures, fines, and in cases of knowing and willful violations of the 1934 Act, prison terms. Where such unauthorized transfers or assignments are made under circumstances which do not call into question the licensee's basic qualifications, the Commission generally has adopted a forgiving attitude, occasionally imposing modest forfeitures. *See, e.g.*, FM Brdct. of Douglas County, *Memorandum Opinion and Order*, 10 FCC Rcd. 10,429, 1 Comm. Reg. (P & F) 772 (1995).

42. Amendment of Section 73.3597 of the Comm'n's Rules, *Report and Order*, 52 Rad. Reg. 2d (P & F) 1081 (1982) [hereinafter *Amendment of Section 73.3597 Report and Order*], *reconsidered by* 99 F.C.C.2d 971, 57 Rad. Reg. 2d (P & F) 1149 (1985); Revision and Update of Part 22 of the Pub. Mobile Radio Servs. Rules, *Report and Order*, 95 F.C.C.2d 769, 54 Rad. Reg. 2d (P & F) 1661 (1983), *reconsidered by Order on Reconsideration*, 101 F.C.C.2d 799, 58 Rad. Reg. 2d (P & F) 1051 (1985), *further reconsidered by Order on Further Reconsideration*, 2 FCC Rcd. 1798, 62 Rad. Reg. 2d (P & F) 861 (1987). The FCC has suggested the existence of other reasons to bar the sale of bare licenses, including: (1) preservation of the integrity of the Commission's application processes and the promotion of new services, Assignment and Transfer of Construction Permits for new Brdct. Stations, *Report and Order*, 16 F.C.C.2d 789, 15 Rad. Reg. 2d (P & F) 1568 (1969); (2) the desire to discourage "speculative" applications seeking not the opportunity to build and operate a licensed facility, but merely the grant of a valuable license for resale,

ices, has been explained as follows:

Sections 301 and 304 provide, *inter alia*, that licenses issued by the Commission convey no property interest. To allow a permit to be transferred in a situation in which the station seller obtains a profit, prior to the time that programs tests have commenced, would appear to violate this prohibition. The permittee would appear to have nothing to convey for profit other than the mere expectation of future profits, which appends to the permit itself.⁴³

Unbuilt broadcast stations can, however, be sold for an amount equal to the documented legitimate and prudent expenses incurred in applying for the facility and attempting to put it in operation.⁴⁴

While the Commission in general has looked askance at the sale of unbuilt facilities, in recent years it has relaxed the broad prohibition in certain instances. In *Bill Welch*,⁴⁵ a much-cited case, the Commission reconsidered its policy in this respect and approved the for-profit sale of a cellular telephone authorization. The Commission reviewed its prior policy and the legislative history of sections 301 and 304 of the 1934 Act. It concluded that the purpose of those provisions was to preserve the government's rights vis-à-vis those of a licensee: "[T]he language of these sections . . . seems to address congressional concerns that the Federal Government retain ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees who are permitted to use the frequencies."⁴⁶ Similarly, the Commission found no language in section 310(d) of the 1934 Act which suggests any Congressional intent to limit the ability of a permittee or licensee to receive a profit for its authorization upon an assignment or transfer approved by the Commission.⁴⁷

see infra Part I.C.; and (3) cases in which a licensee with liabilities but no assets of any value other than its license seeks Commission approval for assignment or transfer of the license to a third party. *See, e.g., Bonanza Brdcast. Corp., Memorandum Opinion and Order*, 10 F.C.C.2d 906, 11 Rad. Reg. 2d (P & F) 1072 (1967).

43. Amendment of Section 73.3597 of the Comm'n's Rules, *Notice of Proposed Rule-making*, 47 Fed. Reg. 985, 987 (1982); *see also* Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, 9 FCC Rcd. 7988, para. 393, 76 Rad. Reg. 2d (P & F) 326 (1994); Amendment of Parts 2, 21, 74 and 94 of the Comm'n's Rules and Regs., *Report and Order*, 94 F.C.C.2d 1203, paras. 143-44 (1983), *reconsidered by Memorandum Opinion and Order on Reconsideration*, 98 F.C.C.2d 1249, 56 Rad. Reg. 2d (P & F) 421 (1984).

44. *Amendment of Section 73.3597 Report and Order*, 52 Rad. Reg. 2d (P & F) 1081, para. 33.

45. *Bill Welch, Memorandum Opinion and Order on Review*, 3 FCC Rcd. 6502, 65 Rad. Reg. 2d 755 (1988).

46. *Id.* para. 11.

47. *Id.* para. 14. Indeed, as the Commission notes, there is strong evidence in the legislative history that no such limitation on profitable sale was intended. The elimination of a

Although the *Bill Welch* case has been widely cited for the proposition that the Commission now has recognized broader property rights in its licenses, the Commission limited its holding in two substantial ways. First, it specified that the holding applied only to the specific context in which it arose, for example, cellular telephone authorizations under part 22 of the Commission's rules.⁴⁸ Second, it specified that the holding did not, in any way, affect continued enforcement of the Commission's policies reflected in the cellular antitrafficking rule.⁴⁹ In fact, the Commission has also been less concerned about the sale of bare permits in the Direct Broadcast Satellite (DBS) service. Indeed, from its inception in 1982, that service has never had an explicit rule or policy barring such sales. In *Directsat Corp.*, the Commission explained that the presence of due diligence obligations in the DBS service provides sufficient assurance that speculation in unbuilt facilities in general is not the goal of DBS permittees.⁵⁰

C. *Prohibitions on Speculation or Trafficking*

Closely related to the prohibition on the sale of a bare license are prohibitions on speculation or trafficking. Among the many ways in which the Commission has interpreted the Communications Act to limit the property rights of licensees, none are more long-lived or curious than the Commission's oft-cited prohibitions on speculating or trafficking in FCC licenses.⁵¹ There are three principal elements in the offense of trafficking: (1) the length of time the station was held; (2) whether it was to be sold for a profit; and (3) whether there was speculative intent.⁵² As set forth in the

Senate bill provision that would have limited the level of profit available for the sale of radio licenses suggests the absence of congressional policy to limit profitable sales. *Id.* para. 15.

48. 47 C.F.R. §§ 22.1-22.383, 22.900-22.959 (1996). Therefore, rules adopted in other services which bar for-profit sales of unbuilt licenses, for example, 47 C.F.R. § 73.3597, were to remain in effect. However, the Commission has acknowledged that the *Bill Welch* case may call into question the statutory basis for other property-limiting rules such as those affecting reverter and security rights in the broadcast industry. Review of the Comm'n's Regs. and Policies Affecting Investment in the Brdcast. Indus., *Notice of Proposed Rule-making and Notice of Inquiry*, 7 FCC Rcd. 2654, para. 22 (1992).

49. See 47 C.F.R. § 22.139 (previously codified at 47 C.F.R. § 22.40(b)).

50. *Directsat Corp.*, *Memorandum Opinion and Order*, 10 FCC Rcd. 88, para. 4 (1995).

51. Use of the word "trafficking" in this context is traceable to hearings on bills which ultimately became the Radio Act of 1927. According to one early commentator it was intended to condemn those who had aggressively taken advantage of their rights under the Radio Act of 1912. See Harry P. Warner, *Transfer of Broadcasting Licenses Under the Communications Act of 1934*, 21 B.U. L. REV. 585, 594-95 (1941).

52. *Atlantic Coast Brdcast. Corp.*, *Memorandum Opinion and Order*, 22 Rad. Reg. (P & F) 1045, para. 15 (1962); *Zenith Radio Corp.*, *Memorandum Opinion and Order*, 60 F.C.C.2d 1012, para. 6, 38 Rad. Reg. 2d (P & F) 585 (1976).

typically stern terms which are used to describe the offense, *Crowder v. FCC*, notes the following:

Trafficking is condemned because "a government license granted in reliance on an applicant's stated intention to operate should not, instead, be bartered away for profit, i.e., that license should not be granted to persons whose primary intent is to sell them at a profit rather than to operate a station in the public interest."⁵³

The rationale appears to rest on the assumption that a radio license is a privilege, granted for the opportunity to serve the public interest and that to permit acquisition and sale of such licenses merely for the profit of doing so is incompatible with the trustee status of a broadcast licensee. A common subtheme is that frequent changes in ownership do not serve the public interest. As indicated in *Guy S. Erway*: "[t]he Commission wants to minimize the public service disruption that accompanies frequent ownership changes. This means that . . . a speculator . . . is not welcome in the broadcast field."⁵⁴

If these are the rationales, there is much less reason to apply the policy to the common carrier or private radio side of the Commission's jurisdiction, where mobile, microwave, or business radio licenses are frequently granted merely as a tool to carry out a nonbroadcast business. Case law, however, does not reflect any such distinction. The Commission acknowledged in *Bill Welch*,⁵⁵ that there is nothing in the 1934 Act that explicitly bans trafficking.⁵⁶ Nevertheless, the antispeculation and antitraff-

53. *Crowder*, 399 F.2d 569, 571 (D.C. Cir.) (quoting WMIE-TV, *Memorandum Opinion and Order*, 11 Rad. Reg. (P & F) 1091, para. 13 (1955)), *cert. denied*, 393 U.S. 962 (1968).

54. *Guy S. Erway*, 90 F.C.C.2d 755, 774 (1980) (citing *Edina Corp.*, 4 F.C.C.2d 36, 7 Rad. Reg. 2d (P & F) 767 (1966), *review denied by FCC* 66-946 (1966), *aff'd per curiam sub nom. Norseman Brdcast. Corp. v. FCC*, 12 Rad. Reg. 2d (P & F) 2007 (D.C. Cir. 1968)).

55. *Bill Welch*, *Memorandum Opinion and Order on Review*, 3 FCC Rcd. 6502, 65 Rad. Reg. 2d (P & F) 755 (1988).

56. Section 309(j) of the Act, enacted in 1993 to provide auction authority, directs the Commission to adopt antitrafficking provisions for licenses won by auction. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, sec. 6002(a), 107 Stat. 387 (codified at 47 U.S.C. § 309(j) (1994)). The statutory language and the Commission's implementing regulations speak of the avoidance of unjust enrichment. *See, e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 9 FCC Rcd. 2348, paras. 211-15, 258-65, 75 Rad. Reg. 2d (P & F) 1 (1994) [hereinafter *Section 309(j) Second Report and Order*]; Competitive Bidding (IVDS), *Fourth Report and Order*, 9 FCC Rcd. 2330, para. 30, 75 Rad. Reg. 2d (P & F) 188 (1994). Similarly, section 309(i)(4)(c) of the 1934 Act requires the Commission to adopt, *inter alia*, antitrafficking restrictions to prevent unjust enrichment of lottery winners. *See* 47 U.S.C. § 309(i)(4)(C); Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *First Report and Order*, 9 FCC Rcd. 7373, 74 Rad. Reg. 2d (P & F) 700 (1994). The Commission has done so by adopting 15 separate provisions. *See, e.g.*, 47 C.F.R. §§ 1.2111(b)-(d); 21.960(b)(5), (d)(1); 24.309(f); 24.712(b); 26.210(d); 90.810(b); and

ficking policies endure. Today, the antitrafficking policy appears in the broadcasting context (in a reduced form),⁵⁷ the MMDS⁵⁸ and cellular⁵⁹ services, fixed microwave,⁶⁰ and others.⁶¹ However, the Commission has adopted relaxed antitrafficking policies for cellular radio permits awarded after a lottery.⁶² More generally, the Commission's bark in respect to traf-

95.816(e) (1996). In predominant part these rules address circumstances in which resale is proposed by entities which won auctions as specially advantaged designated entities. *See Section 309(j) Second Report and Order*, 9 FCC Rcd. 2348, paras. 211-15, 75 Rad. Reg. 2d (P & F) 1. An antitrafficking provision added by the Cable Act of 1992, previously codified at 47 U.S.C. § 537, established a three-year holding requirement for cable systems. Implementing rules at 47 C.F.R. § 76.502 were adopted by the Commission. *See Implementation of Sections 11 and 13 of the Cable TV Consumer Protection and Competition Act of 1992, Report and Order*, 8 FCC Rcd. 6828, para. 48, 6881 (Appendix D), 73 Rad. Reg. 2d (P & F) 627 (1993), *reconsidered by memorandum opinion and order*, 10 FCC Rcd. 4654, 76 Rad. Reg. 2d (P & F) 1560 (1995). Section 301(i) of the Telecommunications Act of 1996 eliminated these restrictions. *See Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996, Order*, 2 Comm. Reg. (P & F) 293, 294 (1996).

57. 47 C.F.R. § 73.3597. In 1982, under pressure from the industry, the Commission eliminated the antitrafficking rule in the broadcast context. *Amendment of Section 73.3597 Report and Order*, 52 Rad. Reg. 2d (P & F) 1081 (1982); *see also Memorandum Opinion and Order*, 4 FCC Rcd. 1710, para. 12, 66 Rad. Reg. 2d (P & F) 219 (1989), *aff'd sub nom. Office of Comm. of United Church of Christ v. FCC*, 911 F.2d 813 (D.C. Cir. 1990), in which the Commission concluded that acquiring a broadcast station for the purpose of enhancing its market value does not constitute a detriment to the public interest.

58. Amendment of Parts 1, 2 and 21 of the Comm'n's Rules, *Report and Order*, 8 FCC Rcd. 1444, para. 11, 71 Rad. Reg. 2d (P & F) 1356 (1993); 47 C.F.R. § 21.39; Amendment of Parts 21 and 74 of the Comm'n's Rules, *Report and Order*, 10 FCC Rcd. 9589, paras. 158-60, 78 Rad. Reg. 2d (P & F) 856 (1995); *see also* 47 C.F.R. § 21.934.

59. 47 C.F.R. §§ 22.137(d), 22.139, 22.943.

60. *Id.* § 101.55.

61. *Id.* § 100.19 (DBS); Amendment of Part 90 of the Comm'n's Rules, *Memorandum Opinion and Order*, 7 FCC Rcd. 4484, para. 7, 70 Rad. Reg. 2d (P & F) 1517 (1992) (220 MHz service); 47 C.F.R. §§ 90.153, 90.709 (private land mobile service); 47 C.F.R. § 25.143(g) (mobile satellite service). The Commission has opined that awarding licenses by auction discourages insincere applicants and has in numerous contexts limited its antitrafficking regulations in specific services to the favorably treated "designated entities." *See, e.g.*, Amendment of Parts 2 and 90 of the Comm'n's Rules, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 10 FCC Rcd. 6884, paras. 141-43, 77 Rad. Reg. 2d (P & F) 960 (1995).

62. Amendment of the Comm'n's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection, *Report and Order*, 98 F.C.C.2d 175, para. 77, 56 Rad. Reg. 2d (P & F) 8 (1984). Closely related to its antitrafficking policy is the Commission's policy against warehousing spectrum, that is, "acquiring, or retaining . . . spectrum on the basis of speculative demand at the expense of other potential users." GTE Corp. and Southern Pac. Co., *Memorandum Opinion and Order*, 94 F.C.C.2d 235, para. 67, 54 Rad. Reg. 2d (P & F) 161 (1983); *see also* Amendment of Parts 21 and 74 of the Comm'n's Rules with Regard to Filing Procedures in the Multipoint Distribution Serv., *Report and Order*, 10 FCC Rcd. 9589, para. 160, 78 Rad. Reg. 2d (P & F) 856 (1995); *DBS Report and Order*, 11 FCC Rcd. 9712, para. 205, 1 Comm. Reg. (P & F) 928 (1995), *aff'd sub nom. DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997). 47 U.S.C. § 309(j)(4)(B) (mandating that the Commission impose performance re-

ficking or speculation most often has proved much worse than its bite. In most circumstances a permittee or licensee of an unbuilt facility need only assure the Commission that its acquisition of the authorization was not for speculative purposes in order to win approval.⁶³ In the *Bill Welch* case, for example, the Commission, having concluded that for-profit sales of unbuilt authorizations in the cellular service are lawful under the Communications Act and “will serve the public interest,” the Commission evaluated the proposed sale under then-effective § 22.40 of the rules.⁶⁴ To do so it reviewed the affidavit submitted by the transferor which indicated that “the transferor acquired the construction authorization for the purpose of constructing and operating the system, and that its decision to sell was prompted by changing business conditions and its determination that it would not be economical to build the system on a stand-alone basis.”⁶⁵ Based on this undisputed assurance, the Commission approved the proposed sale. In addition, there are exceptions to the prohibition against trafficking in instances of *pro forma* changes, involuntary transfers, or instances where a transfer is an incidental part of the bona fide sale of an ongoing business. The Commission has not yet had an opportunity to apply the antitrafficking and unjust enrichment provisions of section 309 of the 1934 Act in a specific case involving competitive bidding. Whether its enforcement of those provisions will be as loose as it has been in respect to earlier instances remains to be seen. Nevertheless, it is clear the antitrafficking policy is not only an important part of the Commission’s historical regulation of the broadcast industry, but continues to be important in evaluating the scope of licensees’ protected interests.

D. Security Interests

When telecommunications properties are bought, sold, or refinanced the ability of a buyer or creditor to use telecom assets, especially the FCC

quirements *inter alia* to prevent spectrum warehousing).

63. The *Guy S. Erway* case candidly, if inelegantly, admits that proving guilty intent is difficult: “It’s hard to prove ‘intent’ because no applicant in his right mind is going to take the stand and openly admit he acquired a station or stations for sale rather than service.” *Guy S. Erway*, 90 F.C.C.2d 755, para. 12 (1980). To cure this difficulty, the Commission looks to all the relevant past and present facts and circumstances. See *Romac Baton Rouge Corp.*, *Memorandum Opinion and Order*, 7 F.C.C.2d 564, para. 8, 9 Rad. Reg. 2d (P & F) 1029 (1967); *Prairieland Brdcast.*, *Memorandum Opinion and Order*, 49 F.C.C.2d 1377, para. 9, 32 Rad. Reg. 2d (P & F) 78 (1974).

64. 47 C.F.R. § 22.40(b) (1988) (in pertinent part contained the following: “Cellular systems: The sale of a cellular construction permit will only be permitted after a showing that the transferor is not speculating in cellular licenses.”).

65. *Bill Welch*, *Memorandum Opinion and Order on Review*, 3 FCC Rcd. 6502, para. 23, 65 Rad. Reg. 2d (P & F) 755 (1988).

license, for securing debt is commonly a major issue. Lenders, of course, want a first-perfected security interest in as many assets as possible. They frequently seek a security interest in the FCC license of the entity to which they are loaning funds, or of a parent or subsidiary, recognizing the pivotal role of the authorization in establishing and maintaining the commercial value of the borrower. By analogy to other forms of collateral, creditors often ask for the right to foreclose on a license or otherwise to acquire it following default in debt service or repayment of principal, applying the proceeds of such foreclosure or acquisition to the discharge or reduction of the borrower's obligation.⁶⁶ The borrower is also generally asked to provide representations and warranties that the security interests created by the sale or loan agreement are enforceable and in accordance with law. Frequently the borrower is asked to agree by contract to assist the lender in securing assignment or transfer of the license to the lender in the event of default or some other failure of the borrower to perform.

For many years the Commission routinely rejected third party assertions of interests in FCC licenses. In *Radio KDAN, Inc.*, the Commission declared a contractual provision purporting to mortgage a license void *ab initio* and adding that it is untenable to consider a license to be a mortgageable chattel in the ordinary commercial sense.⁶⁷ The FCC stated in *Kirk Merkley* that a "broadcast license, as distinguished from the station's plant or physical assets, is not an owned asset or vested property interest so as to be subject to a mortgage, lien, pledge, attachment, seizure, or similar property right."⁶⁸ In *Stephens Industries, Inc. v. McClung*, the court, citing *Kirk Merkley*, held that an FCC license could not be used as collateral for a

66. Under § 9-106 of the Uniform Commercial Code, a government license is a "general intangible," defined as "any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property, rights to proceeds of written letters of credit, and money." U.C.C. § 9-106 (1995). It is worth noting, however, that Article 9 states expressly that it does not apply "to a security interest subject to any statute of the United States, to the extent such statute governs the rights of parties to and third parties affected by transactions in particular types of property." *Id.* § 9-104(a).

67. *Radio KDAN, Inc., Memorandum Opinion and Order*, 11 F.C.C.2d 934 n.1, 12 Rad. Reg. 2d (P & F) 584, *reconsideration denied by Memorandum Opinion and Order*, 13 Rad. Reg. 2d (P & F) 100 (1968), *aff'd sub nom.* W. H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969). *Radio KDAN* is widely cited for this proposition even though the text which addresses the extent to which a security interest is allowed in a license appears to be dictum. The holding of the case is that the license had been forfeited by allowing the station to go silent. *Id.* at 935.

68. *Kirk Merkley, Memorandum Opinion and Order*, 94 F.C.C.2d 829, para. 3, 54 Rad. Reg. 2d (P & F) 68 (1983), *reconsideration denied by Memorandum Opinion and Order*, 56 Rad. Reg. 2d (P & F) 413 (1984), *aff'd mem. sub nom.* *Kirk Merkley v. FCC*, 776 F.2d 365 (D.C. Cir. 1985).

mortgage.⁶⁹ These cases rely principally on the notion that the hypothecation of licenses “‘endangers the independence of the licensee who is and who should be at all times accountable to the Commission in the exercise of the broadcasting trust.’”⁷⁰

These restrictions, imposed by current Commission case law interpreting the 1934 Act, sharply limit the ability of a seller or borrower to comply with requests for security even though such requests may be commercially reasonable and customary in other contexts. On the one hand, the borrower cannot warrant or represent that the lender can foreclose on an FCC permit, nor that the creation of such a right of foreclosure, or even a secured interest in the license, is in accordance with law. On the other hand, the borrower can agree to cooperate with a lender, subject to Commission approval, to seek the transfer or assignment of an FCC license to the lender under certain circumstances. Nevertheless, if lenders could get no comfort from the value of a spectrum license, the movement of capital into licensees would be severely constrained. Moreover, the Commission itself has an interest in assuring that the licensee community has access to capital markets. Such access facilitates the movement of FCC licenses to those entities best able to finance and operate licensed facilities. It also provides a mechanism, consistent with the Communications Act, which will facilitate the placement of debt for financing of sales, facility improvement, or the acquisition of additional licensed properties. In 1992, prompted by petitions seeking revisions to its policy, the Commission adopted a *Notice of Proposed Rulemaking and Notice of Inquiry*⁷¹ seeking public comment on proposals to allow creditors to acquire security interests and to permit reversionary interests in broadcast licenses. No action has been taken yet on these proposals.⁷²

In the meantime, however, prompted by the needs of the marketplace, the Commission has responded by developing the doctrine of “asset pro-

69. *Stephens Indus.*, 789 F.2d 386, 390 (6th Cir. 1986).

70. *In re Smith*, 94 B.R. 220, 221 (Bankr. M.D. Ga. 1988) (quoting Kirk Merkle, 94 F.C.C.2d at 829).

71. Review of the Comm'n's Regs. and Policies Affecting Inv. in the Brdcast. Indus., *Notice of Proposed Rule Making and Notice of Inquiry*, 7 FCC Rcd. 2654, para. 18-23 (1992) [hereinafter *Investment in the Brdcast. Indus. Notice of Proposed Rule Making and Notice of Inquiry*].

72. In adopting rules and policies to implement its 1993 grant of authority to auction licenses (47 U.S.C. § 309(j)), the Commission recognized the need to remove obstacles to capital formation for auction winners and provided for installment payments by so-called designated entities. See 47 U.S.C. § 309(j)(4)(A) (1994); *Section 309(j) Second Report and Order*, 9 FCC Rcd. 2348, para. 231-40, 75 Rad. Reg. 2d (P & F) 1, *reconsidered in part and denied in part by Fifth Report and Order*, 9 FCC Rcd. 5532, 75 Rad. Reg. 2d 859 (1994).

ceeds.” That is, while a creditor may not insist that the FCC honor the private contract between a defaulted borrower and the secured lender, to permit the lender to acquire the license, the creditor can ask for and receive an enforceable right to the proceeds of the sale of the license. The asset proceeds doctrine coalesced as a result of *In re Tak Communications, Inc.*,⁷³ in which the court, construing the 1934 Act and FCC precedent, concluded that the FCC would not allow any security interest in a broadcast license. Prompted by a ruling which, while rationally based on prior Commission precedent, posed the question in stark terms and appeared to deny creditors any securable interests in FCC licenses, the Commission addressed itself squarely to the issue and rejected the *Tak* ruling in *Walter O Cheskey*,⁷⁴ holding that FCC policy is not violated by a security interest in the proceeds of sale of a license.⁷⁵ The rationale supporting the assets proceeds doctrine also accepts the notion that a contractual right to the proceeds of the sale of a license is compatible with the licensee’s obligations and with the statutory requirement that no license can be transferred or assigned without prior Commission approval.⁷⁶ With the Commission’s position thus clarified, the courts have also accepted this view. Allowing a creditor to enforce a proprietary interest in the proceeds of a sale once the FCC has approved that sale does not enable that creditor or any other party to assert rights contrary to the FCC’s regulatory powers and thus does not violate FCC policy.⁷⁷ *In re Beach Television Partners* indicates that “courts have

73. *In re Tak Comm., Inc.*, 985 F.2d 916 (7th Cir. 1993). The liens at issue in *Tak* were not asserted merely against the proceeds of the sale of the license, but gave the creditors the right to take possession of the collateral. See *In re Tak Comm., Inc.*, 138 B.R. 568, 570 (W.D. Wis. 1992).

74. *Walter O Cheskey*, 9 FCC Rcd. 986, para. 8, 74 Rad. Reg. 2d (P & F) 1031 (1994). The *Walter O Cheskey* ruling appears to be the most widely cited of this line of cases. In *Walter O Cheskey* the Chief of the Mobile Services Division, observed that “[i]f a security interest holder were to foreclose on the collateral license, by operation of law, the license could transfer hands without the prior approval of the Commission.” *Id.* While this is only an explanatory observation, it appears to be inconsistent with the automatic forfeiture doctrine. *Perfection Music, Inc., Memorandum Opinion and Order*, 46 F.C.C.2d 635, 30 Rad. Reg. 2d (P & F) 12 (1974).

75. *Walter O Cheskey*, 9 FCC Rcd. 986, 74 Rad. Reg. 2d (P & F) 1031. In doing so the Commission was aligning itself with the opinion in *In re Ridgely Communications, Inc.*, 139 B.R. 374, 379-80 (Bankr. D. Md. 1992), recognizing the validity of security interests in a broadcast license limited to the licensee’s proprietary rights in relation to third parties (e.g., the creditor’s right to receive proceeds of sale of the license) and rejecting the district court’s analysis in the *Tak* ruling.

76. See, e.g., *In re Thomas Comm., Inc.*, 166 B.R. 846, 848-49 (S.D.W.Va. 1994) (finding that security interest in proceeds of sale of license does not threaten bankrupt licensee’s right to transfer its license freely or its relationship with the FCC).

77. PBR Comm. Sys., Inc., *Memorandum Opinion*, 75 Rad. Reg. 2d (P & F) 1336 (Bankr. S.D. Fla. 1994). This distinction has proven decisive in respect to other forms of governmental licensure as well; see, e.g., *Freightliner Mkt. Dev. Corp. v. Silver Wheel*

traditionally held that licensees have no true ownership interest in their broadcast licenses," but developing case law recognizes that a security interest in the proceeds of sale does not contravene FCC authority.⁷⁸ If this proves to be the prevailing view, as it should, the creation of a security interest, albeit limited to the proceeds of an FCC-approved sale, should be deemed valid and enforceable.⁷⁹

E. *Reversionary Interests*

Closely related to the question of security interests is that of reversionary rights. As noted above, licensees cannot assign or transfer their licenses without Commission approval. A contractual right for the seller to call back a license for breach of contract by the buyer, once it has been assigned or transferred, would undermine the Commission's power. Here again, the Commission emphasizes that a license does not confer a property right but only a valuable, though limited, privilege to utilize the airwaves. Once having disposed of such privilege pursuant to FCC approval, the prior licensee cannot by contract establish any rights of reversion if, for example, the new licensee fails to make agreed-upon payments to the assignor or transferor.⁸⁰ To hold otherwise, the Commission has noted, would be to deprive it of its statutorily mandated opportunity to pass upon the public interest qualifications of any new (i.e., reverted) licensee. Nor does it seem to matter that in such cases the reversion will have gone to, by definition, a Commission licensee in the past. Whatever the strength of the Commission's logic in this respect, it has consistently, and down to the present day, denied parties to a license assignment or a license transfer any rights to automatically unwind or void the movement of the license.⁸¹ Logically, a contractual provision providing for reversion but subject to Commission approval would appear to be consistent with law. The em-

Freightlines, Inc., 823 F. 2d 362 (9th Cir. 1987).

78. *In re Beach TV Partners*, 38 F.3d 535, 537 (11th Cir. 1994).

79. *But see* Federal Communications Bar Association, *Report of the Subcommittee on Legal Opinions of the Transactional Practice Committee of the Federal Communications Bar Association*, 48 FED. COMM. L.J. 389, 419 (1996) (stating in a sample opinion letter that "the FCC and various federal courts have held that the attempted creation of a security interest in a license issued by the FCC is neither valid nor enforceable.").

80. *See* 47 C.F.R. § 73.1150(b) (1996).

81. *See, e.g.,* Radio KDAN, Inc., *Memorandum Opinion and Order*, 11 F.C.C.2d 934, 12 Rad. Reg. 2d (P & F) 584, *reconsideration denied by Memorandum Opinion and Order*, 13 Rad. Reg. 2d (P & F) 100 (1968), *aff'd sub nom.* W.H. Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969) (finding that mortgage clause granting prior licensee the right to act as present licensee's attorney-in-fact upon default is void *ab initio* because it attempts to retain reversionary interest for prior licensee).

phatically prohibitive language in the FCC's rules,⁸² however, appears to reject even this. As noted above, the Commission has been asked to revisit its long-standing policy in this area and has been considering the matter since 1992.⁸³

F. *The Bankruptcy Context*

1. In General

Like other businesses, those licensed by the FCC occasionally find themselves in bankruptcy proceedings. Licensees' property rights in their licenses are often disputed in such circumstances. There are numerous respects in which the intersection of the Communications Act and the bankruptcy laws requires thoughtful integration of conflicting or at least divergent legal and policy objectives. In older cases one finds the Commission imperiously asserting its plenary and absolute power to deal with its licensees, while in recent years a recognition of the need for and desirability of accommodation between the two bodies of law has been evident. In *Dale J. Parsons, Jr.*, the Commission acknowledged that it has an affirmative obligation to "reconcile its policies under the Communications Act with the policies of other federal laws and statutes, including the federal bankruptcy laws"⁸⁴

Commission case law requires that the filing of a bankruptcy petition be reported as an involuntary transfer of control,⁸⁵ and generally such applications are routinely granted, either to a trustee or a debtor-in-possession. While normally the FCC would exercise virtually plenary supervisory power over the disposition of a license, once a bankruptcy pro-

82. See 47 C.F.R. § 73.1150(a) (stating that in transferring broadcast license, licensee may retain no right to reversion of license). The Commission has, however, accepted reversionary rights in a transfer which were carefully crafted so as to leave the transferor with rights to less than a controlling interest, provided that the controlling block was to be disposed of through a public or private sale rather than to the transferor by contract. Joseph F. Bryant, *Memorandum Opinion and Order*, 6 FCC Rcd. 6121, 70 Rad. Reg. 2d (P & F) 171 (1991).

83. *Investment in the Brdcst. Indus., Notice of Proposed Rule Making and Notice of Inquiry*, 7 FCC Rcd. 2654 (1992).

84. Dale J. Parsons, Jr., *Memorandum Opinion and Order*, 10 FCC Rcd. 2718, para. 11, 77 Rad. Reg. 2d (P & F) 776 (1995); see also Implementation of Section 309(j) of the Comm. Act—Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403, para. 135, 76 Rad. Reg. 2d (P & F) 945 (1994) (assuming transferee is qualified, Commission will continue generally to defer to bankruptcy laws on many matters); *La Rose v. FCC*, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974) (stating that agencies must be alert to determine whether their policies might conflict with other federal policies and if so, whether such conflict can be minimized).

85. See, e.g., 47 C.F.R. § 24.839(a).

ceeding has been initiated the bankruptcy court acquires substantial powers with respect to the bankruptcy estate. For example, 11 U.S.C. § 362 (a)(3) prohibits any act "to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"⁸⁶ after the filing of a bankruptcy petition. A bankruptcy court, through the district court, has exclusive jurisdiction over all property of the estate.⁸⁷ Eleven U.S.C. § 105(a) provides that the bankruptcy court has authority to enter any order or judgment that is necessary or appropriate to carry out the provisions of the bankruptcy law.⁸⁸

Because an FCC license itself is generally among the more valuable assets of a licensee, the question has frequently arisen whether the bankruptcy court can assert dominion over the license as it would over other bankruptcy estate assets. A number of the most thoughtful judicial opinions concerning the existence or status of licensee property rights have been written in bankruptcy cases addressing these issues. Some bankruptcy courts have treated an FCC license as "property of the estate" under § 541 of the Bankruptcy Code.⁸⁹ Others, however, have taken the contrary view.⁹⁰ It would appear that a sensible reading of the Communications Act and the Bankruptcy Act is readily at hand whether or not the license is considered as bankruptcy estate property: any disposition of a license by a bankruptcy court should be subject to ultimate FCC approval to be sought by the bankruptcy trustee through application to the Commission. Just such a sensible accommodation was adopted in *In re Pacific Land Sales, Inc.*,⁹¹ in which the court upheld a bankruptcy court's injunction which prohibited parties from interfering with the operation of an FM radio station, but permitted them to appear before the FCC. The court indicated that outside the FCC's exclusive licensing power, the bankruptcy court has authority to enjoin parties from taking action.⁹²

2. Government as Creditor

The degree to which a bankruptcy creditor can assert and protect its

86. Bankruptcy Reform Act of 1978 § 362, 11 U.S.C. § 362(a)(3) (1994) (amended 1994).

87. See 28 U.S.C. § 1334(e) (1994) (as amended by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 104(b), 108 Stat. 4106, 4109).

88. 11 U.S.C. § 105(a).

89. *Id.* § 541(a). See, e.g., *In re Fugazy Express, Inc.*, 124 B.R. 426, 430 (S.D.N.Y. 1991), appeal dismissed, 982 F.2d 769 (2d Cir. 1992).

90. See, e.g., *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983) (holding that an FCC license is not property of debtor's estate).

91. *In re Pacific Land Sales, Inc.*, 187 B.R. 302 (B.A.P. 9th Cir. 1995).

92. *Id.* at 313-14.

rights to the security represented by the license is particularly interesting in cases where the U.S. government is itself the creditor. In *In re Atlantic Business and Community Development Corp.*,⁹³ the government, on behalf of the Internal Revenue Service (IRS), contended that an FCC license has certain attributes of property arising from the procedural safeguards applicable to alteration, revocation or suspension of the license. The court held that the IRS could assert the rights of a lien holder with respect to a radio license under § 6321 of the Internal Revenue Code, at least with respect to a lien on the proceeds of sale. It observed that the Commission's normal concern—that the allowance of traditional property rights in a license would undercut the public trustee concept of a radio licensee—was mitigated where the government itself was the lien holder. More recently, the Commission has addressed its own rights as a primary creditor and those of subordinated creditors in instances in which an auction-winning licensee borrows money from the U.S. Treasury pursuant to rules which provide a stretched-out period for designated entities to pay winning auction bids.⁹⁴

In fact the government's interest as creditor has become a hotly contested matter in the context of the Commission's Personal Communication Services (PCS) C and F Block auctions. In the spring of 1997 a number of PCS auction winners claimed variously that circumstances compelled them to seek relief from the auction payment rules.⁹⁵ Certain of these parties contended that, if the Commission did not soften its payment terms for the portion of the winning bids which had been deferred under the applicable auction rules, licensee bankruptcies would inevitably occur.⁹⁶ Such bankruptcies, the parties noted, would lead to delays in the FCC's ability to cancel the licenses granted to the defaulting parties while a bankruptcy court asserted its prerogatives under the bankruptcy law. These proceedings, the parties observed, would interfere with the reauctioning of the licenses and with the FCC's plan to initiate competitive wireless offerings on the C and F Blocks as quickly as possible. The Commission thereupon sought public comment on the issues posed by these circumstances,⁹⁷ in-

93. *In re Atlantic Bus. and Community Dev. Corp.*, 994 F.2d 1069, 1073-75 (3d Cir. 1993).

94. See Letter from William E. Kennard, FCC Gen. Counsel, and Michele C. Farquhar, Chief, Wireless Telecomm. Bureau, to Leonard J. Kennedy, Esq., and Richard S. Denning, Esq., Dow, Lohnes & Albertson, 11 FCC Rcd. 21,572 (1996).

95. See Wireless Telecomm. Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues, *Public Notice*, WT Docket 97-82, 1997 WL 291808 (FCC June 2, 1997) [hereinafter *Installment Payment Issues Pub. Notice*].

96. One winning PCS license holder has already entered bankruptcy proceedings. See *Pocket Seeks Chapter 11 Bankruptcy Protection*, TELECOMM. REP., April 7, 1997, at 13.

97. See *Installment Payment Issues Pub. Notice*, WT Docket 97-82, 1997 WL 291808.

cluding a public forum to ventilate the issues.⁹⁸ Chairman Hundt, however, reacted quickly and forcefully to the potential bankruptcy delays. While seeking legislation from Congress to codify his views,⁹⁹ the Chairman, at least for himself, attempted to rewrite a good deal of the case law, both at the Commission and in the courts, which is discussed above.¹⁰⁰

G. Modification

Limitations on the licensee's rights, however, go far beyond those imposed on its ability to dispose of its license or to use it to secure loans. It is well settled that the Commission has the power to modify existing licenses as necessary in its ongoing administration of the Act. As 47 U.S.C. § 316 simply states:

Any station license or construction permit may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] or of any treaty ratified by the United States will be more fully

98. See Agenda for Pub. Forum regarding Broadband PCS C and F Block Installment Payment Issues, *Public Notice*, WT Docket 97-82, 1997 WL 355535 (FCC June 27, 1997).

99. See Letter from Reed Hundt, FCC Chairman, to Rep. John R. Kasich (July 16, 1997) (on file with author) (stating that the FCC should be given explicit authority to revoke and reacution licenses held by firms in bankruptcy notwithstanding provisions of the Bankruptcy Code); FCC Chairman Reed Hundt, Speech to the U.S. Hispanic Chamber of Commerce (July 17, 1997) (transcript available in <http://www.fcc.gov/Daily_Releases/Business/1997/db970718/spreh740.txt>); *FCC Chairman Reed Hundt Calls on Congress to Protect Spectrum Licenses From Bankruptcy Law Delays* (July 17, 1997)

<http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1997/ntmc7051.txt> (Unofficial announcement of the FCC) (forwarding proposed language to this effect for insertion into pending legislation).

100. As succinctly stated by the Chairman, Congress should spell out:

the plain, irrefutable fact that the public's airwaves belong to the public, and any bankrupt licensee and its other creditors has [sic] absolutely no right whatsoever to hold, retain, litigate about, or delay the revocation of any license when that licensee has not paid monies it promised to the American people.

FCC Chairman Reed Hundt, *Speech to the U.S. Hispanic Chamber of Commerce*, 5 (released July 18, 1997) <<http://www.fcc.gov/Speeches/Hundt/Spreh740.html>>. If these views are intended to summarize existing law, they are mistaken. If they are a proposal to alter existing doctrine, they would at the least require careful analysis. In either case the Chairman's remarks were cast in an unusually derogatory fashion. In the same speech, Hundt urged Congress to:

make it crystal clear to even the most ingenious pettifogging lawyers that the provisions of the Bankruptcy Code: (1) are not applicable to any FCC license for which a payment obligation is owed; (2) do not relieve any licensee from payment obligations, and (3) do not affect the Commission's authority to revoke, cancel, transfer, or assign its licenses.

Id. at 10.

complied with.¹⁰¹

On its face this provision gives the Commission essentially unlimited power to change the rules of the road, provided only that the licensee affected by any such modification is given an opportunity to present its views on the proposed modification to the Commission in a timely fashion.

The Commission has relied on § 316 to modify adversely the authority granted to licensees on countless occasions; the courts have in the vast majority of instances affirmed such withdrawals or diminutions of authority, even when—as is most often the case—affected parties do not receive individual or trial type hearings, but only the protections of rule making.¹⁰² This is true even when the underlying statute—section 316(a) of the Act—provides that no order of modification shall become final until the affected licensee has had an opportunity to show cause by public hearing that such modification should not occur.¹⁰³

The ability to modify existing authorizations is clearly at the core of the statutory responsibility of a quasi-legislative body. In effect, it is the Commission's fundamental grant of authority to continuously review and revise public interest determinations in light of ever changing circumstances and to modify existing grants as necessary to effectuate such forward-looking determinations. ““Cumulative experience” begets understanding and insight by which judgments . . . are validated or qualified or

101. 47 U.S.C. § 316(a)(1) (1994).

102. See, e.g., *United States v. Storer Brcdst. Co.*, 351 U.S. 192, 197, 205 (1956) (stating that the Commission can adopt concentration of ownership rules and dismiss summarily nonconforming applications). The *Storer* decision, one of the most venerable in the field of administrative law, is properly cited in the context of the Commission's power to alter existing license rights because the Commission's decision affected existing business affairs of Storer as well as the opportunity to file applications for additional broadcast licenses. *Id.* at 199; see also *Telocator Network of Am. v. FCC*, 691 F.2d 525, 551 (D.C. Cir. 1982) (stating that Commission may utilize its rulemaking power in lieu of adjudication when the factual issues are legislative and have prospective effect and classwide applicability); *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied sub nom. WBEN, Inc. v. FCC*, 393 U.S. 914 (1968) (holding Commission can amend its rules governing presunrise operation of AM radio stations even if doing so reduces audience of existing licensees). The *Telocator* opinion collects numerous citations to cases addressing the Commission's power to proceed by rule making. *Telocator*, 691 F.2d at 551-52. It is worth noting, however, that the Commission's authority to act by rule making is not unbounded and, particularly in respect to consideration of new, mutually exclusive applications, the Commission must be careful not to violate rights protected by *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). See *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 450, 452 (D.C. Cir. 1991).

103. *California Citizens Band Ass'n v. United States*, 375 F.2d 43, 52 (9th Cir. 1967); see also *Federal Power Comm'n. v. Texaco, Inc.*, 377 U.S. 33 (1964). Section 316 has been amended since the *WBEN* decision to remove the reference to a public hearing. See *FCC Authorization Act of 1983*, Pub. L. No. 98-214, sec. 4, 97 Stat. 1467, 1467-68 (codified at 47 U.S.C. § 316(a) (1994)).

invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process."¹⁰⁴ The Commission has not only the right to do this, but the obligation.¹⁰⁵ The fundamental power to alter existing licenses was perhaps most clearly articulated in a case not involving the FCC: *American Airlines, Inc. v. Civil Aeronautics Board*,¹⁰⁶ in which Judge Leventhal emphasized that, provided the process is not a subterfuge to attack one particular licensee (or, in *American Airlines*, a certificated carrier),¹⁰⁷ rule making under section 4 of the Administrative Procedure Act (APA)¹⁰⁸ is entirely adequate procedurally to amend existing authority even in the presence of a provision in the Federal Aviation Act requiring an adjudicatory hearing before an aviation certificate could be modified.¹⁰⁹ This power to proceed by rule making applies to existing as well as to new authority. As noted by Judge Leventhal:

Petitioners argue that the *Storer* doctrine is restricted to regulations affecting future applications for new licenses . . . [but] such a restrictive reading of the *Storer* doctrine is unwarranted . . . [T]he *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and . . . such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.¹¹⁰

The D.C. Circuit has recently reaffirmed that while modification of a class of licenses by rule making is consistent with law, the FCC "cannot, merely by invoking its rulemaking authority, avoid the adjudicatory procedures required for granting and modifying *individual* licenses."¹¹¹

104. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)).

105. *Storer Brdcst.*, 351 U.S. at 203-05; *NBC v. United States*, 319 U.S. 190, 225 (1943); *Florida Cellular Mobil Comm. Corp. v. FCC*, 28 F.3d 191, 196 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1357 (1995).

106. *American Airlines*, 359 F.2d 624 (D.C. Cir. 1966) (en banc), *cert. denied*, 385 U.S. 843 (1966).

107. *See also* *Civil Aeronautics Bd. v. Delta Airlines*, 367 U.S. 316 (1961) (stating that individual route certificates cannot be altered without a hearing).

108. Administrative Procedure Act § 4, 5 U.S.C.A. § 553 (1994).

109. *American Airlines*, 359 F.2d at 628, 631.

110. *Id.* at 628-29 (citations and footnotes omitted).

111. *Committee For Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1318 (D.C. Cir. 1995). *A fortiori* the mere expectation of receiving an FCC license may be foreclosed by

Nevertheless, while the Commission's power under § 316 is vast, it is not unbounded. Modifications must be rationally related to a legitimate statutory purpose and free of individual or punitive effect. The presence of a waiver provision has been deemed crucial.¹¹² The Commission must provide a reasoned analysis for the change in policy.¹¹³ Agencies may not justify a change in interpretation of mandate by relying merely on shifts in political mood or new political philosophies.¹¹⁴ In addition, the courts traditionally have examined closely the retroactive effect of certain policy modifications.¹¹⁵

Before proceeding to address how the courts have interpreted and applied the property rights of FCC licensees, a brief pause to comment on the Commission's property doctrines is in order. One can fairly say that those doctrines are largely muddled and rarely, if ever, based on empirical evidence that a social scientist would find persuasive. While the Commission denounces the purchase of a broadcast license for profit or resale, there is no reason to accept the assumption that such motives are contrary to the public interest, degrade the public service performance of broadcasters, or in any other significant way abuse the status of a licensee. Indeed, given the capitalistic economy in which we live, one would have thought that classical principles of market trading would be considered admirable rather than deplorable. The Commission has adopted numerous rules and policies limiting the freedom of action of licensees but only infrequently has it rejected license applications for violation of such rules, denied transfer or renewal, or otherwise punished licensees or applicants for behavior deemed inconsistent with the plethora of rules establishing standards of character or performance. The heavy-handed and self-righteous rejection of "trafficking" calls to mind far more serious and malevolent behavior, such as dealing in controlled substances, or even, less dramatically, the unease with which a preindustrial society viewed emerging mercantile activity. Regrettably, the 1934 Act itself encourages hostility, or at least anxiety about profit maximizing, by requiring the Commission to adopt regulations designed to preclude trafficking in licenses won at auction.¹¹⁶ Using the institution of spectrum auctions as a crystallizing factor, the Commission

rule making. *Id.*

112. *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir.), *cert. denied sub nom. WBEN, Inc. v. FCC*, 393 U.S. 914 (1968).

113. *Greater Boston TV Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

114. *National Black Media Coalition v. FCC*, 775 F.2d 342, 356 n.17 (D.C. Cir. 1985).

115. *See infra* Part IV.

116. *See, e.g.*, Communications Act of 1934 ch. 652, § 309(j)(4)(E), 48 Stat. 1064, 1085 (codified at 47 U.S.C. § 309 (j)(4)(E) (1994)).

should reconsider and seriously reevaluate its historic hesitation to acknowledge that licensees have—and should have—substantial property rights.

III. DETRIMENTAL RELIANCE

Part II of this Article describes the limits which exist on the property rights of FCC licensees in their licenses. Given the extent of these limitations, especially the agency's very broad authority to alter prior policy, can licensees rely on prior Commission policy and use such reliance to limit or defeat otherwise lawful agency action? Alternatively, are licensees' prerogatives so limited that detrimental reliance, as it is understood in everyday commercial law, has little or no relevance?

There are three separate theories which may be applicable to the issue of limits on agencies' powers to modify authorizations: constitutional limits, limits imposed by equitable estoppel, and limits related to a theory of contract.

A. *Constitutional Limitations*

The two principal constitutional protections addressed in case law are the Fifth Amendment Takings Clause and the Due Process Clause. If agency action is consistent with the Administrative Procedure Act, there is no basis to claim a due process violation.¹¹⁷ It is also difficult to make a takings argument. Certainly where the matter complained of is congressional action, the courts have not been very sympathetic, and the same principles apply to administrative action which is consistent with enabling law. Congress itself is free to readjust rights and burdens even if doing so upsets prior expectations and even if the effect of legislation is to impose a new liability on prior acts.¹¹⁸ "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹¹⁹ As stated earlier in *Fleming v. Rhodes*: "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it."¹²⁰ In one of the early seminal cases

117. The Due Process Clause is not violated by amendments of authority imposed without trial type hearings. See *Air Lines Pilots Ass'n., Int'l v. Quesada*, 276 F.2d 892, 896 (2d Cir. 1960).

118. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

119. *FHA v. Darlington, Inc.*, 358 U.S. 84, 91 (1958).

120. *Fleming*, 331 U.S. 100, 107 (1947). As formulated in *Usery*, due process may im-

involving licensee rights prior to the 1934 Act, the Supreme Court held that broadcast licensees have no prescriptive right against the subsequent exercise by Congress of its commerce clause powers to delete a station to achieve geographical distribution of broadcast service.¹²¹ The Commission may act at the direction of Congress to eliminate the mere expectation of receiving a license without creating a constitutional problem.¹²²

In *Connolly v. Pension Benefit Guaranty Corp.*, the Court indicated that it has consistently declined to adopt any set formula for identifying a “taking” forbidden by the Fifth Amendment, relying instead on ad hoc, factual inquiries into the circumstances of each case.¹²³ Nevertheless, the Court sets forth three particularly significant factors: “(1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; and (3) ‘the character of the governmental action.’”¹²⁴ More specifically, the Taking Clause is inapplicable to circumstances in which the regulatee has no property right which is entitled to constitutional protection. In *Peterson v. Department of the Interior*, the court rejected a claim that water districts had constitutionally protected vested rights to subsidized water contracts based on a “reasonable investment-backed expectation” tied to U.S. government representations made in such contracts.¹²⁵ The court rejected the notion that a constitutionally protected property interest “can be spun out of the yarn of investment-backed expectations,” indicating that it must first be established that a property right exists, and that such right cannot be fashioned solely out of such expectations.¹²⁶ This is not to say that investment-backed expectations are irrelevant to constitutional challenges to governmentally imposed impairment of property rights. In *Ruckelshaus v. Monsanto Co.*, the Court observed that such expectations are among the factors relevant to a determination whether governmental action

pose higher standards for retroactive than for prospective legislation. *Usery*, 428 U.S. at 17.

121. *Federal Radio Comm’n v. Nelson Bros.*, 289 U.S. 266, 282 (1933).

122. *Multi-State Comm., Inc. v. FCC*, 728 F. 2d 1519, 1526 (D.C. Cir. 1984); *see also* *Motor and Equip. Mfrs. Ass’n v. EPA*, 627 F. 2d 1095, 1128 (D.C. Cir. 1979), *cert. denied sub nom.* *General Motors Corp. v. Costle*, 446 U.S. 952 (1980) (explaining that state regulations which limit amount of maintenance required from motor vehicle purchasers in connection with enforcement of emission standards warranties are not unconstitutional merely because state’s underlying rationale does not meet with vehicle manufacturers’ expectations or desires).

123. *Connolly*, 475 U.S. 211, 224 (1986).

124. *Id.* at 224-25 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

125. *Peterson*, 899 F.2d 799, 812-13 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990).

126. *Id.* at 813.

has gone beyond regulation and effects a taking.¹²⁷ The key, therefore, remains the presence of a property right. But even if such right exists, the weight of authority seems to suggest that regulatory action which is within the ambit of the enabling statute and which complies with the APA is presumptively constitutional.¹²⁸

B. *Equitable Estoppel*

Detrimental reliance, as an essential element of promissory or equitable estoppel, is a long-standing and widely recognized basis on which to assert legal or equitable claims.¹²⁹ As described in section 90(1) of the *Restatement (Second) of Contracts*, promissory estoppel comprehends the making of a promise as to future conduct, on which the promisor should reasonably expect the promisee to substantially rely, and on which the promisee does in fact rely. Such a promise is enforceable if necessary to avoid injustice. Of course, for a claim of detrimental reliance to be cognizable, there must be a property interest, or right, which has been extinguished or impaired.

The extent to which promissory estoppel (or equitable estoppel) lies against the government is not at all clear. In *Heckler v. Community Health Services of Crawford County, Inc.*,¹³⁰ the Court indicated in dictum that while it is well settled that the government cannot be estopped on the same

127. *Ruckelshaus*, 467 U.S. 986, 1005 (1984) (noting that the factors in such a determination include interference of the governmental action with reasonable investment-backed expectations).

128. These principles were recently applied in *In re Jones Truck Lines, Inc.*, 57 F.3d 642 (8th Cir. 1995), a case arising in the motor carrier field but relevant to FCC regulatees. In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), the Supreme Court had ruled that long-standing Interstate Commerce Commission practice permitting motor carriers to charge rates other than those filed with the agency was unlawful. There followed a rash of proceedings in which motor carrier trustees in bankruptcy sought to collect from shippers the difference between the filed rates and the lower rates actually negotiated and charged. In response, Congress passed the Negotiated Rates Act (NRA) which curtailed such suits. After entering bankruptcy, Jones, a trucking company, sought to have the NRA declared unconstitutional insofar as it impaired Jones's prior right to seek additional payment from shippers in "undercharge" claims. Applying the Supreme Court's tripartite test, the Eighth Circuit concluded that the NRA did not effect an unconstitutional taking. The court noted that the NRA did not physically invade Jones's property nor procure it for the government's own use; rather it arose from a "public program that adjusts the benefits and burdens of economic life to promote the common good." *In re Jones Truck Lines*, 57 F.3d at 650. Nor did the court agree that Jones had been deprived of a legitimate expectation that it would be able to collect the undercharges, observing that the pendency of legislation adjusting the law in response to *Maislin* was well known. *Id.* at 650-51.

129. See e.g., RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

130. *Community Health Servs.*, 467 U.S. 51 (1984).

terms as any other litigant,¹³¹ the question whether estoppel may ever run against the government, and if so under what circumstances, is left open.¹³² Cases cited in the Court's opinion strongly suggest that if estoppel does lie against the government it is only for affirmative misconduct or defalcations in the administration of the law, rather than for properly adopted shifts in administrative rules or regulations. One such class of potential applications, however, includes government deception or misleading of private parties. In this context, the Court observed that this line of cases "underlies the doctrine that an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests."¹³³

Neither *NLRB v. Bell Aerospace* nor *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade* appear to support the Court's reliance on them. In *Bell Aerospace* the Court suggested that if adverse consequences ensuing from industry reliance on past decisions of the National Labor Relations Board (Board) were substantial, the Board might be precluded from revising its views in an adjudication.¹³⁴ It rejected preclusion on the facts before it, observing also that the case did not involve a new liability imposed on individuals for past actions taken in good faith reliance on prior Board pronouncements, nor fines or damages.¹³⁵ However, the Court's decision did not squarely address these issues nor announce any clear rules of law applicable to such circumstances. The decision in *Atchison, Topeka & Santa Fe Railway Co.* does little more in respect to reliance issues than to reiterate that an agency's change in path must be articulated and to announce a presumption that congressional policy is best carried out when an agency adheres to settled policy.¹³⁶ *SEC v. Chenery Corp.*, of course, merely articulates the need for balancing the interests of public policy (such as consistency with statutory design) against the injury done to the party relying on prior law when a new standard is applied ret-

131. See generally *Gibson v. Resolution Trust Corp.*, 51 F.3d 1016, 1025 (11th Cir. 1995) (stating that equitable estoppel as a defense to a federal cause of action lies only in the most extreme circumstances); *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir. 1994) (stating that application of the estoppel doctrine against the government may be invoked only when doing so does not frustrate the purpose of federal statutes or unduly undermine their enforcement).

132. *Community Health Servs.*, 467 U.S. at 60.

133. *Id.* at 60 n.12 (citing, inter alia, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974); *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973) (plurality opinion); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

134. *Bell Aerospace*, 416 U.S. at 295.

135. *Id.*

136. *Atchison, Topeka & Santa Fe Ry.*, 412 U.S. at 807-08.

roactively.¹³⁷ More recently, the Court has implied that the use of equitable estoppel against the government is an extraordinary remedy.¹³⁸ And a lower court, citing *Community Health Services* and *Office of Personnel Management*, has noted that while the Court has left open the possibility of estoppel against the government, it has yet to uphold a decision which estops the government.¹³⁹

C. *The Contract Dimension*

Because the FCC, in adopting and amending its rules, acts only as a sovereign and it is undisputed that an FCC license is not a contract between the licensee and the Commission,¹⁴⁰ there is no occasion to consider whether liability of a contractual nature exists.¹⁴¹ Nevertheless, brief mention of this dimension of the issue is justified. When the government acts as a contracting party rather than as a sovereign, the Court has held it to the letter of its undertaking.¹⁴² In *Bowen v. Public Agencies Opposed to Social Security Entrapment (POSSE)*, the Court dealt with the claim that a statute which had the effect of denying states the right to withdraw from social security coverage even though they had previously had the right to do so was an unconstitutional taking under the Fifth Amendment.¹⁴³ Appellants argued that the previous right to withdraw from the coverage was a valuable property right which Congress could not abolish retroactively. The Court denied the claim, noting that the "contractual right" bore "little, if any, resemblance to rights held to constitute 'property' within the

137. *Chenery*, 332 U.S. at 203.

138. See *Board of County Comm'rs v. Isaac*, 18 F.3d 1492, 1498 (10th Cir. 1994) (citing *Office of Personnel Management v. Richmond*, 496 U.S. 414, 421-22 (1990) for the proposition that the Supreme Court therein alerted the judiciary that equitable estoppel against the government is an extraordinary remedy).

139. *Id.* at 1498-99.

140. *Petition for Reconsideration of Comm'n's Action in License Renewal Applications of Certain TV Stations Licensed for and Serving Los Angeles, CA, Memorandum Opinion and Order*, 72 F.C.C.2d 273, para. 10, 45 Rad. Reg. 2d (P & F) 1295 (1979), *vacated and remanded in part sub nom. Gottfried v. FCC*, 655 F.2d 297 (1981), *reversed sub nom. Community TV v. Gottfried*, 459 U.S. 498 (1983).

141. *Cf. Hughes Comm. Galaxy, Inc. v. United States*, 998 F.2d 953, 958-59 (Fed. Cir. 1993) (holding the government financially responsible to commercial satellite company under satellite launch services contract for changes in policy triggered by sovereign government action).

142. See *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), in which the Court held the government contractually liable for damages which arose when Congress amended the law, so as to deny certain financial institutions regulatory treatment to which the government had contractually committed itself.

143. *POSSE*, 477 U.S. 41 (1986).

meaning of the Fifth Amendment.”¹⁴⁴ The Court also noted that the prior statutory right to withdraw constituted neither a debt of the United States nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium. “Rather the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.”¹⁴⁵

But even in the absence of relief predicated on constitutional, estoppel or contract principles, the courts appear willing to consider claims of detrimental reliance on the part of FCC licensees. Typical is *Reuters Ltd. v. FCC*, in which the court held that licensees have a “vested interest [that] must be given due weight in any consideration of fundamental fairness.”¹⁴⁶ There are also cases which recognize that mere applicants—or even merely adversarial parties—by following the Commission’s rules may have enforceable reliance interests, irrespective of any license rights. These cases arise most often in the context of the Commission’s “cut-off” rules.¹⁴⁷ In *National Ass’n of Broadcasters v. FCC*, the court provided an extensive discussion of the permissible limits of retroactivity in administrative decision making.¹⁴⁸ Of the criteria enumerated by the court, “[b]y far the most important consideration . . . is the extent of justifiable reliance on the old rule.”¹⁴⁹ The Commission itself has confirmed on many occasions that reliance interests are entitled to careful consideration.¹⁵⁰

144. *Id.* at 55.

145. *Id.*; *cf.* *National Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. Cir. 1981) (rejecting a Fifth Amendment challenge to the government’s withdrawal of job offers following appointment but prior to employment). “The mere existence of a revocable appointment does not [create] an entitlement.” *Id.* at 248-49.

146. *Reuters*, 781 F.2d 946, 950 n.5 (D.C. Cir. 1986).

147. *See, e.g.,* *McElroy Elec. Corp. v. FCC*, 86 F.3d 248, 257 (D.C. Cir. 1996) (noting that timely filers who diligently comply with FCC requirements have an equitable interest in enforcement of the cut-off rules); *Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992) (noting that timely applicants have a legitimate expectation that cut-off rules will be enforced, as well as an equitable interest); *Orange Park Fla. T.V., Inc. v. FCC*, 811 F.2d 664, 674 n.19 (D.C. Cir. 1987) (stating “[t]he Commission’s well-known recognition of a renewal expectancy that leads applicants to vie for licenses which, if awarded, will require significant expenditure of resources.”).

148. *National Ass’n of Brdcsts.*, 554 F.2d 1118, 1130-32 (D.C. Cir. 1976).

149. *Id.* at 1132. Professor Feinman has suggested that the principal issue in applying promissory estoppel is whether the promisor has made a promise justifying the promisee’s reliance. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 690 (1984).

150. *See, e.g.,* Implementation of Section 309(j) of the Comm. Act—Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd. 7387, para. 13, 75 Rad. Reg. 2d (P & F) 843 (1994) (refusing to subject to auction pending applications filed prior to enactment of section 309(j) because applications had originally been filed “in reliance on the Commis-

The Second Circuit has applied a detrimental reliance analysis to bar the Commission from imposing, on too short notice, a change in its Prime Time Access Rule (PTAR). In *National Ass'n of Independent Television Producers & Distributors (NAITPD) v. FCC*, the court rejected the FCC's claim that independent program producers were not entitled to more than eight months notice of a change in the Commission's rules which would curtail the market for their program products.¹⁵¹ The court noted that:

[P]etitioners had good reason to rely on their status under the rule. The FCC did not merely acquiesce in petitioners' activities, it invited and encouraged them. Part of the avowed purpose of PTAR was to urge independents to produce programs for prime time and to foster a healthy syndication industry. . . . Having justifiably relied on the Commission's prior policy,¹⁵² petitioners are entitled to more opportunity to adjust to the new rule.

The court distinguished *General Telephone Co. v. United States*, which sustained a change in Commission rules affecting existing regulatees,¹⁵³ on the ground that the petitioners there should not have relied on the Commission's acquiescence in their activities because the Commission had hinted

sion's existing lottery procedures"); accord Amendment of Parts 21 and 74 of the Comm'n's Rules, *Report and Order*, 10 FCC Rcd. 9589, paras. 89-90, 78 Rad. Reg. 2d (P & F) 856, *reconsideration granted in part and denied in part by Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd. 13821, 1 Comm. Reg. (P & F) 1 (1995); see also Review of the Pioneer's Preference Rules and Amendment of the Comm'n's Rules To Establish New Personal Comm. Servs., *Memorandum Opinion and Order on Remand*, 9 FCC Rcd. 4055, para. 13, 75 Rad. Reg. 2d (P & F) 1088 (1994) (requiring pre-auction recipients of pioneer's preferences to pay for their licenses, and declining to recognize recipients' request that free licenses be granted as reward for investments and information disclosures made in reliance on their expectation of a preference); Anchor Brdcast. Ltd. Partnership, *Memorandum Opinion and Order*, 7 FCC Rcd. 4566, para. 149, 70 Rad. Reg. 2d (P & F) 1569 (1992), *modified by Memorandum Opinion and Order*, 8 FCC Rcd. 1674, 72 Rad. Reg. 2d (P & F) 98, *reversed and remanded sub nom. Bechtel v. FCC*, 10 F.3d 875 (1993). In reconsidering the extent to which the "integration" factor was relevant in comparative broadcast hearings, FCC decided that any new policy should not be applied to hearings already in progress since "applicants in hearing relied on the 1965 Policy Statement in formulating their applications and have incurred significant expenses litigating proposals that potentially could be rendered inferior by a drastically new policy. We do not believe that this result would be justified under the circumstances here." *Id.* para. 22 (footnote omitted); see also Fox TV Stations, Inc., *Second Memorandum Opinion and Order*, 11 FCC Rcd. 5714, para. 24-28, 78 Rad. Reg. 2d (P & F) 1294 (1995); *DBS Report and Order*, 11 FCC Rcd. 9712, para. 74, 1 Comm. Reg. (P & F) 928 (1995) (rejecting restrictive cross-ownership rules because industry has made investments at least in part in reliance on earlier decision), *aff'd sub nom. DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

151. *NAITPD*, 502 F.2d 249, 254-55 (2d Cir. 1974) (frequently cited erroneously in D.C. Circuit opinions as a D.C. Circuit proceeding; see, e.g., *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996)).

152. *Id.* at 255.

153. *General Tel.*, 449 F.2d 846 (5th Cir. 1971).

for years that it might curtail them.¹⁵⁴

The extent to which an FCC licensee may claim detrimental reliance also arose in connection with the Commission's decision in late 1995 to auction certain Direct Broadcast Satellite (DBS) channels that it had previously indicated it would allocate among certain conditional DBS permittees whose initial channel requests could not be granted. In *Continental Satellite Corp.*, the Commission found that it did not have a sufficient number of DBS channels to award each applicant the sixteen requested. The Commission granted eleven channels to each applicant, but indicated that if any of the DBS permittees forfeited its channels the Commission would reallocate those channels among the remaining eligible DBS permittees.¹⁵⁵ In 1995 the Commission cancelled the DBS channels previously awarded to another DBS permittee for lack of due diligence.¹⁵⁶ Instead of reallocating the newly available channels, the Commission determined that the public interest would be better served by auctioning the fifty-one channels to the highest bidder.¹⁵⁷ A number of the disappointed DBS permittees—eligible for additional channels under the original reallocation policy—argued that they had detrimentally relied on the Commission's earlier

154. *NAITPD*, 502 F.2d at 255; see also *Omnipoint*, 78 F.3d at 633 (sustaining Commission's weighing of reliance interests of one group of affected parties in modifying its rules); *New Eng. Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987) (finding no evidence of telephone companies' detrimental reliance on their understanding of FCC's prior rate-of-return policy), *cert. denied*, 490 U.S. 1039 (1989); *RKO Gen., Inc. v. FCC*, 670 F.2d 215, 223 (D.C. Cir. 1981) (under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy), *cert. denied*, 456 U.S. 927 (1982). *Omnipoint* relies on *NAITPD*, stating that the holding is that "the Commission was required to take into account petitioners' justifiable reliance upon old rule when enacting new rule." *Omnipoint*, 78 F.3d at 633. This is not an accurate characterization of the *NAITPD* holding, since the Commission had given consideration in its decision to the reliance factor. Rather, the *NAITPD* court concluded that the Commission had erred in adopting an eight month transition period, and the holding is that given the justifiable reliance shown in the record, petitioners were entitled to a longer adjustment period. The *NAITPD* record revealed the overwhelming support of the commenters for a transition period longer than the one adopted by the Commission. The court noted also the existence of an FCC rule of a similar nature but which allowed a longer transition period than permitted in the case before the court. The *NAITPD* court's holding, then, may be confined to the Commission's evident misreading or disregard of the record.

155. *Continental Satellite Corp.*, *Memorandum Opinion and Order*, 4 FCC Rcd. 6292, para. 54, 66 Rad. Reg. 2d (P & F) 1185 (1989), *partial reconsideration denied by Memorandum Opinion and Order*, 5 FCC Rcd. 7421 (1990), *reconsideration and clarification granted in part and denied in part sub nom.* *Petition and Application of Tempo Satellite, Inc.*, *Memorandum Opinion and Order*, 7 FCC Rcd. 6597 (1992).

156. *Advanced Comm. Corp.*, *Memorandum Opinion and Order*, 11 FCC Rcd. 3399, 1 Comm. Reg. (P & F) 276 (1995), *aff'd per curiam sub nom.* *Advanced Comm. Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 718 (1997).

157. *DBS Report and Order*, 11 FCC Rcd. 9712, para. 165, 1 Comm. Reg. (P & F) 928 (1995), *aff'd sub nom.* *DirecTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997).

promise of channel reallocations. Three of these parties contended that they had spent many millions of dollars and built spacecraft with more than eleven transponders in reliance on the Commission's 1989 promise to give them additional channels if any were to become available.¹⁵⁸ This promise, they contended, imbued them with "vested rights"¹⁵⁹ once the contingency (of the availability of additional DBS channels) was fulfilled.

The Commission rejected these arguments, finding that while the permittees did have a claim under the prior (pre-auction) regime amounting to rights to reclaimed channels, this right was not a property right for constitutional purposes. In rejecting the permittees' argument that they had vested rights to the newly available channels and had detrimentally relied on the Commission's earlier policy, the Commission cited the provisions of sections 301 and 304 of the Communications Act, as well as the numerous cases holding that the Commission had authority to modify any authorization if in its judgment doing so would promote the public interest.¹⁶⁰ The Commission did admit that the disappointed permittees had equities, but held that any such equities had to give way to the overall public interest.¹⁶¹

In *DirecTV, Inc. v. FCC*, the court of appeals denied rejected claims of detrimental reliance.¹⁶² Without even referring to the issue of property rights or their absence, the court found that the Commission's decision to auction channels previously promised to petitioners was neither impermissibly retroactive nor arbitrary and capricious. Indeed the court said there was no retroactivity at all in the Commission's decision.¹⁶³

158. *DBS Report and Order*, 11 FCC Rcd. 9712, paras. 133, 138, 140, 1 Comm. Reg. (P & F) 928.

159. What is meant by a "vested right" may depend on the context. The concept appears to have arisen in respect to real estate. It may be defined as an "immediate fixed right of present or future enjoyment." *Pearsall v. Great No. Ry. Co.*, 161 U.S. 646, 673 (1896). The Court also refers to the distinction drawn by Justice Cooley between vested rights, on the one hand, and expectant or contingent rights on the other. Rights are expectant "when they depend upon the continued existence of the present condition of things until the happening of some future event." *Id.* The latter formulation, if taken literally, might preclude any FCC license rights from being "vested" given the Commission's broad rulemaking powers. Put another way, there would be no vested right in existing law.

160. *DBS Report and Order*, 11 FCC Rcd. 9712, para. 139, 1 Comm. Reg. (P & F) 928; see also 47 C.F.R. § 100.19(a) (1996), which specifies that interim DBS authorizations "shall be subject to . . . any policies and rules the Commission may adopt at a later date."

161. *DBS Report and Order*, 11 FCC Rcd. 9712, paras. 142, 144-46, 1 Comm. Reg. (P & F) 928.

162. *DirecTV*, 110 F.3d 816 (D.C. Cir. 1997). See *infra* Part IV.A. for further discussion of this case.

163. *Id.* at 821, 826.

IV. RETROACTIVITY

A. *In General*

In Section II.G of this Article, the Commission's broad authority to amend existing rules and licenses is set forth. That authority is both wide and deep but is limited not only by statutory and APA restrictions but also by bounds on the legality of adopting rules with adverse retroactive effect.¹⁶⁴ As a general rule, retroactivity is not favored:¹⁶⁵

[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."¹⁶⁶

Moreover, by definition under the APA, a rule is a pronouncement of future effect.¹⁶⁷ Yet one of the most complex aspects of the power to modify licenses occurs in the context of the Commission's authority to adopt rules which, while nominally forward-looking, have retroactive effects. The D.C. Circuit has observed that courts have long hesitated to permit the "extraordinary step" of retroactive rule making and have noted its troubling nature: "When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief."¹⁶⁸ Accordingly under judicial review, administrative decisions involving retroactivity require a higher standard of justification than is generally the case in the absence of retroactive effect.¹⁶⁹ Indeed, the law in this area is indisputably relevant to the Commission's power to alter prior license rights or powers but is not altogether clear. The Supreme Court has stated in *Motor Vehicle Manufactur-*

164. It is important to distinguish cases involving reliance interests from those in which retroactivity is an issue. Although reliance and retroactivity both look to the past, are often conjoined, and reliance is the rubric under which retroactivity is challenged, the reverse is not always true. That is, simple reliance cases need not and often do not involve retroactivity. See, for example, *Radio Rockford, Inc., Order*, 2 F.C.C.2d 689, para. 4, 6 Rad. Reg. 2d (P & F) 907 (1966), in which the Commission rejected applicant's claim that the Commission should waive new, indisputably prospective rules, merely because applicant had expended funds to prepare an application in reliance on the prior rule. Neither the Commission nor the courts have always articulated this distinction.

165. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

166. *Union Pac. R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913) (quoting *United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806)); see also *Greene v. United States*, 376 U.S. 149, 160 (1964).

167. *Administrative Procedure Act*, 5 U.S.C. § 551(4) (1994).

168. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-46 (D.C. Cir. 1986).

169. See *id.* at 746 (reviewing courts must critically examine retroactive rule making to ensure that agency has appropriately balanced competing considerations).

ers Ass'n of United States v. State Farm Mutual Automobile Insurance Co. that an agency decision to rescind or modify an existing regulation should be reviewed under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of § 706(2)(A).¹⁷⁰ Yet this does not begin to recognize the complexity of the issues presented by claims of unlawful retroactive rule making.

The first and most fundamental uncertainty is determining what constitutes retroactivity. The leading case is *Georgetown University Hospital* in which Justice Scalia, in a concurring opinion, sought to clarify the extent to which an administrative agency by rule can retroactively alter its rules or policies. Justice Scalia divided retroactivity into two categories. The first is primary retroactivity, which alters the legal consequences of past actions and is unlawful unless specifically permitted by statute. Secondary retroactivity concerns and affects, to the extent legally authorized, past transactions in prescribing rules for the future; it may be lawful if the burden on the private party is outweighed by the benefit of imposing a retroactive rule, that is, whether the retroactivity can pass a reasonableness test. If the agency decision cannot pass the reasonableness test it may on that basis be arbitrary and capricious under § 706(2)(A).¹⁷¹ Justice Scalia also sought to distinguish permissible from impermissible retroactivity by examining the effect of a new rule on prior legal rights. Justice Scalia stated that Health and Human Services (HHS) could have applied its new hospital reimbursement formulas in the future, even though respondents may have been operating under contracts previously negotiated in reliance on prior rules, but HHS could not prescribe such a formula for costs reimbursable while the prior rule was in effect because the latter changed the law retroactively in violation of § 551(4).¹⁷² The Justice cautioned, however, that the reasonableness test for secondary retroactivity cannot be used to validate a regulation which changes "what was the law in the past," since rules must apply only to the future.¹⁷³ The concurring opinion in *Georgetown University Hospital* emphasized also that the APA's dichotomy between adjudication and rule making is vital to consideration of the lawfulness of rules with alleged retroactive effect. *SEC v. Chenery Corp.*,¹⁷⁴ Justice Scalia noted, involved adjudication, a form of administrative action in which "retroactivity is not only permissible but standard.

170. *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. 29, 41 (1983).

171. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988); 5 U.S.C. § 706(2)(A). The notion of "secondary retroactivity" is addressed in John K. McNulty, *Corporations and the Intertemporal Conflict of Laws*, 55 CAL. L. REV. 12, 58-60 (1967).

172. *Georgetown Univ. Hosp.*, 488 U.S. at 220; 5 U.S.C. § 551(4).

173. *Georgetown Univ. Hosp.*, 488 U.S. at 220.

174. *Chenery*, 332 U.S. 194 (1947).

Adjudication *deals* with what the law was; rulemaking deals with what the law will be.”¹⁷⁵ Administrative agencies, therefore, enjoy the power to make purely prospective law through rule making, something which courts are not supposed to do; but they should not make purely prospective rules through adjudication which affects both prior and future acts since the design of the APA does not contemplate that method of lawmaking.¹⁷⁶

In *Landgraf v. USI Film Products*, the Court addressed itself specifically to the difficulty of determining whether a particular statutory rule operates retroactively, indicating that a large measure of judgment is required concerning the nature and extent of the change and the connectedness of the new rule and a relevant past event.¹⁷⁷ It also said that retroactivity, in the true sense, occurs when action impairs vested rights possessed when an agency acted to divest them, when action increases a party’s liability for past conduct, or when action imposes new duties with respect to transactions already completed.¹⁷⁸ The D.C. Circuit describes a statute as retroactive if it “‘takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.’”¹⁷⁹

It is often held that retroactive rule making is unlawful unless specifically authorized by statute.¹⁸⁰ In *Retail, Wholesale and Department Store Union v. NLRB (Retail, Wholesale)*,¹⁸¹ a case involving adjudication, the D.C. Circuit set forth a five-part test for determinations of reasonableness: (a) whether the case is one of first impression;¹⁸² (b) whether the new

175. *Georgetown Univ. Hosp.*, 488 U.S. at 220-21.

176. *Id.* at 221. In his concurring opinion in *Georgetown University Hospital*, Justice Scalia concluded that there is no justification for a rule of law permitting retroactive rules so long as they are reasonable. An agency bound by the APA may proceed by retroactive rules, in his view, only when a particular statute explicitly or implicitly allows it to do so. *Id.* at 223. It is not clear that this position has been widely accepted by the courts, which appear to accept retroactivity in rule making if the reasonableness test is met.

177. *Landgraf*, 511 U.S. 244, 269-70 (1994).

178. *Id.* at 280.

179. *Association of Accredited Cosmetology Sch. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992) (quoting *Neild v. District of Columbia*, 110 F.2d 246, 254 (D.C. Cir. 1940) (quoting *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156))).

180. *See, e.g., Motion Picture Ass’n of Am. v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992). The FCC recognizes the “general prohibition on retroactive rulemaking.” *See Implementation of Sections of the Cable TV Consumer Protection and Competition Act of 1992: Rate Reg., Third Order on Reconsideration*, 9 FCC Rcd. 4316, paras. 108, 118, 74 Rad. Reg. 2d (P & F) 1274 (1994).

181. *Retail, Wholesale*, 466 F.2d 380 (D.C. Cir. 1972).

182. Given the equitable flavor of the five-part test one would expect the “case of first impression” test, if answered in the affirmative, to support prospective application only. In *Clark-Cowlitz Joint Operating Agency v. Federal Energy Reg. Comm’n.*, 826 F.2d 1074,

rule is an abrupt departure from well established prior practice, or just fills in a void in an unsettled area of law; (c) the extent of reliance on the prior rule by the party challenging the retroactivity; (d) the degree of burden which a retroactive order would have on the party challenging it; and (e) the public interest in applying a new rule despite the reliance of a party on the old standard.¹⁸³ While the D.C. Circuit has carefully circumscribed the *Retail, Wholesale* criteria to cases of adjudication in *Motion Picture Ass'n of America v. Oman*,¹⁸⁴ it would appear that an essentially similar balancing test applies to retroactivity in rule making.¹⁸⁵ Indeed, the lawfulness of retroactive rule making is often measured by reference to the standards set forth in *Chenery* and *Retail, Wholesale*.¹⁸⁶ These factors have come to represent the "reasonableness" rule in judicial review of agency rules challenged on grounds of retroactivity.

What constitutes retroactivity thus is far from clear, let alone the determination of reasonable retroactivity. Despite the courts' stated heightened concerns about retroactive rule making it is difficult to see significant differences in reviewing courts' treatment of agency action in such instances. In cases involving retroactivity, or allegations of retroactivity, the courts overwhelmingly have sustained agency action, finding some element of retroactive loss or diminution of an authorization or of an opportunity acceptable in the context of overall purposes which are legitimate.¹⁸⁷

1081-82 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 913 (1988), Judge Starr reached the opposite conclusion where the new rule is applied in an adjudication. Judge Mikva, in a vigorous dissent, found this conclusion diametrically wrong. *Id.* at 1093-95.

183. *Retail, Wholesale*, 466 F.2d at 390.

184. *Motion Pictures Ass'n of Am.*, 969 F.2d at 1158.

185. *See* *Sierra Club v. EPA*, 719 F.2d 436, 467 (D.C. Cir. 1983) (rulemaking case in which the last four *Retail, Wholesale* factors are listed among the considerations which enter into a determination of retroactivity), *cert. denied sub nom. Alabama Power Co. v. Sierra Club*, 468 U.S. 1204 (1984); *see also* *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993) (stating FCC must provide reasoned justification reflecting balancing of all relevant interests involved in retroactivity decisions).

186. *See, e.g., Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987).

187. It is worth noting, however, that an agency adopting a retroactive change in policy is subject to a higher standard of justification. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir. 1986). Nor do courts always defer to agency determinations involving allegations of unlawful retroactivity because such review "is in each case a question of law, resolvable by reviewing courts with no overriding obligation to the agency[']s decision." *Maxcell*, 815 F.2d at 1554 (Bork, J.) (quoting *Retail, Wholesale*, 466 F.2d at 390); *accord, Mason Gen. Hosp. v. HHS*, 809 F.2d 1220, 1224 (6th Cir. 1987); *Daughters of Miriam Ctr. for the Aged v. Mathews*, 590 F.2d 1250, 1259 (3d Cir. 1978). It is not at all clear that this is the law in the D.C. Circuit. In *Association of Accredited Cosmetology Schools v. Alexander*, 979 F.2d 859, 866 n.1 (D.C. Cir. 1992), the court could "not let pass" the petitioner's assertion that the D.C. Circuit had held in *Clark-Cowlitz Joint Operating Agency*, 826 F.2d at 1094, that "[a]gencies possess no particular expertise on the issue of

Judicial affirmance rests either on a finding that no retroactive effect exists, or that the retroactivity is reasonable. A statute does not operate retroactively “merely because it . . . upsets expectations based in prior law”¹⁸⁸ or because facts or requisites for its operation are drawn from a time antecedent to its enactment.¹⁸⁹ The D.C. Circuit has noted that “most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.”¹⁹⁰

When challenged on retroactivity grounds, the Commission frequently cites to *General Telephone Co. v. United States* for the proposition that retroactive effects of newly adopted rules may be legal if they are reasonable.¹⁹¹ The case involved FCC adoption of rules barring telephone companies from continuing to provide Community Antenna Television (CATV)¹⁹² service. Citing the reasonableness rule, the court sustained the Commission’s new rule: “That rules of general application, though prospective in form, may ascribe consequences to events which occurred prior to their issuance does not, on that basis alone, invalidate them.”¹⁹³ The court added the following: “Where the on-rushing course of events have outpaced the regulatory process, the Commission should be enabled to remedy the problems of undue concentration of control over communications media by retroactive adjustments, provided they are reasonable.”¹⁹⁴ It also observed that “the property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish

retroactivity, and reviewing courts in turn have ‘no overriding obligation of deference’ to an agency’s decision to give retroactive effect to a new rule.” *Alexander*, 979 F.2d at 866 n.1. The decision rejects such a doctrine: “In fact, we held no such thing—the quoted passage came from the *dissenting opinion*.” *Id.* In any case, there is something inherently circular about this doctrine. If the lawfulness of agency determinations involving claims of retroactivity is tested without deference to the agency’s resolution, then the court, as a logical matter, cannot be deferring to the agency’s evaluation of the reasonableness of the retroactivity. Since the importance of imposing the new policy both generally and retroactively is inherent in any such reasonableness test, the court either is deferring to the agency in reviewing the latter’s decision, or is giving no deference to any aspect of the agency’s decision concerning retroactivity, including, for example, even the expert agency’s weighing of technical factors.

188. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 (1994) (citations omitted).

189. *See Reynolds v. United States*, 292 U.S. 443, 449 (1934).

190. *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

191. *General Tel.*, 449 F.2d 846 (5th Cir. 1971).

192. Community cable operators originally used antenna to receive signals. Thus the service was referred to as Community Antenna Television (CATV). Today, CATV is often used to refer to cable television. *Eds.*

193. *General Tel.*, 449 F.2d at 863.

194. *Id.*

or modify pre-existing interests.”¹⁹⁵ However, the court was clearly influenced by factors which mitigated the harshness of the new rule: the telephone companies’ divestiture of their CATV interests could take place over a four-year period, and waivers of that requirement were available. Moreover, the phone company had been on notice since 1956 through a series of judicial and regulatory proceedings that such divestiture might be required.¹⁹⁶ While finding the retroactivity before it acceptable on equitable grounds, the court also noted that “even where reliance is strong, regulations may be altered retroactively. Indeed very substantial reliance is sometimes disregarded.”¹⁹⁷

The Commission has been successful three times in recent D.C. Circuit cases involving alleged unlawful retroactivity. In *Bell Atlantic Telephone Cos. v. FCC*, Judge Randolph rejected a number of claims of retroactivity involving FCC adjustments to the price cap indices applicable to local exchange carriers.¹⁹⁸ The so-called “Add-Back Order” had required the LECs to adjust their 1994 earnings to determine their 1995 price caps. The court rejected claims of retroactivity because the adjustments affected only future rates. It observed that no refunds were required and current tariffs were not rendered unlawful.¹⁹⁹ The court noted also that the rules did draw upon “antecedent facts” but did not increase liability for past transactions, nor regulate past transactions.²⁰⁰ Analyzing *Association of Accredited Cosmetology Schools v. Alexander*, Randolph noted that the court held that the rule challenged there was not retroactive because the government did not undo past eligibility but merely looked at prior default rates in setting future eligibility.²⁰¹ After concluding that the retroactive effect of the Add-Back Order was only secondary and was reasonable, the court also noted that the rule did not upset petitioners’ reasonable reliance interests. For the latter conclusion, it recited regulatory history to show that the

195. *Id.* at 864 (citing inter alia *WBEN, Inc. v. United States*, 396 F.2d 601 (2nd Cir.), *cert. denied sub nom. King’s Garden, Inc. v. FCC*, 393 U.S. 914 (1968); *American Airlines, Inc. v. Civil Aeronautics Bd.*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966)).

196. *Id.*

197. *Id.* at 864 n.18 (citations omitted). The court’s analysis is imprecise or unclear. Can there be “strong” reliance even when the relying party was or should have been on notice that the prior rules were being reviewed and were good prospects for revision? Does the strength of the reliance interest turn on the extent of the reliance, e.g. in dollars, or on its prudence or reasonableness, under the circumstances?

198. *Bell Atl. Tel.*, 79 F.3d 1195 (D.C. Cir. 1996).

199. *Id.* at 1206.

200. *Id.* at 1206-07; *accord*, *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (stating petitioner not deprived of any right or given new and unexpected liabilities).

201. *Bell Atl. Tel.*, 79 F.3d at 1207.

LECs could not simply have assumed that they would not be subjected to the add-back obligation, adding “[f]urthermore, the rule does not ‘make worthless substantial past investment incurred in reliance upon the prior rule.’”²⁰² Finally, Judge Randolph noted that the “[Add-Back] rule gives petitioners the benefit of their bargain.”²⁰³

The D.C. Circuit again addressed claims of reliance and retroactivity in *DirectTV, Inc. v. FCC* in which Judge Ginsburg rejected claims of unlawful primary and secondary retroactivity.²⁰⁴ As set forth above in Part III.C., petitioners in *DirectTV* argued that the Commission had unlawfully deprived them of certain reclaimed DBS channels which the Commission had earlier promised to distribute to DBS permittees whose channel requests could not be fully satisfied at an earlier stage of the industry’s development.²⁰⁵ Judge Ginsburg first held that the primary retroactivity claim, based on the argument that the Commission’s auction decision deprived petitioners of their previously granted rights to a portion of any forfeited channels, was invalid because it did not meet any of the three criteria of *Landgraf v. USI Film Products*.²⁰⁶ That is to say, the auction decision did not impair rights a party possessed when it acted, increase a party’s liability for past conduct, or impose new duties with respect to completed transactions.²⁰⁷ As to the first criterion, Judge Ginsburg noted that the earlier decision in *Continental Satellite Corp.*²⁰⁸ to apportion any reclaimed channels did not bestow rights to any specific channels, but only set forth a Commission plan; the *Continental Satellite* decision was, in his view, prospective only, addressing what the Commission would do in the future.²⁰⁹

202. *Id.* (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 220 (1988) (Scalia, J. concurring)).

203. *Id.*; see also *Mobile Comm. Corp. of Am. v. FCC*, 77 F.3d 1399, 1407 (D.C. Cir. 1996) (finding that the Commission, by withdrawing its oft-repeated promise of a free pioneer’s preference license, had failed to give adequate consideration to appellant’s reliance concerns); *Adelphia Comm. Corp. v. FCC*, 88 F.3d 1250, 1257 (D.C. Cir. 1996) (rejecting an “equitable claim” against application of a new rule because petitioners had, by disregarding the possibility of a rule change, misread the Commission); cf. *James Cable Partners, L.P. v. City of Jamestown, Tenn.*, 822 F. Supp. 476, 478 (M.D. Tenn. 1993) (stating the Cable Act of 1992 should not be construed to apply retroactively although it could so apply without being a “taking” because FCC conduct put industry on notice of its potential exercise of regulatory authority), *aff’d*, 43 F.3d 277 (6th Cir. 1995).

204. *DirectTV*, 110 F.3d 816 (D.C. Cir. 1997).

205. See *supra* Part III.C.

206. *Landgraf*, 511 U.S. 244 (1994).

207. *DirectTV*, 110 F.3d at 825-26.

208. *Continental Satellite Corp.*, 4 FCC Rcd. 6292, 66 Rad. Reg. 2d (P & F) 1185 (1989), *partial reconsideration denied by Memorandum Opinion and Order*, 5 FCC Rcd. 7421 (1990).

209. *DirectTV*, 110 F.3d at 826.

While the *DirectTV* decision found petitioners' expectations of further channel assignments reasonable, it concluded that such expectations, based on prior law, were not sufficient to bar the agency from altering prior law.²¹⁰

Similarly, the court rejected petitioners' companion argument that, even if the FCC's decision to auction channels previously committed to them was not primarily retroactive, it was nevertheless invalid on the ground that it was secondarily retroactive. Here, petitioners relied on their expenditure of millions of dollars to build satellites of sufficient capacity to put to use any channels subsequently allocated under *Continental Satellite*. The court concluded that the sort of "retroactivity" represented by such expenditures had never been treated as "necessarily violating a separate legal standard."²¹¹ The court added that a rule which upsets expectations may be sustained if it is reasonable, for example not arbitrary or capricious, and a change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The court also addressed the factual analysis made by the Commission in support of its decision to auction the reclaimed channels and concluded that such analysis was not arbitrary or capricious.²¹² In doing so, the court relied on prior cases which provide wide latitude for an agency to change its policies if it considers the relevant factors²¹³ and provides a reasoned explanation for its decision to alter prior policies.²¹⁴

The third recent case involving claims of unlawful retroactive rule making on the part of the FCC arose in *Chadmoore Communications, Inc. v. FCC*.²¹⁵ Appellant, an applicant seeking approval to extend the time within which it was obliged to complete construction of a Special Mobile Radio (SMR) system, alleged that the Commission erred by denying the request on the basis of a rule adopted after the application for extension of time had been filed, and after the applicant, in reasonable reliance on the prior rules, had expended much time, effort, and money to fulfill its construction plans. Chadmoore's argument, as presented to the court, relied heavily on the *Yakima Valley* case.²¹⁶ Chadmoore complained that the

210. *Id.* (citing *Landgraf*, 511 U.S. at 269 n.24).

211. *Id.*

212. *Id.* at 826-27.

213. *Id.* at 826 (citing *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

214. *Id.* (citing *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411 (D.C. Cir. 1983); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1317 (D.C. Cir. 1995)).

215. *Chadmoore Comm.*, 113 F.3d 235 (D.C. Cir. 1997).

216. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986).

Commission had not balanced the harm to Chadmoore against the benefits of applying its new rule retroactively. Citing *DirectTV* and *Landgraf*, the court rejected Chadmoore's claims principally on two grounds: (1) that the Commission had not relied on the new rule in refusing Chadmoore's request for more time to construct and (2) that, in any case the new rule, even if it had been applied to Chadmoore's circumstances, would not have involved any retroactive effect because it did not impair existing rights, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.²¹⁷ The court noted that the applicant's liability for past conduct was not increased, nor were any new duties imposed on it with respect to completed transactions. Nor, said the court, did the Commission's decision impair any rights since, as a mere applicant, Chadmoore had no vested rights.²¹⁸

On its face, *Chadmoore* seems clearly correct. When the applicant filed for extended authority, it had notice through a *Notice of Proposed Rulemaking* that extended implementation requests might be denied. In contrast, the petitioners in *DirectTV* had acted in reliance on Commission policy years before the FCC gave notice that it might alter the DBS channel allocation rules. *Chadmoore* is particularly interesting, however, because the court's opinion addressed the distinction between lawful retroactivity in adjudication and that in rulemaking—an important distinction and one which the D.C. Circuit had not emphasized in recent cases involving retroactivity.²¹⁹ Quoting its own *Georgetown University Hospital v. Bowen*,²²⁰ the court noted that rules adopted in rulemakings under the APA must be given future effect only; for this reason, “equitable considerations are irrelevant to the determination of whether the [agency's] rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA.”²²¹ By contrast, the court added, “an agency may give retroactive effect to a new policy or rule adopted in the course of an

217. *Chadmoore*, 113 F.3d at 240 (citing *DirectTV*, 10 F.3d at 825-26 (quoting *Landgraf v. USI Film Prod.*, 511 U.S. 244, 280 (1994))). Having rejected the claim of unlawful retroactivity, the *Chadmoore* decision went on to examine whether the FCC's action was arbitrary and capricious. The Court concluded that it was not because the newly adopted policies would be impaired by grant of the request for an extended construction period, and the applicant had reasonable notice that its request might not be granted under the proposed new rules. *Id.* at 241 (citing *Adelphia Comm. Corp. v. FCC*, 88 F.3d 1250, 1257-58 (D.C. Cir. 1996)).

218. *Id.* at 240.

219. *Id.*

220. *Georgetown Univ. Hosp.*, 821 F.2d 750, 757 (D.C. Cir. 1987), *aff'd on other grounds sub nom. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

221. *Chadmoore*, 113 F.3d at 240 (quoting *Georgetown Univ. Hosp.*, 821 F.2d 750, 757 (D.C. Cir. 1987)).

adjudication so long as the resulting inequities are 'counterbalanced by sufficiently significant statutory interests.'²²²

Because the U.S. Court of Appeals for the D.C. Circuit handles all but a handful of the FCC's decisions which are reviewed judicially, an effort to derive some general principles from the D.C. Circuit's case law addressing retroactivity is warranted. Frankly it is difficult, as a matter of common sense, not to see retroactivity in the facts presented to the court in *DirecTV*. As noted above, petitioners contended that millions of dollars had been expended in reliance on a carefully constructed Commission decision promising to assign reclaimed channels to a group of permittees under certain circumstances. Those circumstances arose and petitioners claimed the channels, but at the last moment the FCC decided to award the channels another way, and assets worth tens to hundreds of millions of dollars were withdrawn from the permittees who had anticipated receiving them. Whether or not that policy reversal is sound as a matter of public policy, was justified by the particular circumstances facing the Commission when it changed its views, or was just one of a number of rational choices available given the circumstances,²²³ is quite a different question from the determination whether the effect was retroactive. To this commentator, at least, retroactivity is quite plain in the premises. What the court has done in *DirecTV*, however, is to define away retroactivity altogether. Certainly there is language in *Landgraf* which can be used to justify the court's conclusion that retroactivity does not exist in *DirecTV*.²²⁴ On the other hand, its analysis of the facts is wooden and fails to deal with

222. *Id.* (quoting *Georgetown Univ. Hosp.*, 821 F.2d at 756 (citing *Retail, Wholesale and Dep't. Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-46 (D.C. Cir. 1986))).

223. Apart from whether the court's application of existing law to petitioners' allegations in *DirecTV* is legally sound, one would have to be extraordinarily naive not to understand that the Commission's decision to change its policy from one of reallocating to existing permittees recaptured channels to one of auctioning such recaptured channels was driven simply and solely by the Commission's desire to raise hundreds of millions of dollars in such an auction. The petitioners in *DirecTV* did not present this argument for judicial review. The argument that the Commission's DBS decisional processes had been tainted by unlawful and illegitimate considerations of revenue generation and the presumptive political advantages of such activity to the agency had, however, been briefed extensively in *Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (per curiam), cert. denied, 117 S.Ct. 718 (1997). In its unpublished opinion in *Advanced Communications*, the court summarily rejected such argument and noted that it would not address such allegations because appellants had not pointed to anything in the record sufficient to overcome the "strong presumption of agency regularity." *Advanced Comm.*, 84 F.3d 1452 (D.C. Cir. 1996) (per curiam) (quoting *Louisiana Ass'n of Indep. Producers v. Federal Energy Reg. Comm'n*, 958 F.2d 1101, 1111 (D.C. Cir. 1992)).

224. *But see Landgraf v. USI Film Prod.*, 511 U.S. 244, 268 n.23 (1994) (providing precedent with broad definitions of retroactivity).

much of its own precedent emphasizing that allegations of retroactivity require particularly careful judicial scrutiny.

More broadly, in the context of administrative regulations a moment's reflection will suffice to demonstrate that the presumption against retroactivity must be applied with considerable delicacy: Administrative agencies exist primarily to develop specialized expertise and to apply such expertise to the often technical and dynamic demands of modern life. If any change in administrative regulations which alters prior rules or policies could be successfully challenged on that ground alone, the very heart of administrative lawmaking would be eviscerated. Therefore, to give proper respect to the default rule of prospectivity, retroactivity must be defined in such a way that it protects legitimate expectations while taking account of the special nature of administrative lawmaking. In this sense, a rule is not retroactive merely because it changes prior expectations or upsets a reliance interest because regulatees should not anticipate that the rules under which they act cannot be altered to their disadvantage. As the Supreme Court said in *Landgraf*:

The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.²²⁵

225. *Id.* at 270. Moreover, in the 1996-97 term the Court revisited and, in a less than pellucid passage, cautioned against reading *Landgraf* too broadly. In *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), a case construing the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, enacting 28 U.S.C.A. § 2254(d) (West Supp. 1997), the Court warned against reading *Landgraf* to establish the principle that in determining whether a statute produces a retroactive effect the default rule disfavoring retroactive application in the absence of clear Congressional intent to achieve such a result should be the operative test.

Although *Landgraf's* default rule would deny application [of the statute] when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity . . . [I]n sum, if the application of a term would be retroactive as to Lindh the term will not be applied, even if, in the absence of retroactive effect, we might find the term applicable; if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply as to Lindh.

117 S.Ct. 2059, 2063. What this appears to mean is that determining the presence of retroactivity requires looking at the relevant provisions of the statute before applying the default rule which disfavors such retroactivity unless Congress has affirmatively required such a result. The *Lindh* decision struggles manfully with determining Congressional intent only to note that "in a world of silk purses and pigs' ears, the [Antiterrorism and Effective Death Penalty] Act is not a silk purse of the art of statutory drafting." *Id.* at 2068. One might respectfully say the same of this latest judicial foray into establishing the rules of retroactiv-

Accordingly, while a private party may find the sting of modified rules affecting its prior status difficult to bear, the fact is that the FCC has wide powers to alter the scope of licensees' authorizations under the Communications Act and has not infrequently relied on them to achieve its public interest objectives, even when doing so effectuated retroactive and detrimental changes.

B. Auctioning of Licenses

The foregoing discussion deals only with licenses granted by the Commission without the payment of significant fees. Excluding acquisition or transactional expenses and relatively insubstantial filing fees, these may be considered "free" licenses.²²⁶ In 1993, however, the Communications Act was amended by the addition of section 309(j), giving the Commission authority to auction spectrum under certain circumstances.²²⁷ The Commission immediately and aggressively resorted to its auction authority, adopted rules, and quickly raised many billions of dollars.²²⁸ Although the auction process involves paying directly for an authorization that previously would have been granted without any such payment, Congress made very clear that auction-winner licensees did not acquire any ownership interests in the assigned frequencies. The auction statute declares that: "Nothing in this subsection or in the use of competitive bidding shall . . . be construed to convey any rights, including any expectation of renewal of a license, that differ from the rights that apply to other licenses within the same service that were not issued [by auction]."²²⁹ Beyond that unequivocal language, other provisions reinforce congressional intent to constrain the rights of auction winners. Section 309(j)(3)(C) thus speaks of the avoidance of unjust enrichment in awarding of licenses by auction; § 309(j)(4)(B) requires the Commission to adopt rules creating performance requirements to prevent warehousing of spectrum by auction winners; and § 309(j)(4)(E) calls on the Commission to require transfer disclosures and antitrafficking restrictions as necessary to prevent unjust enrichment.²³⁰ The Commission has implemented these directives in numerous regula-

ity.

226. That such licenses, at least in the broadcast context, can be anything but free is evident from the high costs of acquiring an existing broadcast station. Of course, in such cases the cost is imposed by the seller rather than by the government.

227. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, sec. 6002(a), 107 Stat. 387 (codified at 47 U.S.C. § 309(j) (1994)).

228. *See, e.g.*, 47 C.F.R. §§ 24.701-24.720 (1996). As of October 1996, these auctions had raised commitments of more than \$20 billion for the federal treasury.

229. 47 U.S.C. § 309(j)(6)(D).

230. 47 U.S.C. § 309(j)(3)(C), (4)(B), (E).

tions adopted pursuant to the law. However, no Commission decision implementing § 309(j) has addressed the question whether a license bought and paid for at auction bestows property rights on the licensee which do not exist in the traditional context of licenses awarded without payment to the government; Congress appears to have foreclosed any such arguments.

Nevertheless, one would expect that application of the Commission's authority to alter, amend, curtail, or diminish licensee rights as set forth in more than sixty years of Commission and judicial history would raise a wholly new set of issues in such a context. At the very least the test of reasonableness as applied to secondary retroactivity could be expected to give great weight to the investment made by an auction winner. But that might not be enough. Once having paid cold cash for a license, a licensee disappointed by a government assault on its authority would undoubtedly make constitutional arguments involving a Fifth Amendment taking of property.²³¹ It would be reasonable to expect such claims to be treated more carefully than in prior cases, notwithstanding the language of § 309(j)(6)(D) and the applicability of §§ 301, 304, and 316 to licenses granted by auction.²³² Even if the Commission's authority to amend, alter, or curtail existing licenses were deemed sufficient to adversely affect or even terminate an auctioned authorization, a strong argument for fair compensation would appear to be reasonable.²³³

An interesting twist on the question of the property rights of an auc-

231. 47 C.F.R. § 21.936(a) provides that, in the context of MDS authorizations granted by auction, the Commission may revoke or cancel an authorization, inter alia, for "gross misconduct." See Amendment of Parts 21 and 74 of the Comm'n's Rules with Regard to Filing Procedures, *Report and Order*, 10 FCC Rcd. 9589, para. 42, 78 Rad. Reg. 2d (P & F) 856 (1995), *reconsideration granted in part and denied in part by Memorandum and Order on Reconsideration*, 10 FCC Rcd. 13821, 1 Comm. Reg. 1 (1995). It is doubtful that such a vague standard would be sustained if an authorization awarded after auction were withdrawn on such grounds.

232. One commentator has suggested that fee-based incentives for efficient use of spectrum might turn on the concept of spectrum access rights (SAR). See Terrence J. Schroeffer, *Fee-Based Incentives and the Efficient Use of Spectrum*, 44 FED. COMM. L.J. 411, 431 (1992); see also Arthur S. De Vany, *supra* note 11.

233. Cf. *Monroe Comm. Corp. v. FCC*, 900 F.2d 351, 359 (D.C. Cir. 1990) (Silberman, J., concurring) (stating if license holder paid for a license, incumbency might bear weight in comparative renewal case); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1444 n.1 (D.C. Cir. 1994) (discussing in dicta that claims of government taking of private property are compensable in district court and/or the U.S. Claims Court). The long-standing rule against retroactive rule making may be relevant. *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (FPC has no power to alter gas rates retroactively but can only set just and reasonable rate to be charged in the future); cf. *Shanbaum v. United States*, 1 Cl. Ct. 177, 179 n.5, 52 Rad. Reg. 2d (P & F) 1499 (1982) (stating that because an FCC policy constituting normal regulatory action cannot amount to a taking, it is unnecessary to decide whether licensee has a property right which can be taken) *aff'd mem.*, 723 F.2d 69 (1983).

tion-winning licensee has arisen in instances where the government seeks to retrieve the license for nonpayment by the licensee of the periodic post-grant payments specified in the Commission's rules.²³⁴ As set forth in Part II.F.2 above, this possibility has arisen in the case of certain PCS C and F Block auction winners, who are actively seeking a rescheduling of their payment obligations to the U.S. government. In the face of potential retreats to bankruptcy by auction winners who cannot meet their originally imposed obligations and have been unsuccessful in securing an easing of those burdens, the question whether the government, as a creditor, is required to accept the normal processes of the Bankruptcy Code, or can circumvent them, has arisen rather sharply. While the Commission, acting through Chairman Hundt, has aggressively asserted the view that such licensees should have essentially no rights in bankruptcy,²³⁵ the logic of this position is somewhat difficult to understand. To be sure, in the case of a default in payment the license must revert to the Commission for it to make a new public interest determination, as in any case of licensee bankruptcy. But why an auction-winning licensee who has defaulted in its obligations to pay the FCC for the license should be in any worse position vis-à-vis the bankruptcy laws than a licensee who has defaulted in making post-license transfer payments to a prior licensee is not obvious. Even less clear is why a licensee who has paid the government for a license should have fewer or lesser rights in bankruptcy vis-à-vis the government than a licensee who has not paid for the license. After all, the language of § 309(j) quoted above merely denies auction winners any more license rights than are held by nonauction licensees; it does not deprive them of any such rights held by other licensees. Moreover, third-party creditors may be expected to have legitimate interests in the equitable disposition for which the bankruptcy courts have been established. Indeed, given the fundamentally equitable nature of bankruptcy proceedings, it would appear appropriate for the government in its multiple roles as regulator, grantor of a license for payment, and first-secured creditor of the licensee to accept the normal processes of bankruptcy courts, as must any other party.²³⁶ Delaying the recapture and regrant (i.e., resale) of the spectrum rights at issue is simply one of the negative but logically reciprocal effects of treating auctioned licenses as commercial commodities.²³⁷

234. See 47 C.F.R. § 1.2110(e).

235. See *supra* Part II.F.2.

236. As of August 5, 1997, it appears that the Chairman's views have been unavailing. The Budget Reconciliation Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, into which the Chairman wished to insert proposed alterations to the Bankruptcy Code, was passed by Congress with no such changes.

237. The foregoing does not in any way express an opinion on the merits of any yet-to-

V. CONCLUSION

Although there is substantial variation from case to case and not infrequent inconsistency in judicial and administrative pronouncements, it is reasonably clear that FCC licenses have some, albeit limited, attributes of property. Moreover, considerations of justifiable reliance—often cloaked in the language of fundamental fairness rather than explicitly in terms of detrimental reliance—appear to have at least some force in the cases. It is difficult to construct any sort of consistent explanation for judicial reactions to claims of detrimental reliance. Some of the cases rejecting such claims appear to rely on early signals from the Commission of possible policy alterations, the insubstantiality of claimed damage or the absence of unlawful retroactivity. If the ever-present power to change policy, as set forth in *WBEN* and *American Airlines*, is adequate to justify adverse effects on existing licensees, justifiable reliance would appear to be irrelevant. But the courts do seem to take account of reliance, so the abstract power to change policy, however grandly stated, in reality is subject to boundaries imposed by judicial respect for substantial reliance interests.

One way to reconcile the seeming inconsistency would be to propose that property rights as normally understood are not a necessary precondition to careful judicial review of agency policy changes. That is, detrimental reliance may represent a recognizable and legitimate basis on which to seek relief even when, in the classical sense, there are no property rights as such. As noted above equitable estoppel against the government is like the weather: everybody talks about it, but nobody applies it. The obverse circumstance may exist for detrimental reliance: no one will assert that it is the equivalent of classical property rights, but court decisions recognize the potency of the argument often enough to permit the hypothesis that it is in some measure and in some circumstances a workable substitute for property rights.

It may simply be that, however elaborate their rationale, the courts consider common sense fairness in evaluating claims of detrimental reliance, tucking their analysis under one or more of the formulaic approaches relied upon in such cases. However described, taken together the cases demonstrate that, notwithstanding the limited property rights held by FCC licensees, they nevertheless have the right to be treated equitably by the agency; the Commission cannot simply disregard their legitimate reliance

be-adopted FCC plan which has the effect of reducing or stretching out the financial obligations of an auction winner beyond those it voluntarily undertook in submitting a winning bid for the license. It would appear to represent a serious incursion both into the fundamental rationale for auctioning of spectrum and into basic notions of fairness to permit such post-grant reductions in the financial obligations of the winner.

on prior policy, and the courts will not automatically defer to FCC conclusions concerning the balancing test which is required when claims of detrimental reliance are presented on judicial review. When the agency has given even a modicum of warning that the policy on which a petitioner has relied is subject to reexamination, such reliance claims are not likely to carry much weight with the courts. Similarly, where the reliance is of minor consequence courts are not likely to disrupt administrative conclusions. New or amended policies which are purely prospective are harder to attack on appeal. Indeed, most reliance claims do not result in remands, much less reversals; in most unsuccessful efforts to assert reliance claims the failure of petitioners appears to be one of proof rather than a conceptual weakness. Undoubtedly the courts hear a great many detrimental reliance claims in appeals of administrative action, and a somewhat skeptical attitude is probably justified.²³⁸ It should give petitioners comfort, however, to recognize that where damaging prudent reliance of a substantial sort based on a long-standing and unquestioned policy has occurred, especially where a significant retroactive effect is arguable, courts will take a fresh look at the claims presented, at least to the extent of not automatically deferring to the agency's decision below. While this may be comforting as a general proposition, it does little for any effort to produce a more refined analysis. In the inevitable battle between administrative agencies and reviewing courts, this appears to be merely one more instance where the ebb and flow of facts and law present too uncertain a path for rigid rules.

238. An interesting review of the broad relationship between the FCC and the U.S. Court of Appeals for the D.C. Circuit appears in Michael J. Hirrel, *Oil and Vinegar: The FCC and the D.C. Circuit*, *COMMLAW CONSPPECTUS* 121(1995).