

BRIEF FOR RESPONDENTS

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 05-1040

PARADISE CABLE, INC.

Petitioner

v.

**FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA**

Respondents

**PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION**

THOMAS O. BARNETT
ACTING ASSISTANT ATTORNEY GENERAL

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

CATHERINE G. O'SULLIVAN
STEVEN MINTZ
ATTORNEYS

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

STANLEY SCHEINER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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GLOSSARY

MDS

Multichannel Distribution Service

BTA

Basic Trading Area

Consent

Consent to Assignment, granted by the FCC on October 6, 1999

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

Paradise Cable, Inc. (“Paradise”) held four Multipoint Distribution Service (“MDS”) authorizations in 1998 (the “licenses”) when its parent company was forced into bankruptcy proceedings. In 1999, as part of a plan of reorganization, Paradise agreed to assign the licenses to Inforum Communications, Inc. (“Inforum”).¹ The reorganization plan was confirmed and the FCC consented to the assignments. The confirmed plan was subsequently – and unsuccessfully – challenged in several court proceedings, culminating in a July 6, 2001 decision by the U.S.

¹ SkyLynx Communications, Inc. subsequently changed its name to Inforum Communications, Inc; for ease of reference, we will refer to the assignee throughout as Inforum.

Court of Appeals for the Eleventh Circuit holding that such challenges had been rendered equitably moot by the plan's substantial consummation.

On July 18, 2001, Inforum applied to the FCC to transfer the licenses to TDI Acquisition Corp. ("TDI"). Paradise subsequently filed a petition to deny the application, arguing that the original assignments had never been properly consummated, notwithstanding the confirmed plan and the 11th Circuit's decision. The Commission dismissed, finding that Paradise had waited too long to raise issues concerning the original assignments from it to Inforum, and also that the matter had been resolved by the courts. This appeal followed.

The question presented is:

Was the FCC within its discretion to dismiss Paradise's petition to deny Inforum's application, given that Paradise had failed to file a challenge to the original assignment to Inforum with the Commission at its first opportunity, but instead did so only after challenges to the reorganization plan, upon which the assignments were based, had been rejected?

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Paradise's appeal under 47 U.S.C. § 402(b), which vests exclusive jurisdiction in this Court to review Commission decisions on applications for grant, renewal or transfer of radio licenses. 47 U.S.C. § 402(b)(1) –(3), (9). Not only did Paradise file a petition to deny the transfer of the licenses from Inforum to TDI, but it also sought to have those licenses restored to it.

Paradise asserts that jurisdiction lies under 47 U.S.C. § 402(a), which authorizes the courts of appeals to review Commission orders that are not covered by section 402(b) – although it "request[s] * * * review under 402(b)" in the "alternative[]." Paradise Br. viii. Any difference

with respect to this issue, however, is of no moment in this case, because Paradise filed its appeal within 30 days, which was timely under either provision.

COUNTERSTATEMENT

This appeal arises against a backdrop of lengthy and repetitious bankruptcy litigation in the courts of the Eleventh Circuit.² This counterstatement will describe, first, the initial plan confirmation proceeding; then the FCC proceeding in which the licenses were assigned from Paradise to Inforum and the consummation of those assignments; and finally, the first adversary proceeding which culminated in the Eleventh Circuit’s order.

A. The Initial Bankruptcy Proceedings Leading to Plan Confirmation.

The history of proceedings in the bankruptcy court is set forth extensively in the order under review. To summarize, on March 16, 1998, Paradise’s parent, Cable Corporation of America, was forced into an involuntary liquidation proceeding under Chapter 7 of the Bankruptcy Code. At that time, Paradise held three MDS station licenses and the Basic Trading Area (“BTA”) authorization for Sarasota, Florida (the “licenses”).³

The case was converted to a reorganization proceeding under Chapter 11 of the Bankruptcy Code on April 14, 1998. On November 30, 1998, Paradise and Inforum executed a

² Since the confirmation of Paradise’s plan of reorganization in 1999, there have been no less than four adversary proceedings that have been resolved by some combination of the United States Bankruptcy Court for the Middle District of Florida, Tampa Division, the United States District Court for the Middle District of Florida, Tampa Division, and the United States Court of Appeals for the Eleventh Circuit. All of these actions sought to undo the confirmed plan and concomitant license assignments, and all failed.

³ *In the Matter of Application of Inforum Communications, Inc. and TDI Acquisition Corporation*, 20 FCC Rcd 820 (2005) (“Order”), at ¶ 2. Basic Trading Areas, designed by Rand McNally, are the geographic areas by which MDS was auctioned and authorized. See *Amendment of Parts 21 and 74 of the Commission’s Rules With Regard To Filing Procedures In the Multipoint Distribution Service, etc.*, 10 FCC Rcd. 9589, 9608 ¶ 34 (1995).

Plan Term Sheet, contemplating the assignment of the licenses to Inforum, subject to FCC approval.⁴ Following the filing and approval of a disclosure statement, on May 12, 1999 the bankruptcy court confirmed a plan of reorganization (hereinafter, the “Confirmed Plan” and the “Plan Confirmation Order”).⁵ As the Eleventh Circuit later explained, the gist of the plan was a “buyout” of Paradise’s parent company by Inforum. “In exchange for its stock, [Inforum] was to purchase broadcast licenses (with FCC approval) and equipment owned by . . . Paradise.” The reorganization “plan also required dismissal with prejudice of pending related litigation, involving parties other than the debtor and [Inforum], in Florida and Colorado courts.”⁶ The assignment of these licenses was thus part of a comprehensive plan to resolve the debts of Paradise’s parent company in bankruptcy. No timely appeal was taken from the Plan Confirmation Order.⁷

B. The Assignment of Licenses From Paradise to Inforum.

On July 9, 1999, Paradise filed an application with the FCC to assign the licenses to Inforum. No comments or objections were filed, and the FCC granted the application on October 6, 1999.⁸ On October 12, 1999, the Mass Media Bureau (the “Bureau”) sent a letter to

⁴ See Inforum Opposition to Petition to Deny (“Opposition”), Exhibit B, p. 7 (J.A. ____)

⁵ See Order Confirming Plan of Reorganization for Cable Corporation of America, Exhibit J to Opposition (J.A. ____).

⁶ *Hansen v. Skylynx Communications, Inc. (In re Cable Corp. of Am.)*, No. 01-11329 (11th Cir. July 6, 2001) (attached as Addendum B to Paradise’s Brief), at 2.

⁷ Order at ¶ 4.

⁸ See Order at ¶ 6.

Inforum's counsel attaching the Consent to Assignment (the "Consent").⁹ The Consent stated, in pertinent part:

The Commission's consent to the above is based on the representations made by the applicants... and that the undertakings of the parties upon which this transaction is authorized will be carried out in good faith. The actual consummation of voluntary transactions shall be completed within 45 days from the date hereof, and notice in letter form thereof shall be furnished to the Commission by the buyer within 10 days from the date of consummation and shall show the date on which the acts necessary to effect the transaction were completed. Upon furnishing the Commission with such written notice, this transaction will be considered completed for all purposes relating to the above described station(s).

In addition, italicized language in the Consent – as well as the transmittal letter – reminded the parties that the “assignment shall not be considered complete until the underlying transaction closes and all conditions set forth in the grant documents and application are met.” Specifically, the assignment’s approval was “conditioned upon the execution of all Commission loan documents by the assignor, assignee and the Commission, unless the license being assigned has been paid in full,” and “upon the assignee’s execution of the applicable financing statements . . . and payment of all costs associated with the preparation of all costs associated with the preparation and recording of the financing statements, on or before the consummation date.” “Additionally, all installment payments must be current on the consummation date, and all past due are paid in full on or before the consummation date.”¹⁰

⁹ The Consent (together with the transmittal letter) is part of Attachment A to the Petition to Deny (J.A.) The October 12, 1999 letter that accompanied the Consent, attached as Addendum A to Paradise's Brief, is mistakenly referred to by Paradise as the “instrument of authorization,” when it was instead a cover letter.

¹⁰ Consent transmittal letter, p. 2 (J.A.).

Mr. Dave Roberts was appointed to the Board of Directors of Paradise's parent on February 19, 2000, and became a director of Paradise on February 22, 2000.¹¹ The parties then signed an Assignment and Assumption Agreement on August 18, 2000 agreeing that Inforum would assume the debt associated with the Sarasota BTA authorization, with Mr. Roberts signing for Paradise.¹²

Under 47 C.F.R. § 21.11, and as set forth in the Consent, the parties initially had until November 20, 1999 to consummate the transaction. However, the FCC subsequently granted several extensions.¹³ In part, these extensions were motivated by pending court proceedings,¹⁴ and in part, they were necessitated by administrative delay in the FCC's execution of the Assignment and Assumption Agreement.¹⁵

The Confirmed Plan provided that certain Inforum stock would be tendered in exchange for the licenses.¹⁶ A portion of the stock was delivered to the disbursing agent on the Plan's effective date, June 3, 1999; however, the Plan required that the balance of the stock be

¹¹ See Opposition, ¶¶ 15-17 (J.A.).

¹² See Assignment and Assumption of Installment Payment Plan Note and Security Agreement for Multipoint and or Multichannel Distribution Service (MDS) (hereafter "Assignment and Assumption Agreement"), Attachment H to the Petition to Deny (J.A.).

¹³ See Order at ¶ 6 n.23.

¹⁴ See, e.g., Opposition at ¶ 12.

¹⁵ The Assignment and Assumption Agreement was sent to the FCC on September 13, 2000, yet was not executed until November 7, 2000. The September 13 cover letter reminded the FCC that the deadline for consummation per the most recent extension was October 1, 2000, and stated that the FCC's signature was a prerequisite to consummation. See Addendum A.

¹⁶ The Plan provisions and facts relating to these transactions are described in the October 29, 2002 order in *Hill v. Inforum Communications, Inc.*, (*In re Cable Corp. of Am.*, Case No. 98-04207-B1), No. 8:02-CV-806-T-17-MAP (M.D. Fla.) ("Hill v. Inforum"). That opinion is attached hereto as Addendum B.

accompanied by a fully executed Assignment and Assumption Agreement; therefore, the FCC's delay in signing that Agreement also delayed the tender of the remaining stock.¹⁷ (Paradise claims that in the interim, "the value of Inforum's stock had dropped so precipitously that it was virtually worthless." Paradise Br. 4).

On October 27, 2000, Inforum's counsel wrote a letter to the Commission, advising that, "For all practical purposes, the transaction has been consummated, however.... [t]he Commission has yet to countersign the [Assignment and Assumption Agreement]." Counsel indicated further that, "Inforum is working diligently with the Commission staff involved in order to obtain the countersignature. Once the Commission has countersigned the document, the transaction will be consummated in all respects." The letter copied Paul Sinderbrand, Esq., Counsel for Paradise Cable, Inc., as well as Mr. Roberts, Paradise's director.¹⁸

On November 7, 2000, the FCC countersigned the Assignment and Assumption Agreement.¹⁹ Contemporaneously, the Bureau sent a letter to Inforum's counsel, extending the consummation deadline one final time to accommodate the date of its countersignature.²⁰ Paradise's counsel was again served with a copy of the November 7, 2000 letter, and failed to object to the Commission's action in waiving the deadline.²¹ The next day, November 8, 2000,

¹⁷ See Opposition at ¶¶ 38-39 (J.A.).

¹⁸ See October 27, 2000 letter from Howard Barr to the Secretary of the FCC, Exhibit M to Opposition. (J.A.).

¹⁹ See Assignment and Assumption Agreement, last signature page (J.A.). The November 7 date appears in the first paragraph of the document as the "effective date." (J.A.).

²⁰ See November 7, 2000 letter from Sharon Bertelsen to Howard J. Barr, waiving the time limit of 47 C.F.R. § 21.11(d) and extending the October 1, 2000 deadline for consummation, attached hereto as Addendum C.

²¹ See Order at ¶ 6 n.23.

Inforum's counsel sent a letter notifying the Commission that the assignment had been consummated.²²

On December 8, 2000, Mr. Hill, the former President of Paradise, had a telephone conversation with Mr. Stephen Svab, an FCC staff attorney, in which Mr. Hill learned that the assignment had been consummated. This conversation is reported by Mr. Hill in an August 20, 2001 letter to Mr. Svab (the "Hill letter").²³ The Hill letter was on Paradise stationery, although there is some question whether Mr. Hill was then authorized to act on behalf of Paradise.²⁴

In his letter, Mr. Hill said he wished to bring Mr. Svab's and the FCC's attention to "alleged Violations of FCC Regulations and Misrepresentations in the [assignment]." Mr. Hill complained that Mr. Roberts had signed the Assignment and Assumption Agreement on behalf of Paradise without authorization, whereas "[Paradise would not have signed the Assumption Agreement on August 18, 2000 without a Court Directed Order, as [Inforum] had delayed transfer [of stock] for eleven months with a significant devaluation in the expected consideration.]"²⁵ Mr. Hill continued, "You may recall how shocked I was in our phone

²² See November 8, 2000 letter from Howard J. Barr to the Secretary of the FCC, Attachment A to the Petition to Deny (J.A.). This letter was served on Mr. Roberts, then the sole director of Paradise.

²³ (J.A.).

²⁴ Mr. Hill apparently resigned as President of Paradise on September 17, 1999, see Exhibit A to Opposition (J.A.); Inforum has alleged that the Confirmation Order did not permit Mr. Hill to act on Paradise's behalf. See Opposition at ¶ 29 (J.A.). Both Mr. Hill and Mr. Hansen have made repeated attempts to undo the Plan in the bankruptcy courts, and it is not clear whether this appeal is brought on their behalf.

²⁵ Inforum's position was that this claim was misguided, in that the delay was attributable to Mr. Hill's and other former Paradise principals' litigation efforts; in any case, the question of Mr. Roberts' authority to sign was resolved against Mr. Hill and others in the court proceedings, as Paradise admits at p. 2, note 1 of its Brief.

conversation on December 8, 2000 when you told me the transfer was complete and how I objected that no one had asked me to sign the Assumption Agreement.”²⁶

The Hill letter went on to detail certain pending proceedings in the bankruptcy court, and concluded, “Until these issues are resolved or Judge Baynes directs, we will aggressively object to any action involving the transfer of the [licenses] from [Inforum] to a third party.”²⁷ Eleven days later, on August 31, 2001, the Petition to Deny was filed under Paradise’s name in the current docket.²⁸

C. The Hansen Adversary Proceeding.

Stepping back in time, on October 8, 1999, Mr. Hansen, the former Chief Operating Officer of Paradise and a major creditor, filed an adversary proceeding seeking to revoke the Plan Confirmation Order.²⁹ Hansen had initially objected to the Confirmed Plan, but had subsequently voted for it after it had been modified for his benefit.³⁰

The bankruptcy court analyzed Hansen’s allegations in detail in its December 23, 1999 order. It rejected each, finding some irrelevant and some meritless.³¹ The court commented that, in certain respects, “it is hard not to draw the conclusion that the present adversary proceeding is

²⁶ Hill letter at p. 1 (J.A.).

²⁷ Hill letter at p. 2 (J.A.).

²⁸ As Paradise notes, three of Inforum’s four licenses cancelled for failure to make installment payments due on July 31, 2001, *see* Paradise Br. 3, although Inforum is seeking reconsideration of the Commission’s decision not to waive its payment rules. Order, ¶ 9. The remaining license (WM1303) was not cancelled and remains the subject of the application to transfer to TDI.

²⁹ *See Hansen v. Skylynx Communications, Inc. (In re Cable Corp. of Am., No. 98-4207-8B1),* Adv. No. 99-591 (Bankr. M.D. Fla. Dec. 23, 1999), attached as Addendum B to Paradise Brief, at 3-4.

³⁰ *See id.* at 3.

³¹ *See id.* at 4-9.

nothing more than an attempt to modify the plan because of lost opportunities.”³² The court held that there had been “no showing of any intention on the part of [Inforum] to mislead or hide from the Court any material facts which would preclude this Court from confirming the plan.”³³ Accordingly, the bankruptcy court granted summary judgment in favor of Inforum. The district court affirmed.³⁴

The district court’s affirmance of the Plan Confirmation Order was subsequently appealed to the Eleventh Circuit. Inforum moved to dismiss the appeal as moot, arguing that the Confirmed Plan had already been substantially consummated. After analyzing the case under that Circuit’s test for determining substantial consummation, the court of appeals granted the motion. “On balance, we conclude that the implementation of the plan has passed the point at which judicial relief is ‘a viable option.’”³⁵ The Eleventh discussed the factors bearing on its decision, and concluded:

Many third parties have already relied on the plan in releasing claims in litigation, and whether or not Florida or Colorado procedural rules might permit the reopening of those cases and revocation of those releases, that reopening cannot be assured by an order of this court or any other federal court. There is no guarantee either that this or any other court can now reverse the transfer of the broadcast licenses to [Inforum]; nothing in the record before us suggests that Paradise is still a going concern and can reassume its former debts to the FCC, or that the FCC (which is not a party to this adversary proceeding) can be ordered to transfer the licenses back.... Weighing in the balance as well is Hansen’s failure to seek any kind of stay of the implementation of the plan. And because Hansen

³² See *id.* at 6.

³³ See *id.* at 11.

³⁴ See *Hansen v. Skylynx Communications, Inc. (In re Cable Corp. of Am., No. 98-4207-8B1)*, Adv. No. 99-591 (M.D. Fla. Feb. 9, 2001), attached at Addendum B to Paradise’s Brief.

³⁵ *Hansen v. Skylynx Communications, Inc. (In re Cable Corp. of Am.)*, No. 01-11329 (11th Cir. July 6, 2001) (attached as Addendum B to Paradise’s Brief), at 3, quoting *In re Club Assocs.*, 956 F.2d 1065, 1069 (11th Cir. 1992).

seeks only the vacatur of the present plan, not the implementation of an alternative plan, granting Hansen relief would jeopardize the reorganization that is already substantially complete. For these reasons, we conclude that the adversary proceeding is equitably moot and dismiss Hansen's appeal.³⁶

Other attempts were made to undermine the Confirmed Plan, but none were successful.³⁷

All of the various judicial proceedings in the 11th Circuit now appear to be final.

D. The Present Proceeding.

On August 31, 2001, several months after the 11th Circuit had issued its order, Paradise filed a Petition to Deny Inforum's application to assign the licenses to TDI. In its petition, Paradise argued that Inforum could not assign the licenses because it did not own them. Paradise based its argument on its claim that Inforum had failed to satisfy the conditions laid out in the Commission's consent to assignment.³⁸ Among other things, Paradise argued that Inforum was some \$17,000 in arrears at the time the assignment was consummated, and that Dave Roberts lacked authorization to execute the assignment on Paradise's behalf.³⁹

³⁶ *Id.*

³⁷ See, e.g., *Hill v. Inforum, supra*, Addendum B hereto (finding request to rescind Confirmed Plan controlled by result in Hansen adversary proceeding), *affirmed, Harry L. Brown, Jr. et al. v. Inforum Communications, Inc.*, (No. 98-04207-81B) (M.D. Fla. Dec. 12, 2003) (Order finding that issues had been resolved against appellants in prior litigation); *Official Committee of Unsecured Creditors v. SkyLynx Communications, Inc. (In re Cable Corp. of Am.)* (No. 98-04207-8B1), Order on Final Evidentiary Hearing, Adv. No. 00-112 (Bankr. M.D. Fla. Oct. 2, 2002), *appeal dismissed*, (11th Cir. June 3, 2004). Various other motions were filed, but all were resolved against the movants.

³⁸ Petition to Deny, at 8 (J.A. ____).

³⁹ *Id.* at 8-9 (J.A. ____).

The Bureau dismissed the petition on September 9, 2003, finding that it was “in fact an untimely attempt to seek reconsideration of the assignment of the subject licenses from Paradise to Inforum” and that Paradise lacked standing to oppose the proposed assignment to TDI.⁴⁰

Paradise thereupon filed an Application for Review to the Commission on October 6, 2003, reasserting the same arguments it had made to the Bureau. The Commission denied the application and agreed with the Bureau that the Petition was properly viewed as a request to reopen the original assignment. It observed that Paradise had notice “at the very least, on December 8, 2000 of the facts that formed the basis for its instant allegations....” and, therefore, found Paradise’s “untimely attempt to use a subsequent assignment application to litigate issues that were not timely brought before the Commission when Paradise first learned of what it deems ‘irregularities with the consummation’ of the prior assignment... to be fundamentally and fatally flawed.”⁴¹ The Commission also stated that contractual issues relating to the consummation of license assignments were within the court’s jurisdiction; and noted that it has, in the past, “[taken] whatever steps are necessary, if any, to accommodate the court’s ruling on matters within its jurisdiction.”⁴² The Commission noted that the courts in the Eleventh Circuit had repeatedly “rejected attempts to revoke or rescind the Confirmation Order. In so doing, the courts relied upon the finality of the consummation of the assignment of the subject licenses

⁴⁰ *In the Matter of Inforum Communications, Inc., Assignor and TDI Acquisition Corporation, Assignee*, 18 FCC Red 18,508, ¶ 13 (J.A. ____)

⁴¹ Order at ¶ 13 (J.A. ____).

⁴² Order at ¶ 12 (citations omitted) (J.A. ____).

from Paradise to Inforum. Consistent with our policies, we defer to the findings and conclusions reached by the courts.”⁴³ This appeal followed.

STANDARD OF REVIEW

This Court “review[s] an agency's dismissal of pleadings on procedural grounds under the familiar standards of the Administrative Procedure Act, setting aside such dismissals only if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ 5 U.S.C. § 706(a)(2).” *BDPCS v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003).

Because Paradise’s pleading was properly characterized as a request to reopen a closed proceeding, as explained *infra*, the Court should apply an even more exacting standard in this case. As explained in *AT&T v. FCC*, 363 F.3d 504, 509 (D.C. Cir. 2004), “courts will reverse an agency’s denial of reconsideration only ‘in the most extraordinary circumstances,’” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974), and only if the agency has engaged in the ‘clearest abuse of discretion.’ *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 278 (1987).” (other citations omitted).

SUMMARY OF ARGUMENT

Although Paradise’s pleading was styled as a petition to deny the proposed license assignments from Inforum to TDI, the FCC correctly construed the pleading as a request to reopen the earlier, long-completed proceeding in which the licenses had been assigned by Paradise to Inforum. Those earlier assignments had been granted by the FCC in 1999 and were

⁴³ Order at ¶ 12 (citations and footnotes omitted) (J.A.). The Commission, as had the Bureau, found it unnecessary to address whether any of Paradise’s arguments concerning the consummation of the assignment to Inforum would have warranted relief had Paradise come to the Commission seeking such relief in a timely manner. Order at ¶ 13. (J.A.).

consummated in 2000. The FCC was well within its discretion to rule that Paradise was too late to seek reopening of that proceeding.

Relying on technical objections to their consummation, Paradise belatedly seeks to undo license transfers to Inforum that were an integral part of Paradise's long-completed bankruptcy reorganization. As the Eleventh Circuit emphasized in ruling that challenges to the Paradise's reorganization plan had become equitably moot, many third parties have relied on the plan's provisions (including the license transfers) to release claims in litigation and otherwise order their business affairs. Were the Commission to restore the licenses to Paradise, the agency is hardly in a position to construct an alternative reorganization plan or otherwise mitigate the consequences to third parties of restoring the licenses to Paradise. Paradise's request would completely undermine reorganization proceedings that have been otherwise completed, and the Commission, acting consistently with the Eleventh Circuit, reasonably decided that such action is unwarranted.

Agencies have broad discretion to reopen closed proceedings, and reconsideration is reserved for extraordinary circumstances. In this case, Paradise made no effort to appeal the Commission's approval of the license transfers, or the agency's waiver of the deadline for consummation, at the time those decisions were made. Instead, Paradise returned to the Commission only after bankruptcy court challenges to the reorganization had been repeatedly rebuffed, and sought relief that would have vitiated the court-approved reorganization. The Commission properly denied its request.

ARGUMENT**THE COMMISSION PROPERLY AFFIRMED THE DISMISSAL
OF PARADISE'S PETITION TO DENY.**

The Commission reasonably affirmed the Bureau's dismissal of Paradise's petition to deny Inforum's application to transfer its MDS licenses to TDI. The basis for Paradise's petition was that Inforum had not properly consummated its acquisition of the licenses from Paradise in the bankruptcy proceedings. The Commission reasonably held, however, that it was too late for Paradise to raise such an argument. The licenses were assigned, in accordance with the Commission's consent, as part and parcel of Paradise's confirmed plan of reorganization. Numerous courts, including the Eleventh Circuit, had refused attempts to rescind the plan and the assignments. For the Commission to reopen the issue and overturn the assignments at Paradise's request would have undermined the plan and the court judgments upholding its implementation as well as the interests of numerous third parties who had relied on the transfers in dismissing litigation and ordering their affairs.

A. Paradise's Petition To Deny Was In Fact A Request To Reopen.

Preliminarily, the Commission was clearly correct in characterizing Paradise's petition to deny as "an untimely attempt to seek reconsideration of the finality of the assignment of the subject licenses from Paradise to Inforum." Order at ¶13. Paradise's basis for objecting to Inforum's application to transfer the licenses to TDI was that the prior assignment of the licenses from Paradise to Inforum was never properly consummated. Order at ¶ 12. Although raising

that issue in a petition to deny, Paradise was asking the FCC for a ruling invalidating the original assignments, and “restor[ing] the licenses” to it. Paradise Br. at 9.⁴⁴

Whether to reopen a proceeding for the purpose of reconsideration is a decision committed to the discretion of the agency. *See Radio Corp. of America v. United States*, 341 U.S. 412, 420-421 (1951); *LaRose v. FCC*, 494 F.2d 1145, 1149 (D.C. Cir. 1974). As this Court explained in *AT&T v. FCC*, 363 F.3d 504, 509 (D.C. Cir. 2004), even where the evidence presented is newly discovered, “courts will reverse an agency’s denial of reconsideration only ‘in the most extraordinary circumstances,’” *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 296 (1974), and only if the agency has engaged in the ‘clearest abuse of discretion.’ *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 278 (1987).” (other citations omitted).

The Commission rule which governs requests for reconsideration in proceedings of this type is 47 C.F.R. § 1.106. That rule “make[s] plain [that] only new facts … can serve as a basis for granting reconsideration....” *See AT&T v. FCC*, 363 F.3d at 509, *citing* 47 C.F.R. § 1.106(b)(2)(i) & (ii). The rule also generally requires that any requests for leave to file outside the normal pleading cycle state the grounds therefor. *See, e.g., BDPCS v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (affirming dismissal where petitioner had offered no excuse for failing to

⁴⁴ In several confusing passages, Paradise complains that the Commission chose to “bifurcate the proceeding” by separating the issue of Paradise’s “true licenseehip” from other questions in the proceeding. *Ibid.* But it was plainly reasonable for the Commission to consider whether Paradise had a valid claim to the licenses before addressing its petition to deny on the merits. As the Commission explained, without leave to reopen the original proceeding and challenge the original assignments from it to Inforum, Paradise had no interest in the present proceeding at all, and therefore did not have standing to participate. *See Order at ¶¶ 11-13.*

make its request in a timely manner). The *BDPCS* Court noted that in *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003), “we have gone so far as to discourage the Commission from entertaining late-filed pleadings ‘in the absence of extremely unusual circumstances.’” 353 F.3d at 1184.

B. Reconsidering The Initial License Transfers Would Have Undermined The Confirmed Plan And The Judgments Upholding That Plan On Appeal.

The license transfers from Paradise to Inforum were an integral part of Paradise’s plan of reorganization in bankruptcy. The plan was confirmed by the bankruptcy court in 1999 and the transfers were consented to by the Commission in 2000. Although no party appealed the plan’s confirmation or the Commission’s action consenting to the license transfers, a number of lawsuits were filed in federal court to have the plan rescinded or the confirmation order revoked. Each such attempt was rejected.⁴⁵ In July of 2001, the Eleventh Circuit concluded that the implementation of Paradise’s plan of reorganization had “passed the point at which judicial relief is ‘a viable option.’” and that challenges to the plan were therefore “equitably moot.” *Hansen v. Skylynx*, No. 01-11329 (11th Cir. July 6, 2001), at 3-4. In denying the application for review of the Bureau’s decision to dismiss Paradise’s petition to deny, the Commission emphasized that federal courts had repeatedly “rejected attempts to reject or rescind the Confirmation Order,” and that in so doing, “the courts relied upon the finality of the consummation of the assignment of the subject licenses from Paradise to Inforum.” Order at ¶ 12. For the Commission to have

⁴⁵ See, e.g., *Hansen v. Skylynx Communications, Inc. (In re Cable Corp. of Am. d/b/a Paradise Cable*, Adversary No. 99-591(Bankr. M.D. Fla. Dec. 23, 1999); *Hansen v. Skylynx Communications, Inc.*, No. 8:00-cv-209-T-23MAP (M.D. Fla. Feb. 9, 2001) ; *Hansen v. Skylynx Communications, Inc. (In re Cable Corp. of Am. d/b/a Paradise Cable)*, No. 01-11329 (11th Cir. July 6, 2001) (all attached at Paradise Br., Addendum B). See also *Hill v. Inforum Communications, Inc. (In re Cable Corp. of Am.)*, No. 8:02-CV-806-T-17-MAP (Oct. 29, 2002).

reopened the license transfers at Paradise’s belated request would have completely undermined the plan of reorganization and the judicial decisions rejecting challenges to the plan on equitable mootness grounds.

Paradise’s plan of reorganization involved a buyout of Paradise’s parent by Inforum pursuant to which Inforum was to purchase broadcast licenses and equipment owned by Paradise, and which required third parties to dismiss related litigation with prejudice. *Hansen v. Skylynx*, 11th Cir. No. 01-11329, at 3. As the Eleventh Circuit emphasized, “[m]any third parties” had “already relied on the plan in releasing claims in litigation,” and it had no power to assure that those actions could be unwound. *Ibid.* Nor, the court stated, could there be any guarantee that the transfer of the broadcast licenses to [Inforum]” could be reversed – not only because the FCC was not a party to the proceeding, but also because there was “nothing in the record to suggest that Paradise is a going concern and can reassume its former debts to the FCC.” *Ibid.*⁴⁶ Finally, the court noted, because “Hansen seeks only the vacatur of the present plan, not the implementation of an alternative plan, granting Hansen relief would jeopardize the reorganization that is already substantially complete.” *Id.* at 4.

Paradise’s request to have the Commission restore the licenses to it would have resulted in many of the adverse consequences to third party reliance interests that led the Eleventh Circuit to conclude that the bankruptcy challenges to the reorganization plan were equitably moot. The license transfers to Inforum were an integral step in Paradise’s reorganization, and pursuant to the confirmed plan, led to the dismissal of related litigation with prejudice. The Commission, no

⁴⁶ Paradise concedes that it was “dissolved in the course of bankruptcy proceedings below,” although it asserts it is now “being reinstated by its original shareholder group.” Paradise Br. i. Paradise thus appears to concede that it had no legal existence at the time it filed the Petition to Deny and pursued the Application for Review before the Commission.

less than the courts, would have had no power to reverse the actions of third parties taken in reliance on the license transfers, including the litigation releases. Likewise, Paradise does not seek (and the Commission would have no authority to approve) an alternate plan of reorganization. Thus, just as with the bankruptcy challenges to the plan of reorganization, Paradise's request to the Commission to unwind the license transfers "would jeopardize the reorganization that is already substantially complete." *Ibid.*

This Court has in the past required the FCC to seek to accommodate the decisions of a bankruptcy court as one factor in the public interest calculus under the Communications Act, *see LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974), and it has upheld FCC decisions in which that factor played an important part in the FCC's public interest licensing determination. *See Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995). These principles apply with even greater force here where the Commission action requested threatens to interfere with actions taken in reliance on long-completed bankruptcy proceedings.⁴⁷

C. Paradise's Objections To The Technicalities Of Consummation Did Not Compel The Commission To Reopen.

It would have been particularly inappropriate for the Commission to have reopened consideration of its approval of the license transfers in this case, given that Paradise's claims

⁴⁷ Indeed, it could be argued that the Commission was foreclosed by principles of res judicata from reconsidering its approval of the license transfers to Inforum in the face of the court judgments upholding the plan of confirmation, *see, e.g., Town of Deerfield v. FCC*, 992 F.2d 420, 427-30 (2d Cir. 1992); *see Dynaquest Corp. v. United States Postal Serv.*, 242 F.3d 1070, 1074-76 (D.C. Cir. 2001). Nonetheless, we note, such principles do permit collateral attack "when the first court's proceeding 'substantially infringes the authority of another tribunal or agency of government.'" *See Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 (D.C. Cir. 1988). There is no occasion for this Court to address this issue, however, given that the Commission's decision to defer to prior court proceedings in this case was entirely reasonable.

were based on technical contentions that the license transfers had not been properly consummated. As the Commission explained, it has been its policy “to accommodate court decrees adjudicating disputes over contract and property rights, unless a public interest determination compels a different result.” Order at ¶ 12.⁴⁸ The issue of “whether consummation of a Commission-approved sale occurred” is thus ordinarily “a contractual issue within the province of a local court, not the Commission.” *Ibid.*

In its petition to deny, Paradise challenged Inforum’s ownership of the licenses on the grounds that two conditions to the license transfer had not been met: (1) funds remained owing to the Commission at the time of the transfer, and (2) Dave Roberts had no authorization to file on Paradise’s behalf. Petition to Deny at 8 (J.A.). Paradise abandoned the latter objection in its application for review to the Commission on the ground that the bankruptcy court had “consider[ed] the issue in the course of its examination and decided that the execution by Inforum on Paradise’s behalf was effective.” See Paradise Br. 2 n.1. (Paradise contends (Br. 5) that “none” of the conditions to the Commission’s consent were “met as of October 1, 2000,” but as it acknowledges, the Media Bureau waived the October 1, 2000 deadline to accommodate the Commission’s execution of the consent on November 7.) Thus, as presented to the Commission, Paradise’s objections to Inforum’s right to hold the licenses rested upon its contention that the payment condition had not been satisfied at the time of consummation. Paradise does not contend that the past due amount was not ultimately paid; it argues that because it had not been paid at the time of consummation, Inforum never became the holder of the licenses. Paradise Br. 6.

⁴⁸ See *Dale J. Parsons, Jr.*, 10 FCC Rcd. 2718, 2721 ¶ 18 (1995) (quoting *Arecibo Radio Corp.*, 101 FCC 2d 545, 550 n.12 (1985).

There is no dispute that on October 17, 2000 the FCC generated a payment notice reflecting the quarterly payment that would come due by reason of the licenses on October 31, 2000 – a notice that was sent to Paradise, and was apparently not shared with Inforum. See Opposition, Exh. N. (J.A. __).⁴⁹ This notice indicated a “past due charge” in the – incorrect – amount of \$17,066.33. Following the FCC’s November 7, 2000 execution of the assumption and assignment agreement and the receipt of the November 8, 2000 notice of consummation, the FCC generated a corrected payment notice on November 15, 2000. (Addendum D). Inforum and the FCC subsequently came to an understanding as to the amount actually owed by Inforum, and the appropriate amount was paid and Inforum’s payment status was clarified.⁵⁰

The Commission’s execution of the Assignment and Assumption Agreement, and its subsequent acceptance of the notice of consummation – at a time when an additional amount had come due several days previously – could be viewed as an implicit waiver of the requirement that all payments be current on the date of consummation. Even were this not the case, had the issue been raised at the time, it could have been resolved easily by an explicit waiver of that requirement. There is certainly no reason to believe that this issue, had it been raised in timely fashion, would have caused the Commission to invalidate the assignment.

Paradise’s attempt to rely on a technical contention that consummation had been improperly effectuated because an amount was due and owing at the time the Commission countersigned the Assumption and Assignment Agreement plainly does not present the type of

⁴⁹ Installment payments to the Commission are due on a quarterly basis; if a payment is not made by the initial due date, the licensee may make that payment before the end of the second of two grace periods, with applicable late fees, to forestall cancellation. *See* 47 C.F.R. § 1.2110(f)(4).

⁵⁰ As earlier noted, three of the four licenses later cancelled on August 1, 2001 for Inforum’s failure to make the required installment payments. *See* Order ¶ 9.

public policy consideration that would compel the Commission to reopen a license transfer issue upon which a long-closed bankruptcy proceeding depended. In this instance, there is no basis for concluding that the Commission would have sought to rescind the assignment because of an unpaid amount that came due and owing several days prior to the consummation date – largely due to the Commission’s delay in executing the assignment documents. Any failure to pay under such circumstances would not, for example, have called the licensee’s financial qualifications into question, or otherwise triggered automatic cancellation of the license. The technical and relatively insubstantial nature of Paradise’s objections to consummation further supports the reasonableness of the Commission’s decision to refuse to reopen the matter.⁵¹

D. Paradise’s Claims Were Untimely.

Paradise’s knowing delay in raising issues before the Commission provide an independent and sufficient ground for affirming the Commission’s decision. Paradise, or former principals of Paradise directing this appeal, discovered at least as early as December 8, 2000 that the assignment had been consummated. Alleged “Violations of FCC Regulations” were identified,⁵² yet no attempt was made by Paradise to raise these issues with the Commission at that time. Nor was any filing made “[e]ven when the Bankruptcy Court began taking evidence” – in May 2001 – “to determine whether (and when) the assignment of the subject licenses from Paradise to Inforum became final.” Order ¶ 13 (citing *Official Comm. of Unsecured Creditors v Skylynx Communications, Inc. (In re Cable Corp. of Am.)* (No. 98-04207-8B1), Order on Final

⁵¹ In this regard, we note that the condition that payments be current prior to consummation of a license assignment does not have the same regulatory significance as the requirement codified at 47 C.F.R. § 1.2110(f)(4) that installment payments be made as provided in the Note and prior to the end of the second grace period. That latter requirement is at the very core of auction integrity and is strictly enforced. See, e.g., *21st Century*, 318 F.3d at 201.

⁵² Hill letter, p. 1 (J.A.).

Evidentiary Hearing, Adv. No. 00-112) (Bankr. M.D. Fla. Oct. 2, 2002)). Instead, it was only months later, on August 31, 2001, that Paradise raised its claims by filing its petition to deny. Particularly given the importance of the license transfers to the long-completed reorganization proceedings, Paradise’s delay in presenting its arguments to the Commission was inexcusable, as the Commission properly concluded. Order ¶ 13.

Paradise suggests that “no time limit” applies to a challenge to the consummation of a license assignment, Paradise Br. 18, and that the Commission has “*invariably entertained*” late-filed challenges to license ownership. *Id.* at 20 (emphasis in original). But none of the cited cases arose in circumstances even remotely resembling the facts presented here. Instead, they were cases in which the request was 1) warranted in the circumstances, 2) made as soon as the facts supporting the request were known, and/or 3) made in order to *conform* the Commission’s decision to results that had been reached in the courts, as opposed to in an attempt to *undermine* the courts’ decisions and disrupt a confirmed reorganization plan, as is the case here.⁵³

* * * * *

In sum, the Commission reasonably rejected Paradise’s belated attempt to have the Commission reconsider its approval of the license transfers to Inforum. Paradise’s claims that the technical conditions the Commission has imposed on the assignment of the licenses had not been met at the time of consummation were brought to the Commission’s attention months after it learned of a basis to challenge the consummation of the license transfers, and long after the

⁵³ Thus, as the Commission explained, in *Dawson*, 17 FCC Rcd. 472 (2002), the Commission was confronted with “unresolved” allegations of fraud; by contrast, the claims here would have to be entertained in the face of “three federal courts that considered and rejected the allegations of fraud and other irregularities with regard to the consummation of the assignment of the subject licenses.” Order, ¶ 14. See also *Dale J. Parsons*, 10 FCC Rcd. 2718 (1995); *Pacific Wireless Technology, Inc.*, 18 FCC Rcd. 7833 (2003); *Champion Communications Servs., Inc.*, 15 FCC Rcd. 12832 (2000).

plan of reorganization – of which the license transfers were an integral part – had been confirmed by the court, relied upon by third parties, and sustained against repeated collateral attack. For the Commission to have granted Paradise’s request to restore the licenses to it would have completely undermined Paradise’s long-implemented bankruptcy reorganization proceedings. The extraordinary circumstances needed to support reopening the Commission’s approval of the license transfers were plainly not present in this case.

CONCLUSION

For the foregoing reasons, the Court should affirm the Commission's denial of the application for review of the Bureau's dismissal of Paradise's petition to deny the transfer of the licenses from Inforum to TDI.

Respectfully submitted,

THOMAS O. BARNETT
ACTING ASSISTANT ATTORNEY GENERAL

SAMUEL L. FEDER
ACTING GENERAL COUNSEL

CATHERINE G. O'SULLIVAN
STEVEN MINTZ
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

STANLEY SCHEINER
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

September 1, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PARADISE CABLE, Inc.)
PETITIONER)
v.) No. 05-1040
FEDERAL COMMUNICATIONS COMMISSION AND UNITED)
STATES OF AMERICA)
RESPONDENTS)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Respondents” in the captioned case contains 7257 words.

STANLEY SCHEINER
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

September 1, 2005