

## Security Interests in FCC Broadcast Licenses

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We are often asked by lenders who lend money to companies that either own FCC licenses or are using the loan to buy an FCC license, what type of security interest they can take in the FCC license. The answer is none. The FCC license cannot legally be pledged to the lender as collateral. Without the FCC license, all of the station's other assets (including that 1992 Chevy van with "Hot 105.5" painted in four-foot high red letters on its flanks and 150,000 miles on the odometer) are not worth nearly as much as the FCC license. In most station acquisition transactions we work on, the tangible assets are worth only a tiny fraction of the total purchase price. There is, however, a way to get around this issue—by pledging the *proceeds* from a sale of the FCC license, instead of the license itself.

Under the Communications Act, any direct pledge of an FCC license, or to put it in other words, a grant of a security interest in the license, without the FCC's consent is considered to be an unauthorized transfer of control. As the United States Court of Appeals for the Ninth Circuit said in a 1998 bankruptcy case decision: "... the FCC may prohibit security interests in licenses themselves because the creation of such an interest could result in foreclosure and transfer of the license without FCC approval. Such approval is necessary to regulate the airwaves in the public interest."

While a lender cannot take a security interest directly in the FCC license it is legal for the lender to legally obtain and enforce a security interest in the proceeds of the sale of a station's FCC license. In the words of the Ninth Circuit court: "No such public interest is implicated, however, by a security interest in the proceeds of licenses, which does not grant the creditor any power or control over the license or the segment of the broadcast spectrum it represents." This means that lenders can get at the next best thing to the station's license—the money that results from a sale of such license.

When we review loan documents, we insert special wording to cover this situation into the Security Agreement, Pledge Agreement, Mortgage, or any other document that purports to create security interests in a station's assets. Typically the wording goes something like this:

The parties recognize that as of the date of this instrument, there is a dispute as to whether the Communications Act of 1934, as amended, and the rules and regulations of the FCC, permit a security interest to apply directly to a station's FCC construction permits, licenses, and authorizations, and the parties recognize that courts have held that security interests are permitted to extend to the proceeds of the sale, transfer, or other disposition of such FCC construction permits, licenses, and authorizations. The parties agree that if a security interest is not permitted to cover [borrower's] FCC construction permits, licenses, and authorizations that the security interest shall extend to the proceeds of the sale, transfer, or other disposition of such FCC construction permits, licenses, and authorizations.

If the law in this regard is subsequently changed, in whole or in part, then all of the right, title, and interest of [borrower] in and to any FCC construction permits, licenses, and authorizations, whether now held or hereafter acquired, shall automatically and immediately become subject to the Secured Party's security interest to the maximum extent permitted by law as then in force and effect.

In addition, since any good lawyer believes that if something is worth saying once it should be said (at least) twice, we usually add more wording like this:

Notwithstanding any other provisions of this instrument, any foreclosure, sale, transfer or other disposition of, or the exercise of any right to vote or consent with respect to, any of the collateral as provided herein or any other action taken or proposed to be taken hereunder which would affect the operational, voting or other control of any entity holding a construction permit, license, or other authorization issued by the FCC, shall be made in accordance with the Communications Act of 1934, as amended, the terms of such permit, license or authorization, and any applicable rules and regulations of the FCC, including, to the extent applicable under the rules and regulations of the FCC in effect at the time of an Event of Default, any requirement that there be a public or private sale. Notwithstanding anything to the contrary contained in this instrument, the Secured Party shall not, without first obtaining the consent or approval of the FCC, take any action pursuant to this instrument that would constitute or result in any change in ownership or control of the holder of a construction permit, license, or other authorization issued by the FCC if any such change in ownership or control would require, under then existing law, the prior consent or approval of the FCC.

With provisions like these added to the loan documents, a lender should feel confident enough to loan money to a broadcast station, with such loan being secured by the station's assets and the proceeds from the sale of the FCC license. If the borrower later defaults in its loan payments and the station's assets must be sold off to satisfy the debt, the lender can legally make a secured claim against the money realized from such sale.

We have advised on deals where lenders have required individual and corporate borrowers to place their tangible assets and their FCC licenses into separate companies. This allows the borrower to pledge to the lender the stock or membership interest of the licensee company. Upon default, this allows the lender to foreclose on the borrower's tangible assets without FCC approval. And then, the lender can, subject to prior FCC approval, foreclose on the stock and take control of the license.

Lenders then have two ways to secure their interest in addition to taking a security interest directly in the non-FCC license assets: A lender can legally take interest in the proceeds of the sale of the FCC license; and if the FCC license is held in a license sub, foreclose on the stock and take control of the license (subject to the prior approval of the FCC, of course).

We hope you have found this brief review of the FCC policies governing security interests in FCC licenses useful. Please contact Frank Montero at 703-812-0480 or [Montero@fhhlaw.com](mailto:Montero@fhhlaw.com) for further information.