

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)	File No. EB-07-IH-4089
)	
Rally Capital, LLC)	NAL Acct. No. 200732080038
)	
Apparent Liability for Forfeiture)	FRN No. 0015577208
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: September 20, 2007**Released: September 24, 2007**

By the Chief, Investigations and Hearings Division:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Rally Capital, LLC ("Rally") apparently willfully or repeatedly violated the Commission's rules by consummating unauthorized transfers of control. Specifically, we find that Rally apparently violated section 214 of the Communications Act of 1934, as amended (the "Act"), and sections 63.03 and 63.24 of the Commission's rules by transferring control of Telesphere Networks Ltd.'s ("Telesphere's") domestic and international section 214 authorizations to Rally without obtaining prior Commission approval.¹ Based on our review of the facts and circumstances surrounding this matter, we find that Rally is apparently liable for a forfeiture of \$16,000.

II. BACKGROUND

2. Section 214 of the Act requires telecommunications carriers to obtain a certificate of public convenience and necessity from the Commission before constructing, acquiring, operating or engaging in transmission over lines of communications, or before discontinuing, reducing or impairing service to a community.² In accordance with section 63.03 of the Commission's rules, any domestic carrier seeking to transfer control of lines or authorization to operate pursuant to section 214 of the Act must obtain prior approval from the Commission.³ Similarly, pursuant to section 63.24, a transfer of control of an international section 214 authorization requires application to and prior approval from the Commission.⁴ Section 63.24(e) requires that the proposed transferee apply to the Commission for

¹ 47 U.S.C. § 214; 47 C.F.R. §§ 63.03, 63.24.

² See 47 U.S.C. § 214(a).

³ See *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order 17 FCC Rcd 5517, 5521, ¶ 5 (2002) ("2002 Streamlining Order"); 47 C.F.R. §§ 63.03. See also *id.* § 63.03(d)(1) excluding all *pro forma* transactions, which do not result in a change in the carrier's ultimate ownership or control, from the domestic section 214 application and approval requirements; *id.* § 63.04(d)(2) (requiring that a post-transaction notice be filed with the Commission within 30 days of a *pro forma* transfer of a domestic section 214 authorization to a trustee, a debtor-in-possession, or any other party pursuant to any applicable chapter of the Bankruptcy Code).

⁴ 47 C.F.R. § 63.24(a).

approval prior to the consummation of the proposed transfer of control.⁵ The Commission employs a public interest standard under section 214(a) of the Act that involves the examination of the positive and negative public interest impact of a proposed transaction.⁶

3. For a transfer of control of a domestic or international section 214 authorization, the Commission defines control to include “actual working control in whatever manner exercised and is not limited to majority stock ownership.”⁷ “Control” also includes direct or indirect ownership or control, such as through intervening subsidiaries.⁸ The Commission further defines a transfer of control of an international section 214 authorization as a transaction in which the authorization continues to be held by the same entity, but there is a change in the entity or entities that control the authorization holder.⁹ A change from less than 50 percent ownership to 50 percent or more ownership shall always be considered a section 214 transfer of control.¹⁰

4. Applicants may file a joint application to the Commission for prior approval of a domestic and international section 214 transfers of control.¹¹ Commission action upon those joint applications may be effected either through separate actions or through consolidated action, as appropriate under the individual circumstances.¹²

5. Telesphere, a Washington-state corporation based in Arizona, is a telecommunications non-dominant carrier holding section 214 authority to provide domestic interstate telecommunications as well as global facilities-based and resale-based international telecommunications services.¹³ In particular, Telesphere is an IP Ethernet carrier that provides interstate IP-based voice, video and data

⁵ See generally 47 C.F.R. § 63.24(e); see also *id.* 47 C.F.R. § 63.24(d) (excluding *pro forma* applications, or non-substantive assignments and transfers of control that do not result in a change in the actual controlling party or do not require prior Commission approval). Section 63.24(g) of the Commission’s rules also establishes a narrow exception to this application requirement for specified involuntary transfers involving bankruptcy, foreclosure action, legal disability or death, for which only a post-transaction notification is required. In a case involving involuntary assignment or transfer of control to: a bankruptcy trustee appointed under involuntary bankruptcy; an independent receiver appointed by a court of competent jurisdiction in a foreclosure action; or, in the case of death or legal disability, to a person or entity legally qualified to succeed the deceased or disabled person under the laws of the place having jurisdiction over the estate involved; the transferee must provide post-transaction notice no later than 30 days after the event causing the involuntary assignment or transfer of control. See 47 C.F.R. § 63.24(g). But see *id.* 47 C.F.R. § 63.03 (categorizing these types of involuntary transactions as *pro forma* assignments or transfers of control for domestic section 214 applications).

⁶ See 47 U.S.C. § 214(a).

⁷ 47 C.F.R. § 63.03 n.1; 47 C.F.R. § 63.09(b).

⁸ *Id.*

⁹ 47 C.F.R. § 63.24(c).

¹⁰ See *id.*; 47 C.F.R. § 63.03 n.1.

¹¹ 47 C.F.R. § 63.04(b).

¹² 2002 *Streamlining Order*, 17 FCC Rcd at 5524, ¶ 13.

¹³ The Commission granted Telesphere, formally known as Clear Sky Broadband, Inc., section 214 authority to become a facilities based international common carrier on September 9, 2005. See Public Notice, “International Authorizations Granted, Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests,” 20 FCC Rcd 14650 (Int. Bur., rel. September 15, 2005) (“September 15, 2005 Public Notice”); FCC File No. ITC-214-20050824-00344. Telesphere relies on the blanket section 214 authorization for the provision of domestic interstate telecommunications services. Letter from Kent D. Bressie, Harris, Wiltshire & Grannis, LLP, Counsel for Rally Capital, LLC, to Ms. Elizabeth Mumaw, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, dated June 29, 2007 (“LOI Response”) at Inquiry 7.

services.¹⁴ Until February 2007, Telesphere also provided wholesale international IP services.¹⁵ Telesphere had no controlling shareholders prior to the transfer of control.¹⁶

6. Rally Capital, LLC ("Rally") is a Washington-state company that specializes in communications investments.¹⁷ Rally is the secured and only lender of Telesphere.¹⁸ On September 20, 2006, Rally completed an accelerated conversion of Telesphere debt to equity, acquiring a majority stock ownership of 64.9 percent in Telesphere and effectively obtaining control of Telesphere.¹⁹ Shortly thereafter on October 4, 2006, Rally acquired an additional 2.1 percent interest, increasing the company's stock ownership in Telesphere to 67 percent.²⁰

7. On October 12, 2006, Rally and Telesphere filed a joint domestic and international section 214 application to the Commission for approval of the transfers of control.²¹ The applicants stated that the acquisition of corporate control was necessary to improve immediately the financial position of Telesphere.²² Subsequently on October 24, 2006, the applicants requested special temporary authority ("STA") for Telesphere to continue operating under its domestic and international section 214 authorizations pending the Commission's action on the joint transfer of control application.²³ The Commission granted the international section 214 STA on October 25, 2006 and the domestic section 214 STA on October 27, 2006.²⁴ The Commission processed the applicants' domestic section 214 application for transfer of control under streamlined procedures²⁵ and granted the application on

¹⁴ See *Telesphere Networks Ltd., Transferor and Licensee and Rally Capital, Transferee, Application for Consent to Provide Global Facilities-Based and Global Resale International Telecommunications Services and to Transfer Control of Domestic Common Carrier Transmission Lines Pursuant to Section 214 of the Communications Act of 1934, as Amended, Consolidated Application-Streamlined Processing Required*, amended October 20, 2006 ("Section 214 Transfer of Control Joint Application"). See also *LOI Response* at Inquiry 6.

¹⁵ See *LOI Response* at Inquiry 5(b).

¹⁶ See *Section 214 Transfer of Control Joint Application* at 2; *LOI Response* at 5.

¹⁷ See *id.*

¹⁸ See *Section 214 Transfer of Control Joint Application* at 3; *LOI Response* at 5.

¹⁹ See *id.*

²⁰ See *id.* Rally has further increased its ownership interest in Telesphere. See *LOI Response* at 5.

²¹ See generally *Section 214 Transfer of Control Joint Application*.

²² See *Section 214 Transfer of Control Joint Application* at 3; *LOI Response* at 5.

²³ See *Telesphere Networks Ltd., Transferor and Licensee and Rally Capital, LLC, Transferee, Application for Consent to Transfer Control of a Telecommunications Carrier Authorized to provide Global Facilities-Based and Global Resale International Telecommunications Services and to Transfer Control of Domestic Common Carrier Transmission Lines, Pursuant to Section 214 of the Communications Act of 1934, as Amended Request for Special Temporary Authority* (filed October 24, 2006) ("*Joint Application for STA*").

²⁴ See *LOI Response* at Exhibit 9(a) (International Bureau granting applicants' international section 214 STA on October 25, 2007) and Exhibit 9(b) (Wireline Competition Bureau granting applicants' domestic section 214 STA on October 27, 2006).

²⁵ Public Notice, "Domestic Section 214 Application Filed for the Transfer of Control of Telesphere Networks Ltd. To Rally Capital, LLC, Streamlined Pleading Cycle Established, 21 FCC Rcd 12950 (Wir. Comp. Bur., rel. October 30, 2006). Under this standard, 47 C.F.R. § 63.03 prescribes six categories of transactions that would not raise public interest concerns and thus are presumptively accorded streamlined treatment, which allows qualifying domestic telecommunications carriers expedited review of their applications. See 47 C.F.R. § 63.03(b).

November 30, 2006.²⁶ The Commission also granted the applicants' application for transfer of control of Telesphere's international section 214 authorization to Rally on December 7, 2006.²⁷

8. On June 15, 2007, the Enforcement Bureau issued a letter of inquiry ("LOI") to Rally directing the company to provide information and documents regarding, among other things, the nature of the unauthorized transfer of control and the applicants' corporate affiliation.²⁸ Rally responded to the LOI on June 29, 2007.²⁹

9. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.³⁰ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.³¹ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act³² and the Commission has so interpreted the term in the section 503(b) context.³³ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.³⁴ "Repeated" means that the act was committed or omitted more than once, or lasts more than one day.³⁵ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.³⁶ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.³⁷ As we set forth below, we conclude under

²⁶ Public Notice, "Notice of Domestic Section 214 Authorizations granted," 21 FCC Rcd 14080 (Wir. Comp. Bur., rel. November 30, 2006) ("*November 30, 2006 Public Notice*").

²⁷ Public Notice, "International Authorizations Granted, Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests," 21 FCC Rcd 14186, 14190 (Int. Bur., rel. December 7, 2006) ("*December 7, 2006 Public Notice*"); FCC File No. ITC-T/C-20061012-00465.

²⁸ Letter from Trent B. Harkrader, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Dennis Weibling, Managing Director, Rally Capital, LLC, dated June 15, 2007 ("*LOI*").

²⁹ See *LOI Response*.

³⁰ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); see also 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464).

³¹ 47 U.S.C. § 312(f)(1).

³² H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

³³ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*").

³⁴ See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362, ¶ 10 (2001) ("*Callais Cablevision*") (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage).

³⁵ *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9.

³⁶ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

³⁷ See, e.g., *SBC Communications, Inc., Apparent Liability for Forfeiture*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

this standard that Rally is apparently liable for forfeiture for its apparent willful or repeated violations of sections 63.03 and 63.24 of the Commission's rules.³⁸

III. DISCUSSION

10. The fundamental issue in this case is whether Rally apparently willfully or repeatedly violated the Commission's rules by consummating its transfer of control of Telesphere's domestic and international section 214 authorizations without prior Commission approval. We answer this question affirmatively. Based on a preponderance of the evidence, we therefore conclude that Rally is apparently liable for a forfeiture of \$16,000 for apparently willfully or repeatedly violating section 63.03 and 63.24 of the Commission's rules.³⁹

A. Unauthorized Domestic Section 214 Transfer of Control

11. We conclude that Rally apparently willfully or repeatedly violated section 63.03 of the Commission's rules by failing to obtain Commission approval prior to transferring control of Telesphere's domestic section 214 authorization to Rally. The facts underlying this case are undisputed. Rally acquired a majority stock interest in Telesphere on September 20, 2006, resulting in a transfer of control without prior Commission approval. Rally did not seek approval for this transfer until October 12, 2006. Rally claimed that it needed to "improve immediately the financial position of Telesphere" and that such "exigent financial circumstances precluded [the company] from seeking timely transaction consent from the Commission."⁴⁰ Such circumstances do not qualify as the type of transactions that section 63.03 exempts from prior Commission approval.⁴¹ Rally also confirmed that it failed to seek or receive a domestic section 214 STA before consummating the transfer of control.⁴² We therefore find that the apparent domestic section 214 unauthorized transfer of control violation continued from September 20, 2006 until October 27, 2006, when the Commission granted Rally the domestic section 214 STA pending the Commission's action on the transfer of control joint application.

B. Unauthorized International Section 214 Transfer of Control

12. Similarly, we conclude that Rally apparently willfully or repeatedly violated section 63.24 of the Commission's rules by failing to obtain Commission approval prior to transferring control of Telesphere's international section 214 authorization to Rally. As mentioned above, Rally admits that it acquired majority ownership of Telesphere on September 20, 2006 without prior Commission approval. In addition, Rally confirmed that it did not seek or receive an international section 214 STA before consummating the transfer of control.⁴³ Rally does not claim its acquisition of control without approval was excused under section 63.24(g) because it was involuntary, nor would the facts support any such claim.⁴⁴ We find that Rally's apparent violation continued from September 20, 2006 until October 25, 2006, when the Commission granted Rally the international section 214 STA pending the Commission's action on the transfer of control joint application.

³⁸ 47 U.S.C. 47 C.F.R. §§ 63.03, 63.24.

³⁹ 47 C.F.R. §§ 63.03, 63.24.

⁴⁰ *LOI Response* at 5.

⁴¹ *See* 47 C.F.R. § 63.03(d)(2); *LOI Response* at 5.

⁴² *See Joint Application for STA*.

⁴³ *See id.*

⁴⁴ *LOI Response* at Inquiry 10.

C. Proposed Forfeiture

13. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$130,000 for each violation or each day of a continuing violation, up to a statutory maximum of \$1,325,000 for a single act or failure to act.⁴⁵ In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁴⁶

14. The Commission’s *Forfeiture Policy Statement* and implementing rules prescribe a base forfeiture of \$8,000 for unauthorized substantial transfers of control.⁴⁷ In consideration of the factors enumerated in section 503(b)(2)(D) for establishing the forfeiture amount, there is no other evidence before us to suggest that the base amount should be adjusted in any way. Accordingly, we find that the base forfeiture of \$8,000 against Rally is appropriate for the unauthorized transfer of control of Telesphere’s domestic section 214 authorization to Rally. Similarly, we find that a proposed base forfeiture in the amount of \$8,000 against Rally is warranted for the unauthorized transfer of control of Telesphere’s international section 214 authorization to Rally. Based on the facts and circumstances presented, we conclude that a proposed forfeiture of \$16,000 against Rally is warranted.

IV. ORDERING CLAUSES

15. IT IS Further ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80 of the Commission’s rules, 47 C.F.R. § 1.80, that Rally Capital, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$16,000 for willfully or repeatedly violating sections 63.03 and 63.24 of the Commission’s rules.

16. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission’s Rules,⁴⁸ within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Rally Capital, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

17. Payment by check or money order, payable to the order of the “Federal Communications Commission,” may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251. Payment by overnight mail may be sent to Mellon Client Service Center, 500 Ross Street, Room 670, Pittsburgh, PA 15262-0001, Attn: FCC Module Supervisor. Payment by wire transfer may be made to: ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229. The payment should note the NAL/Acct. No. referenced in the caption.

18. The response, if any, to this NOTICE OF APPARENT LIABILITY FOR FORFEITURE must be mailed to Hillary DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau,

⁴⁵ 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R. § 1.80(b)(2); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004).

⁴⁶ 47 U.S.C. § 503(b)(2)(D).

⁴⁷ See 47 C.F.R. § 1.80; *Forfeiture Policy Statement*, 12 FCC Rcd 17087, 17113 (1997). See also *One Call Internet, Inc. Section 214 Transfer of Control of Domestic Transmission Lines Requirements*, Order adopting Consent Decree, 18 FCC Rcd 25718 (2003) (setting the voluntary amount at \$8,000 for possible unauthorized domestic section 214 transfer of control).

⁴⁸ See 47 C.F.R. § 1.80.

Federal Communications Commission, 445 12th Street, S.W., Suite 4-C330, Washington, D.C. 20554 and must include the *NAL*/Acct. No. referenced above. E-mail address: hillary.denigro@fcc.gov.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (GAAP); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

20. Requests for payment of the full amount of this *Notice of Apparent Liability for Forfeiture* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, SW, Washington, DC 20554.⁴⁹

21. IT IS FURTHER ORDERED that a copy of this NOTICE OF APPARENT LIABILITY FOR FORFEITURE shall be sent by certified mail, return receipt requested, to Kent D. Bressie, Counsel for Rally Capital, LLC, Harris, Wiltshire and Grannis, LLP, 1200 Eighteenth Street, NW, Washington DC 20036.

FEDERAL COMMUNICATIONS COMMISSION

Hillary S. DeNigro
Chief, Investigations and Hearings Division

⁴⁹ 47 C.F.R. § 1.1914.