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Lessons From The NextWave Saga: The Federal Communications Commission, The Courts, And The Use of Market Forms To Perform Public Functions

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LESSONS FROM THE *NEXTWAVE* SAGA: THE FEDERAL COMMUNICATIONS COMMISSION, THE COURTS, AND THE USE OF MARKET FORMS TO PERFORM PUBLIC FUNCTIONS

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INTRODUCTION

Since the enactment of the Telecommunications Act of 1996,[1] the Federal Communications Commission (FCC or Commission) has been involved in some of the most challenging and compelling legal disputes involving a federal agency.[2] Recent efforts by the Commission to rework its rules for promoting competition in local telephone markets and to modify its media ownership rules have resulted in extremely controversial and closely watched cases.[3] Yet a strong argument can be made that the most significant case involving the Commission in recent history is *FCC v. NextWave Personal Communications Inc.*[4] The Supreme Court held in *NextWave* that § 525(a) of the Bankruptcy Code prevented the FCC from revoking wireless communications licenses held by NextWave[5] after the company had bid successfully for the licenses at an agency auction and agreed to make "full and timely payment of all monies due" to the agency, but then defaulted on its obligation to pay.[6]

A narrow view of *NextWave* is that the case did no more than address the application of a single provision of the Bankruptcy Code, § 525(a), to the unusual situation in which the Commission acted as both a regulator and creditor of a license holder. However, this view verges on myopia because *NextWave* implicated the fundamental question of the scope of the Commission's regulatory authority. Whether the Commission's local

1. Pub. L. No. 104-104, 110 Stat. 56 (1996).

2. *See, e.g.*, AT&T v. Iowa Util. Bd., 525 U.S. 366 (1999) (rejecting a "states' rights" challenge to the Telecommunications Act of 1996); Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2001) (upholding the Commission's TELRIC pricing methodology as a reasonable exercise of agency discretion under the Administrative Procedure Act (APA)); Reno v. ACLU, 521 U.S. 844 (1997) (invalidating provisions of the Communications Decency Act of 1996 under the First Amendment).

3. *See In re* Review of the § 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16,978 (2003) (revising rules governing the unbundling obligations of incumbent local exchange carriers (ILECs) under 47 U.S.C. 251(c)(3)), *aff'd in part, rev'd in part*, United States Telecom. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, Nat'l Ass'n of Regulatory Util. Comm'rs v. United States Telecom. Ass'n, 125 S. Ct. 313 (2004). *See also In re* 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to § 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620 (2003) (modifying media ownership rules) *aff'd in part, rev'd in part*, Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

4. 537 U.S. 293 (2003).

5. NextWave is shorthand for NextWave Personal Communications Inc. and NextWave Power Partners Inc., which are wholly owned subsidiaries of NextWave Telecom, Inc.

6. *See NextWave*, 537 U.S. at 296-97 (describing the security agreement between NextWave and the FCC and events leading up to the filing of NextWave's bankruptcy case).

competition rules or its media ownership regulations survive arbitrary and capricious review under the Administrative Procedure Act[7] (APA) involves only a familiar application of administrative law principles, admittedly in a complicated and controverted regulatory setting.

The Commission has historically enjoyed broad discretion to act in the public interest when making licensing decisions.[8] The Commission acted in a regulatory capacity in awarding the spectrum to NextWave based on the company's successful bids totaling more than $4 billion on wireless spectrum licenses and in establishing a series of regulatory conditions with which the company had to comply in order to receive the licenses.[9] The challenge to the Commission's authority resulted from its decision to act also as a creditor of NextWave. As allowed by FCC regulations, NextWave elected to pay for its licenses in installment payments.[10] The Commission became a creditor of the company, taking a security interest in the licenses and filing Uniform Commercial Code financing statements to perfect its claims.[11] When NextWave defaulted on its payments, the Commission cancelled the licenses in an effort to recover them. NextWave, in turn, sought to retain the licenses by filing for bankruptcy protection, leading to five years of litigation in no less than five different federal courts, including the Supreme Court.[12]

The central issue in the litigation was the scope of the Commission's regulatory authority.[13] Did the Commission have the authority to cancel (and thereby recover) NextWave's licenses after the company defaulted on its installment payment? Or, was the Commission's authority restricted by § 525(a) of the Bankruptcy Code, which would enable NextWave to retain the licenses while it reorganized in bankruptcy? The Second Circuit held that the Commission was acting as a regulator, and that the Commission's licensing authority could not be limited by a bankruptcy court.[14] That court viewed NextWave's default as a breach of its obligation to act in the public

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7. *See* 5 U.S.C. § 706(2)(A) (2000) ("[R]eviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.").

8. *See* discussion *infra* Part I.

9. *See* FCC v. NextWave Pers. Communications, Inc. (*In re* NextWave Pers. Communications, Inc.), 200 F.3d 43, 51-53 (2d Cir. 1999) *aff'd* 537 U.S. 293 (2003) (noting that "Congress came to the conclusion that using market forces to allocate spectrum could accomplish congressionally defined policy goals" and discussing "regulatory purpose" of "payment in full requirement").

10. *See NextWave*, 537 U.S. at 296-97 (relating, in relevant part, the general agreement authenticated by the Note and Security Agreements between NextWave and the FCC).

11. *See id.* (detailing the FCC's position as a NextWave's secured creditor).

12. *See* discussion *infra* Part II.

13. *See NextWave*, 537 U.S. at 301.

14. *See NextWave*, 200 F.3d at 62 (holding that the Bankruptcy Court had "no power to interfere with the FCC's system for allocating spectrum licenses").

interest, thereby depriving the company of the right to retain the licenses.[15] Subsequently, the D.C. Circuit and the Supreme Court held that the Commission's regulatory authority was circumscribed by § 525 of the Bankruptcy Code and that the Commission could not revoke the licenses for failure to make a timely payment.[16] Thus, the Commission's authority to regulate licenses issued in the public interest was subordinate to the protections under the Bankruptcy Code available to debtors that hold licenses.

This Article discusses the extensive litigation over the licenses issued to NextWave as the high bidder at spectrum auctions conducted in 1996, in which the Supreme Court ultimately held that the FCC—despite its special governmental role of allocating spectrum licenses—should be treated in the same way as any other creditor in bankruptcy, given the way it structured its dealings with NextWave. Part I situates *NextWave* in historical context. It describes the establishment and operation of the FCC in what we refer to as the "public interest regime," in which the Commission enjoyed broad discretion in making decisions, including licensing decisions, as a regulator. Part I also discusses the emergence of a hybrid "private-public" approach to communications regulation, in which Congress has directed the Commission to employ market forms—requiring the use of auctions to allocate spectrum and directing the Commission to consider installment payment programs—to perform regulatory functions. Congress adopted the auction approach in 1993, during a period when government agencies increasingly embraced privatization as a means of performing public functions.

Part II provides a history of the *NextWave* litigation, from the bids at the 1996 spectrum auctions to the announcement in 2004 of an agreement between the Commission and NextWave resolving the ongoing dispute. Part III situates *NextWave* in the context of other cases, notably *United States v. Winstar Corporation*,[17] in which courts have addressed whether the federal government should be treated as a private party based on the form under which the government performed its functions. Part III also discusses the lessons learned by the Commission from the *NextWave* litigation. The tension between form and function in litigation over the "private-public approach" to regulation may be inevitable when a regulatory agency acts in a dual capacity, and the critical question in litigation over the agency's conduct is whether its actions are viewed as

15. *See id.* at 52 (holding that the "'payment in full' requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions").

16. *See* NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 149-56 (D.C. Cir. 2001) (reasoning that, because the FCC chose to pursue a debtor-creditor relationship with NextWave, it therefore is bound by the Bankruptcy Code), *aff'd*, 537 U.S. 293, 308 (2003).

17. 518 U.S. 839 (1996).

"regulatory." The use of private or market forms to perform public functions should not necessarily subject the agency to more rigorous scrutiny when the agency's actions are challenged in court. Nevertheless, the Supreme Court's decision in *NextWave* suggests that the Court accords the agency less deference when it employs a private or market form to perform a public function.

We conclude with a description of the resolution of the *NextWave* litigation. The Commission and NextWave agreed to a settlement, in which NextWave retained some of its licenses and returned the rest to the FCC, and the Commission received payments for licenses that NextWave either retained or sold. Our last lesson is a suggestion that, at a minimum, agency counsel should embrace the private role assigned to it in the event that the agency does not succeed in establishing in the litigation that its actions were public or regulatory.

I. FROM THE PUBLIC INTEREST REGIME OF THE COMMUNICATIONS ACT OF 1934 TO THE PRIVATE-PUBLIC APPROACH OF MORE RECENT FEDERAL STATUTES

A. The Public Interest Regime

We begin with a brief description of the establishment of the FCC and the legal regime in which it first operated. The defining features of the public interest regime are that Congress gave the Commission broad discretion to act in the public interest, and courts generally accorded the Commission substantial deference when evaluating the agency's actions.

The predecessor to the FCC, the Federal Radio Commission (FRC), was created by Congress in 1927 "to ration the electromagnetic spectrum and to regulate radio broadcasters."[18] At the time the FRC was created, "AM radio stations were spreading around the country and just beginning to link up into networks."[19] Consequently, "[t]he firms broadcast through the airwaves and so tended to interfere with each other if not legally constrained from doing so."[20] Congress decided to establish an

18. THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 20 (2d ed. 1998). The electromagnetic spectrum has been described as "an 'input' into the 'product' of communicating data electronically via the ether." *Id.* at 39. Krattenmaker also provides a technical definition of spectrum as "the entire available range of sinusoidal frequencies." *See id.* at 40 (quoting DON L. CANNON & GERALD LUECKE, UNDERSTANDING COMMUNICATIONS SYSTEMS 87 (2d ed. 1984)). *See also* Nicholas W. Allard, *The New Spectrum Auction Law*, 18 SETON HALL LEGIS. J. 13, 20 (1993) ("The radio spectrum is composed of naturally occurring electromagnetic radiating energy . . . [and] is an array of electric and magnetic rays arranged in order of their frequency measured in wavelength or cycles.").

19. KRATTENMAKER, *supra* note 18, at 22.

20. *Id; see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969) ("Before 1927,

independent agency to regulate the spectrum and radio broadcasters because it believed "that an independent federal agency could develop relevant expertise," and "that using an independent agency was the only way to sufficiently insulate spectrum decisions from the political process."[21]

Subsequently, Congress enacted the Communications Act of 1934[22] (the 1934 Act), which, among other things, created the FCC.[23] The 1934 Act combined two bureaucracies: the FRC and the parts of the Interstate Commerce Commission that were responsible for regulating telephone and telegraph companies.[24] The general governing standard in the 1934 Act directs the Commission to act "in the public interest."[25]

Title III of the 1934 Act addressed the licensing of commercial radio broadcasters—that is, "deciding who should be licensed to broadcast on what frequencies in which communities."[26] Under the 1934 Act, no one in the United States may broadcast over the airwaves without a license from the federal government.[27] Initially the FCC allocated spectrum licenses through comparative hearings, in which the agency evaluated each applicant's submission and made a determination as to which applicant would best serve the public interest.[28]

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the allocation of frequencies was left entirely to the private sector, and the result was chaos.").

21. *See* STUART M. BENJAMIN ET AL., TELECOMMUNICATIONS LAW AND POLICY 58 (2001) (elaborating further that "[d]uring the time when the FRC and later the FCC were created, there was a widespread belief that politically insulated expert administrators would do a better job of managing complex regulatory undertakings than their masters in Congress and the White House").

22. Communications Act, 47 U.S.C. § 151 (1934).

23. BENJAMIN, *supra* note 21, at 57.

24. KRATTENMAKER, *supra* note 18, at 20.

25. *See* 47 U.S.C. § 309(a) (2000) (directing the Commission when evaluating license applications to act "in the public interest, convenience, and necessity"). *See also* 47 U.S.C. § 307(b) (2000) (addressing the allocation of facilities and the term of licenses as well as charging the Commission with evaluating whether an application for a station license will serve "public convenience, interest, or necessity").

26. KRATTENMAKER, *supra* note 18, at 22. *See* 47 U.S.C. § 307(a) (2000) (authorizing the Commission to grant a license if doing so would serve "public convenience, interest, or necessity").

27. *See* 47 U.S.C. § 301 (2000) (allowing only persons with licenses to use or operate devices transmitting radio signals). *See also* Grid Radio v. FCC, 278 F.3d 1314, 1316 (2002) (stating that "Section 301 of the Communications Act of 1934 makes it unlawful to operate a radio station without a license from the Federal Communications Commission."), *cert. denied*, 537 U.S. 815 (2002).

28. *See* BENJAMIN, *supra* note 21, at 85-90 (discussing the history of comparative hearings and the criteria used to evaluate applicants). Courts generally deferred to the licensing decisions made by the Commission in the public interest. *See, e.g.*, Pottsville Broad. Co. v. FCC, 309 U.S. 134, 138 (1940) (noting that the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission"); FCC v. WOKO, Inc., 329 U.S. 223, 229 (1946) (holding that the FCC, and not federal courts, had the right to determine if a license renewal was in the public interest); Rochester Tel. Corp. v. United States, 307 U.S. 125, 145 (1939) (deferring to the FCC's determination that one company is

The comparative hearing process used by the Commission after adoption of the 1934 Act was ultimately criticized for the costs and delays associated with its administration.[29] In 1981, Congress authorized the FCC to award initial spectrum licenses to qualified applicants through the use of a lottery.[30] However, this method of license allocation also was criticized on the grounds that it encouraged speculation for spectrum licenses.[31]

B. The Hybrid Private-Public Approach to Communications Regulation of More Recent Federal Statutes

In 1993, Congress authorized the FCC to award initial spectrum licenses for certain commercial services through "a system of competitive bidding" that is, an auction.[32] The auction method was intended to realize several objectives: (1) "the development and rapid deployment of new technologies, products and services," (2) "the 'recovery for the public of a portion of the value of the public spectrum resource made available for commercial use,'" and (3) "the efficient and intensive use of the electromagnetic spectrum."[33] The reasoning behind the use of the auction method is that it would quickly award licenses to the parties "who value them most highly and who are therefore most likely to introduce service rapidly to the public."[34] In 1997, Congress mandated the use of auctions

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under the "control" of another); Yankee Network, Inc. v. FCC, 107 F.2d 212, 219 (D.C. Cir. 1939) (affirming the FCC decision granting an application to an existing license-holder to operate on a different frequency with increased power and dismissing protests filed by other license-holders).

29. *See* Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705, 1735 (1999) (noting that comparative hearings "were costly, both in terms of resources and time," and that the "open-ended nature of the [decisionmaking] criteria arguably led to the imposition of personal preferences by the Commissioners").

30. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736-37 (1981) (authorizing allocation of licenses through random selection), *amended by* Communications Amendment Act of 1982, Pub. L. No. 97-259 § 115, 96 Stat. 1087, 1094-95 (1982) (codified as amended at 47 U.S.C. § 309(i) (2000)).

31. *See* Krent, *supra* note 29, at 1735-36 (explaining that "lotteries drew fire for precipitating a secondary auction" in which lottery winners could sell "their right to broadcast in the open market, reaping windfalls at the expense of the public"); *see also* Allard, *supra* note 18, at 26 (describing "application mills" that "aggressively advertise[d] the availability of licenses and overstate[d] the chances as well as the value of winning the lottery"); *NextWave*, 200 F.3d 43, 51 (2d Cir. 1999) (noting the "huge administrative burden" comparative hearings system placed on the FCC as well as the fact that the "use of lotteries lessened the administrative burden, but encouraged speculation and, ultimately, failed to allocate licenses to those most likely to use them most efficiently or beneficially").

32. *See* 47 U.S.C. § 309(j)(1) (2000) (authorizing the use of competitive bidding).

33. *See NextWave*, 254 F.3d 130, 133 (D.C. Cir. 2001) (quoting 47 U.S.C. § 309(j)(3) (2000)); *see also* Allard, *supra* note 18, at 17 (noting that the Omnibus Budget Reconciliation Act of 1993 authorizing spectrum auctions "has several ambitious goals including: encouraging swift and efficient development of emerging communications technologies, such as PCS; encouraging economic opportunities for small businesses and other designated groups; and raising revenue for deficit reduction").

34. *See NextWave*, 254 F.3d at 134 (quoting *In re* Implementation of § 309(j) of the

for most future licensing proceedings.[35]

We view the 1993 statute establishing spectrum auctions as part of the hybrid private-public approach to regulation because it employs a private or market form—an auction—to perform the Commission's function of awarding licenses.[36] In addition, the 1993 statute[37] also directed the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments"[38] to "avoi[d] excessive concentration of licenses"[39] by "disseminating licenses among a wide variety of applications, including small businesses [and] rural telephone companies."[40] The 1993 auction law authorized the Commission to employ private or market forms in awarding spectrum licenses.[41]

Congressionally-mandated use of market forms to allocate spectrum licenses began at a time when government agencies increasingly embraced privatization as a means of performing public functions. The literature on privatization is extensive.[42] We are unable to offer a comprehensive account of the rise of privatization and its reception in the courts. Nevertheless, it is useful to note a number of general points. First, privatization refers to a number of different arrangements between a government agency and a private entity.[43] The most common arrangement is when a government agency contracts with a private party to perform a

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Communications Act, 9 F.C.C.R. 5,532, ¶ 5, at 5,535 (1994)); *see also* Krent, *supra* note 29, at 1736 ("The goals of providing best service to the public and allocating the license to those entities valuing them most should overlap, if not converge.").

35. *See* Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258 (1997) (mandating the use of competitive bidding in all but a few explicitly exempt circumstances).

36. The Telecommunications Act of 1996 is an example of the new private-public approach to regulation because of its principal goal of improving the provision of telecommunications service through deregulation and competition. The 1996 Act "radically revised prior law by both eliminating state-imposed barriers to competition and forcing existing local exchange carriers to cooperate with potential competitive entrants. The goal of all these provisions is the same: to facilitate, to the extent possible given the economics of the industry, competition in the local loop." BENJAMIN, *supra* note 21, at 717; *see also* Verizon Communications, Inc. v. FCC, 535 U.S. 467, 488 (2002) (describing the goal of the 1996 Act as intent to "uproot[] . . . monopolies" and "jump-start" competition by providing competitive carriers incentives to enter local retail telephone markets).

37. 47 U.S.C. § 309 (2000).

38. *Id.* § 309(j)(4)(A).

39. *Id.* § 309(j)(3)(B).

40. *See NextWave*, 537 U.S. at 296 (quoting 47 U.S.C. § 309(j)(1), 309(j)(3)(B), 309(j)(4)(A) (2000)).

41. *See* 47 U.S.C. § 309(j)(4)(A) (directing the Commission to consider alternative methods of payments for licenses).

42. *See, e.g.*, Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003); Panel Discussion, *The Changing Shape of Government*, 28 FORDHAM URB. L.J. 1319 (2001).

43. *See* Metzger, *supra* note 42, at 1370 (noting that "privatization can take a variety of forms," and that "in some instances privatization represents government withdrawal from a field of activity or from responsibility for providing services").

task or provide a service previously performed by that agency.[44] The case for such an arrangement is that a private party can perform the task more efficiently; critics respond that any increase in efficiency comes at the cost of reduced oversight and accountability.[45] The paradigmatic example is when the government contracts with a private company for the operation of a prison.[46] In this article, we discuss a more limited form of privatization—when the government employs market or private forms (in this case, an auction) but continues itself to perform the public function (the award of licenses).

Second, the rise of privatization has many causes. At the risk of oversimplifying a complicated set of developments, we attribute the rise of privatization, in part, to the enduring legacy of Ronald Reagan's presidency.[47] Intellectually, it coincides with the emergence of public choice theory, which challenged the fundamental premise of the public interest regime—that the personnel of administrative agencies were capable of setting aside their private interests, however defined, in attempting to act in the public interest.[48] And in the regulatory realm, the federal government took its first steps towards deregulation—in which traditional government command and control regulation is eschewed, and competition in private markets is embraced—during the presidency of Jimmy Carter, with the Airline Deregulation Act of 1978.[49] This Act introduced competition into the airline industry and, several years later, terminated the Civil Aeronautics Board, the agency responsible for overseeing the airline industry.[50]

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44. *See id.* (noting that "the more common model of privatization [is] government use of private entities to implement government programs or to provide services to others on the government's behalf").

45. *See* Jody Freeman, *Extending Public Law Norms Through Privatization,* 116 HARV. L. REV. 1285, 1291-314 (2003) (discussing the arguments for and against privatization); *see also* Metzger, *supra* note 42, at 1454 (discussing the trade-off between accountability and efficiency).

46. *See, e.g.*, Alexander Volokh, Note, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. Rev. 1868 (2002) (discussing the rise of private prisons in the United States).

47. *See* Burton Yale Pines, *The Ten Legacies of Ronald Reagan*, POL'Y REV. (1989) (declaring that Ronald Reagan "began the privatization of federal services and programs"), *available at* http://www.policyreview.org/spring89/pines.html (last visited July 8, 2005); *see also* Freeman, *supra* note 45, at 1293 (explaining that Ronald Reagan stressed deregulation during his term).

48. *See generally* JAMES D. GWARTNEY & RICHARD L. STROUP, ECONOMICS: PRIVATE AND PUBLIC CHOICE (6th ed. 1992). A seminal work in public choice theory is JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

49. Pub. L. No. 95-504, 92 Stat. 1705 (1978).

50. *See* Alfred E. Kahn, *Surprises of Airline Deregulation*, 78 AM. ECON. REV. PAPERS & PROC. 316 (1988) (discussing the process of airline deregulation and its consequences).

Third, although the embrace of privatization may have reduced the government's role in performing regulatory tasks, it has not necessarily reduced federal government activity. To the contrary, the increasing reliance on private parties and use of market forms has contributed to the increase in government expenditures as the federal government transacts government "business" with private parties.[51]

Cumulatively, these developments have created a political and legal environment in which privatization generally has been embraced, and in which the distinction between "regulatory" and "private" in the characterization of government action has been blurred. What would a court do when a private party challenged governmental action that had a regulatory purpose but was discharged in the form of a private transaction with that party? To what extent would the government's actions receive deference (since they were "regulatory")? And to what extent could the private party assert that its private property rights—as documented in its transaction with the agency—should be protected against subsequent actions by the agency? All of these questions were implicated in the *NextWave* litigation.

II. THE *NEXTWAVE* LITIGATION

A. The C and F Block Auctions

1. The Commission's Auction Program

Before discussing the litigation, we set the stage by describing the Commission's auction program. With respect to the design of the competitive bidding system, Congress directed the Commission to, among other things, "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by . . . disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies."[52] To promote this goal, Congress instructed the FCC "to consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments . . . or other schedules or methods."[53]

51. *See* Metzger, *supra* note 42, at 1377 ("[H]istory demonstrates that increased privatization often goes hand in hand with expansion rather than contraction in public responsibilities.").

52. *See* NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 133 (D.C. Cir. 2001) (quoting 47 U.S.C. § 309(j)(3)(B)).

53. *Id.* (quoting 47 U.S.C. § 309(j)(4)(A)).

In implementing § 309(j), the Commission promulgated "rules to auction licenses for 'broadband PCS.'"[54] It decided to use simultaneous, multiple-round auctions.[55] The FCC complied with the statute's direction to consider installment payments and other methods to allow small businesses and "designated entities" to participate in the broadband PCS industry.[56] It divided the spectrum set aside for broadband PCS into six blocks: "three of 30 MHz each (A, B, and C) and three of 10 MHz each (D, E, and F)."[57] The FCC limited participation in the "C" and "F" Block auctions to small businesses and other designated entities and allowed small businesses that obtained licenses at auction to pay in installments over the ten-year term of the license.[58]

In order to ensure that a potential bidder was certain of its financial capability before it participated in an auction, the FCC adopted rules requiring prompt and complete payment. Significantly, for a bidder that decided to pay in installments, the rules provided that any "license granted . . . shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan."[59] Failure to make a timely payment would result in automatic cancellation of the license.[60]

2. NextWave's Participation in the C and F Block Auctions

The NextWave companies were founded in 1995 "for the purpose of bidding on PCS licenses and operating a personal communications service."[61] Although the details of the events culminating in NextWave's decision to file for Chapter 11 bankruptcy protection are somewhat intricate, the basic facts are straightforward.

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54. *Id.* Broadband PCS refers to "'personal communications services [for example, cordless phones] in the 2 GHz band.'" *See id.* (quoting *In re* Implementation of § 309(j) of the Communications Act, 9 F.C.C.R. 5,532, ¶¶ 1, 3, at 5,534 (1994)).

55. *See In re* Implementation of § 309(j) of the Communications Act, 9 F.C.C.R. 2,348, ¶ 68, at 2,360 (1994) (expounding the belief that multiple round auctions best meet the goals of Congress); *see also* High Plains Wireless, LP v. FCC, 276 F.3d 599, 603 (D.C. Cir. 2002) (explaining "open, simultaneous, and ascending" auctions of DEF blocks for broadband PCS spectrum).

56. *See In re* Implementation of § 309(j) of the Communications Act, 9 F.C.C.R. 2,348, ¶ 229, at 2,388-89 (1994) (deferring the decision on whether and how to use these preferences until the development of specific competitive bidding rules in subsequent reports and orders is completed).

57. *See High Plains Wireless*, 276 F.3d at 602-03.

58. *See* 47 C.F.R. § 24.709(a)(1) (2003). *See also* 9 F.C.C.R. 2,348, ¶¶ 231-40, at 2,389-91 (1994) (discussing the reasons and qualifications for installment payments); *NextWave*, 254 F.3d at 134 (describing the agency's views that installment payments would alleviate small business entities' lack of access to capital and equating installment payments with a government extension of credit to licensees).

59. 47 C.F.R. § 1.2110(g)(4) (2003).

60. *See id.* § 1.2110(g)(4)(iv) (2003).

61. *NextWave*, 254 F.3d at 134.

In 1996, NextWave participated in auctions for C-Block and F-Block licenses, and "was awarded 63 C-Block licenses on winning bids totaling approximately $4.74 billion, and 27 F-Block licenses on winning bids of approximately $123 million."[62] Pursuant to the Commission's regulations, NextWave "made a down payment on the purchase price, signed promissory notes for the balance, and executed security agreements that the FCC perfected by filing under the Uniform Commercial Code."[63] NextWave received the licenses, which provided that "authorization is conditioned upon the full and timely payment of all monies due" and that "[f]ailure to comply with this condition will result in the automatic cancellation of this authorization."[64]

After the Commission awarded the C-Block licenses, several winning bidders, including NextWave, encountered difficulties in obtaining financing and sought relief from the FCC.[65] "In response, the Commission suspended installment payment obligations for C-Block licensees, and then issued two *Restructuring Orders*, offering a variety of revised financing options that allowed C-Block licensees to surrender some or all of their licenses for full or partial forgiveness of their outstanding debt."[66] The critical point with respect to the various restructuring orders is that they required full payment of the amount bid.[67]

The FCC set a deadline of June 8, 1998 for a licensee to elect a restructuring option and October 29, 1998 as the last date to make an installment payment.[68] NextWave sought a stay of the deadline from the Commission and the D.C. Circuit Court of Appeals.[69] When these efforts

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62. FCC v. NextWave Pers. Communications Inc., 537 U.S. 293, 296 (2003).

63. *Id.* at 296-97; *see NextWave*, 254 F.3d at 134 (quoting the first paragraph of the Security Agreement between NextWave and the FCC for the proposition that the "security agreements gave the Commission 'a first lien on and continuing security interests in all of the Debtor's rights and interest in [each] License'").

64. *Id.* (quoting FCC, Radio Station Authorization for Broadband PCS 2 (issued to NextWave Jan. 3, 1997)). Similar language appeared in the Installment Plan Note and associated security agreements executed by NextWave. *Id.*

65. *See NextWave*, 537 U.S. at 297.

66. *NextWave*, 254 F.3d at 134-35. *See NextWave*, 200 F.3d at 47-48 (setting out the details of the *Restructuring Orders*).

67. *See In re* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, 12 F.C.C.R. 16436, ¶ 19, at 16447 (1997). The Court stated:

> The FCC decided that it would be contrary to the public interest to forgive a portion of the obligations, thereby allowing bidders to keep their licenses at a significantly reduced price, because the C-block auction had been designed to ensure that licenses were allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses.

NextWave, 200 F.3d at 48. *See generally* U.S. Airwaves, Inc. v. FCC, 232 F.3d 227, 230-31 (D.C. Cir. 2000) (discussing restructuring orders).

68. 13 F.C.C.R. 7413-14 (1998).

69. *See* NextWave Telecom, Inc. v. FCC, No. 98-1255, 1998 WL 389116 (D.C. Cir.

failed, NextWave filed for reorganization under Chapter 11 of the Bankruptcy Code on June 8, 1998, and on the same day, it initiated an adversary proceeding against the FCC in which it claimed that its C-Block license payment obligations should be avoided as a fraudulent conveyance.[70] After filing for bankruptcy, NextWave did not make another timely payment on its licenses.

B. The Litigation in the Second Circuit Over the Jurisdiction of the Bankruptcy Court

The ensuing litigation from NextWave's decision to file for bankruptcy was extensive, resulting in no less than six decisions by the Bankruptcy Court and the District Court in the Southern District of New York as well as two decisions by the Second Circuit Court of Appeals. The litigation over NextWave's fraudulent conveyance claim presented a dispute over the capacity in which the FCC acted when it sought to enforce the timely payment condition agreed to by NextWave when the company received the licenses. NextWave contended that the FCC did not enjoy a remedy that was not available to any other creditor of the company and therefore was limited to participating in the reorganization.[71]

The FCC, on the other hand, insisted that regardless of the agency's rights as a creditor, it was acting in a regulatory capacity when it canceled the licenses.[72] According to the Commission, the dispute should be governed exclusively by communications law, and the agency's public interest determination awarding the licenses to NextWave required the company to make timely payments.[73] The Commission contended that by failing to make the full and timely payment due, NextWave established that its retention of the licenses was not in the public interest and that the Commission was well within its authority to cancel the licenses.[74]

The conflicting views of the scope of the FCC's authority and of the licenses are set out in the decisions. The Bankruptcy Court and the District Court sided with NextWave, while the Second Circuit consistently agreed

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June 11, 1998) (dismissing petition for review).

70. *See NextWave*, 200 F.3d at 48. As the Supreme Court summarized:

> NextWave initiated an adversary proceeding in the Bankruptcy Court, alleging that its $4.74 billion indebtedness on the C-Block licenses was avoidable as a 'fraudulent conveyance' under section 544 of the Bankruptcy Code, 11 U.S.C. § 544, because, by the time the Commission actually conveyed the licenses, their value had declined from approximately $4.74 billion to less than $1 billion.

NextWave, 537 U.S. at 297-98.

71. *In re* NextWave Pers. Communications, Inc., 235 B.R. 314, 317 (Bankr. S.D.N.Y. 1999).

72. *See NextWave*, 200 F.3d at 54 (noting that deciding which entities are entitled to spectrum licenses is part of the FCC's regulatory power).

73. *Id.*

74. *Id.*

with the FCC and reversed the lower courts.[75]

The FCC initially moved to dismiss NextWave's complaint, which asserted a fraudulent conveyance claim under 11 U.S.C. § 544, for lack of subject matter jurisdiction.[76] Even though NextWave had initiated the litigation in the Bankruptcy Court, the FCC argued that the company's claim challenged the agency's action in its regulatory capacity and that only a federal court of appeals had jurisdiction over such claims.[77] The Bankruptcy Court acknowledged that two different bodies of law applied insofar as the FCC was acting as both a creditor and a regulator in conducting the spectrum auctions and entering into financial arrangements—including taking a security interest—with winning bidders.[78] It determined that the fraudulent conveyance claim implicated the FCC only to the extent that the agency was acting as a creditor and that the agency therefore was subject to the bankruptcy code in the same manner as any other creditor.[79] Implicit in the Bankruptcy Court's conclusion was that the licenses were property of the debtor's estate.[80]

The Second Circuit rejected this reasoning. It too recognized that the case involved the interplay of communications law and bankruptcy law, but ruled decisively that the former governed, to the *exclusion* of the latter.[81] The court of appeals rejected the notion that NextWave had a property interest in the licenses, emphasizing that a "license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms."[82]

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75. The district court opinion is reported in *NextWave Pers. Communications, Inc. v. FCC*, 241 B.R. 311 (Bankr. S.D.N.Y. 1999). The citations to the bankruptcy court decisions are collected in *In re FCC*, 217 F.3d 125, 130 n.3 (2d Cir. 2000).

76. *See In re NextWave*, 235 B.R. at 265. In its fraudulent conveyance claim, NextWave asserted that its $4.74 billion obligation was avoidable as a "fraudulent conveyance" because the obligation greatly exceeded the value of the licenses by the time the company received them from the FCC. *Id.* at 269.

77. *See* 47 U.S.C. § 402 (2000). *See also NextWave*, 200 F.3d at 54 (noting that "jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals").

78. The Bankruptcy Court noted the dual role of the FCC:

> Nothing in section 309(j) of the FCA or any other statute confers any regulatory or other jurisdiction upon the FCC to make rules or other determinations with respect to its own status as a creditor . . . . By the same token, the Bankruptcy Code expressly recognizes the exclusive jurisdiction of regulatory agencies to perform the regulatory functions conferred upon them by statute.

In re NextWave, 235 B.R. at 269.

79. *See id.* at 270-71.

80. *See NextWave*, 200 F.3d at 54-55; *see also In re* FCC, 217 F.3d at 132 (noting that after initial remand from the Second Circuit, the bankruptcy court held that licenses were property of NextWave's estate subject to the automatic stay provision of the Bankruptcy Code, located at 11 U.S.C. § 362(a) (2000)).

81. *NextWave*, 200 F.3d at 54.

82. *Id.* at 51.

The Court of Appeals also minimized the significance of the form of the transactions between the Commission and NextWave. The fact that the FCC became a creditor of NextWave when it executed a note and a security interest with NextWave and that licenses were awarded at an auction—a transaction that is in some respects contractual—did not limit any of the FCC's authority in performing its core task of awarding licenses.[83] Therefore, the basis for the FCC's efforts to recover the licenses—NextWave's failure to make a "full and timely payment"—was a regulatory condition with "a regulatory purpose related to the FCC's implementation of the spectrum auctions."[84]

Furthermore, because the purpose of the auction was to allocate spectrum licenses and because the FCC had exclusive jurisdiction to award and to revoke licenses, the Second Circuit concluded that the agency was acting in a regulatory capacity in deciding to award the licenses to the highest bidder and attempting to revoke them for failure to comply with the agency's conditions.[85] The Court of Appeals further concluded that it was beyond the jurisdiction of the Bankruptcy Court to hold that NextWave could retain the licenses when it had failed to meet the conditions to which the license was subject.[86]

The Court of Appeals acknowledged that the spectrum auction would generate revenue for the federal government but nevertheless credited the FCC's explanation that the agency was not acting to maximize its "self-interest" in auctioning spectrum licenses to the highest bidders.[87] Noting

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83. *See id.* at 51-52 ("[T]he broader purpose of 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses."); *see also id.* at 58-59 (noting the Commission's "dual role" and stating that "the regulatory function is not ended by the bankruptcy of a licensee or a license claimant"); *In re* FCC, 217 F.3d at 131 (explaining that in first appeal filed by NextWave, the court "held that even where the regulatory conditions imposed on a license take the form of a financial obligation, the bankruptcy and district courts lack jurisdiction to interfere in the FCC's allocation").

84. *See NextWave*, 200 F.3d at 52 (quoting 47 C.F.R. § 24.708 (2003)). The court of appeals credited the FCC's explanation that the "payment in full" requirement was intended to "deter frivolous or insincere bidding." *See NextWave*, 200 F.3d at 52. The case also stated:

> It was important for the functioning of the auction of licenses to 'designated entities' that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the 'detailed credit checks' and other forms of due diligence that otherwise would be necessary to ensure, within the framework of a competitive auction method of spectrum allocation, that the licenses would be awarded to the most appropriate entities.

Id. at 53.

85. *See id.* at 54-55 ("The FCC's auction rules promulgated under § 309(g) have primarily a regulatory purpose to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives.").

86. *Id.* at 54; *see id.* at 46 ("We hold that the bankruptcy court had no authority . . . to interfere with the FCC's system for allocating spectrum licenses . . . .").

87. *See NextWave,* 200 F.3d at 58-60 (explaining the auction procedures).

that Congress sought "fair and efficient allocation of spectrum licenses," the Court explained that "[t]he auction mechanism can do so only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue. And this goal is served only if the high bid entails the obligation to make good the amount bid."[88]

After the Second Circuit issued its initial opinion, there was a reprise in the back and forth between the Bankruptcy Court and the Court of Appeals over the FCC's decision to reject NextWave's offer, made in a plan of reorganization, of a single lump sum to pay off "the present value of its billions of dollars in notes."[89] NextWave's offer would have satisfied the company's entire $4.3 billion obligation to the Commission. The Commission, however, did not accept the offer because it concluded that NextWave's failure to make timely payments "resulted in the 'automatic cancellation' of the licenses."[90] Instead, the FCC issued a public notice announcing its intention to re-auction the licenses held by NextWave.[91]

NextWave returned to the Bankruptcy Court, where it successfully sought an order to void the public notice.[92] Essentially, the Bankruptcy Court held that the Commission's timely payment requirement did not have a regulatory purpose. It explained that because "[n]o rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics," it concluded that the Commission was acting only as a creditor in enforcing the timely payment requirement.[93] The Bankruptcy Court held that it was authorized to invalidate the Commission's public notice pursuant to the automatic stay provision of the Bankruptcy Code.[94]

In response, the FCC successfully sought a writ of mandamus from the Court of Appeals directing the Bankruptcy Court to vacate its order providing relief to NextWave.[95] As in its earlier decision, the Second Circuit emphasized that the FCC's timely payment condition was regulatory and that the Bankruptcy Court did not have jurisdiction over NextWave's challenge to the FCC's regulatory actions.[96] The Second Circuit concluded that the Bankruptcy Court was not authorized to act

88. *Id.* at 59-60.
89. *See In re* FCC, 217 F.3d 125, 132 (2d Cir. 2000)..
90. *See id.* (quoting the FCC's memorandum objecting to NextWave's modified reorganization plan).
91. *See id.*
92. *See In re* NextWave Pers. Communications Inc., 244 B.R. 253, 257-58 (Bankr. S.D.N.Y. 2000) (articulating three distinct reasons for granting NewWave's motion).
93. *See id.* at 281; *see also In re FCC*, 217 F.3d at 132-33 (discussing bankruptcy court decision after remand).
94. *See NextWave*, 244 B.R. at 266-68 (explaining that the automatic stay is one of the cornerstones of the bankruptcy process). *See also* 11 U.S.C. § 362 (2000).
95. *In re FCC*, 217 F.3d at 129, 141.
96. *Id.* at 137-41.

under the automatic stay provision because of the "regulatory power" exception set out in 11 U.S.C. § 362(b)(4).[97] The Second Circuit noted that "NextWave remains free to pursue its challenge to the FCC's regulatory acts."[98]

C. The D.C. Circuit's Decision Construing § 525(a) of the Bankruptcy Code

NextWave already had filed a petition with the FCC, asking the agency to reconsider its decision to re-auction the spectrum, by the time the Second Circuit issued its last decision. The FCC denied that petition, prompting NextWave to seek review in the D.C. Circuit.[99] Before summarizing the D.C. Circuit's decision, it is important to note the shift in the posture of the litigation once it was before a federal court of appeals that unquestionably had jurisdiction to review actions of the FCC. The principal purpose of the Second Circuit's evaluation of whether the Commission was acting as a regulator or a creditor with respect to NextWave was to determine whether the Bankruptcy Court *could* exercise jurisdiction over the Commission's licensing decisions. The Second Circuit concluded that because all of the Commission's actions—from its auction awarding the spectrum licenses to NextWave, to its cancellation of the licenses after NextWave defaulted on its initial installment payment—were taken as part of the agency's efforts to perform its (regulatory) licensing function, the Bankruptcy Court did not have jurisdiction over NextWave's claims under the Bankruptcy Code.[100]

Before the D.C. Circuit, NextWave presented its claims in the form of an APA challenge. NextWave essentially claimed that the Commission did not act "in accordance with law"[101] by violating a number of provisions of the Bankruptcy Code when it cancelled NextWave's licenses subsequent to its bankruptcy filing. Significantly, NextWave advanced a claim that had not been substantially addressed in the litigation in the Second Circuit, that the Commission violated § 525(a) of the Bankruptcy Code, which prevents a governmental entity "from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy."[102] NextWave's argument under

97. *Id.* at 138. *See also* 11 U.S.C. § 362(b)(4) (2000).
98. *In re FCC*, 217 F.3d at 140.
99. *See In re NextWave Pers. Communications, Inc.*, Order on Reconsideration, 15 F.C.C.R. 17,500 (2000).
100. *See In re FCC*, 217 F.3d at 134-41 (explaining the differences between the regulatory aspects of *timely* payment compared to *full* payment as well as the implications for jurisdiction).
101. 5 U.S.C. § 706(2)(A) (2000).
102. *See* NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 133 (D.C. Cir. 2001). *See also* 11 U.S.C. § 525(a) (2000). The bankruptcy court concluded that the Commission violated § 525(a). *NextWave*, 244 B.R. at 269-70. The Second Circuit did not address the merits of the bankruptcy court's § 525(a) finding. *NextWave*, 200 F.3d 43 (2d Cir. 1999).

§ 525(a) challenged the scope of the Commission's regulatory authority. If NextWave prevailed, it would be able to avoid the FCC's cancellation of the licenses and to retain the licenses while the company reorganized in bankruptcy.

In the D.C. Circuit, the Commission initially asserted that NextWave's claims were barred by the doctrine of res judicata.[103] The Commission argued that the Second Circuit decisions had already resolved all of the claims raised by NextWave in the Commission's favor.[104] The D.C. Circuit, however, did not agree—with the exception of the FCC's claim that its actions were permitted under the regulatory power exception to the automatic stay under 11 U.S.C. § 362(b)(4)—and concluded that the Second Circuit's decision was primarily "jurisdictional."[105]

The D.C. Circuit proceeded to address the merits of NextWave's § 525 claim. Section 525 provides that a governmental unit may not "revoke" a license "solely because" a "debtor has not paid a debt that is dischargeable in the case under this title."[106] The D.C. Circuit held that § 525 of the Bankruptcy Code did not permit cancellation of NextWave's licenses.[107] It rejected the FCC's argument that § 525 should be read in light of 11 U.S.C. § 362(b)(4), which exempts the exercise of regulatory power from the automatic stay provision available to the debtor.[108] The Court concluded that reading a comparable stay provision into § 525 would be inconsistent with the plain language of that statute.[109] The D.C. Circuit also rejected the Commission's contention that § 525 did not apply because NextWave's license fee obligation was not a "dischargeable" debt principally on the grounds that the agency's interpretation would have written an exception into the statute that did not exist and therefore was contrary to the plain language of § 525.[110]

The D.C. Circuit rejected the argument that cancellation of NextWave's licenses had not occurred "solely because" of the company's failure to pay a debt within the meaning of § 525.[111] The court recognized that the purpose of the cancellation was to ensure the integrity of the auction process and select licensees that would most likely use the spectrum

103. *See NextWave*, 254 F.3d at 142.
104. *See id.* at 142-43.
105. *See id.* at 142-49 (explaining that the Second Circuit did not "actually and necessarily" decide whether § 525 and § 1123 allow for the license cancellation).
106. 11 U.S.C. § 525(a) (2000).
107. *See NextWave*, 254 F.3d at 149-56 (articulating the court's reasoning).
108. *See* 11 U.S.C. § 362(b)(4) (2000) (defining exceptions to the automatic stay provision).
109. *See NextWave*, 254 F.3d at 150 ("[N]othing in § 525 or § 362 states that § 525 is subject to subsection 362(b)(4)'s regulatory power exception, or that the exception should be read to limit § 525's clear reach.").
110. *Id.* at 152.
111. *Id.* at 153-54.

efficiently for public benefit.[112] The D.C. Circuit nevertheless concluded that such a regulatory "motive" was not sufficient because the triggering event for canceling the licenses was NextWave's failure to pay.[113]

Additionally, the D.C. Circuit emphasized that in structuring its transaction with NextWave, the FCC became a creditor and therefore should be treated in the same way as any other creditor under § 525.[114] Accordingly, the court held that "section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11."[115]

D. The Supreme Court's Decision Affirming the D.C. Circuit

The Commission appealed the D.C. Circuit's decision to the Supreme Court, which granted certiorari.[116] On the merits, the Supreme Court affirmed the D.C. Circuit in an 8-1 decision emphasizing the plain language of § 525.[117] Writing for the Court, Justice Scalia rejected the FCC's argument that § 525 did not apply because the Commission had a "valid regulatory motive" for its actions.[118] According to Justice Scalia, "[s]ection 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation—the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be."[119] To read an exception into the statute for having a "valid regulatory purpose," Justice Scalia suggested, would be contrary to the "clear[]" and "express[]" language of the Bankruptcy Code.[120]

The Court similarly rejected the Commission's argument that NextWave's license obligations were not debts dischargeable in bankruptcy.[121] Citing the broad definition of "debt" and the terms used to define it (in particular "claim," which "has 'the broadest available definition'"), the Court concluded that "a debt is a debt, even when the

112. *See id.* at 154-56. The court acknowledged that "allowing NextWave to retain its licenses may be 'grossly unfair'" but that "[a]ny unfairness . . . was inherent in the Commissioner's decision to employ a licensing scheme that left its regulatory actions open to attack under Chapter 11 of the Bankruptcy code . . . ." *Id.* at 154-55.

113. *NextWave*, 254 F.3d at 153-54.

114. *See id.* at 133 ("The Commission, having chosen to create standard debt obligations as part of its licensing scheme, is bound by the usual rules governing the treatment of such obligations in bankruptcy.").

115. *Id.* at 155.

116. *See* FCC v. NextWdave, 535 U.S. 904 (2002).

117. *See NextWave*, 537 U.S. at 293.

118. *See id.* at 301.

119. *Id.* at 301-02.

120. *Id.* at 302 (noting that when Congress has intended to provide such regulatory exceptions for agencies it has "clearly" and "expressly" done so).

121. *NextWave*, 537 U.S. at 302-04.

obligation to pay it also is a regulatory condition."[122] The Court also rejected the argument that NextWave's obligations were not "dischargeable" in bankruptcy because Bankruptcy Courts did not have jurisdiction to "alter or modify regulatory obligations" on the grounds that such an exception could only be provided expressly by statute.[123]

Finally, the Court rejected the argument that upholding the D.C. Circuit's interpretation of § 525 would conflict with the Communications Act.[124] The Court's interpretation, according to Justice Scalia, "does not . . . obstruct the functioning of the auction provisions of 47 U.S.C. 309(j), since nothing in those provisions demands that cancellation be the sanction for failure to make agreed-upon periodic payments."[125] The Court dismissed the Commission's efforts in its auction program to satisfy Congress's instruction to disseminate licenses among a wide variety of applicants and to ensure the swift allocation of licenses as nothing more than "a policy preference."[126]

Justice Breyer dissented. In his view, the majority erred in relying "exclusively upon the literal meaning" of § 525 without considering the purpose of the statute.[127] He asserted that the better reading of § 525 limited its scope "to instances in which a government's license revocation is related to the fact that the debt was dischargeable in bankruptcy."[128] This interpretation ensured that entities that are, or were, in bankruptcy would not be discriminated against for that reason.[129]

Justice Breyer argued that the majority's reading of § 525 created the anomalous situation that the government would not have the ability to repossess its product (the license) even though it had a security interest in

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122. *Id.* at 303. The Court explained that under the Bankruptcy Code, a "debt" means "liability on a claim." *Id.* at 302.

123. *See id.* at 303.

124. *See id.* at 304.

125. *Id.*

126. *See NextWave*, 537 U.S. at 304 (elaborating that "such administrative preferences cannot be the basis for denying respondent rights provided by the plain terms of the law"). Justice Stevens issued a brief opinion, concurring in part and concurring in the judgment. *Id.* at 308. He explained that although he agreed with Justice Breyer's "view that the literal text of a statute is not always a sufficient basis for determining the actual intent of Congress," he nevertheless believed that the majority's interpretation of the statute "produce[d] the correct answer" in this case. *Id.* at 310. Justice Stevens elaborated that, in his view, "application of the general rule [of section 525(a)] will not be unfair to the [FCC] either as a regulator or as a creditor." *Id.* at 309. As to the former, "[i]f the bankrupt licensee is unable to fulfill other conditions of its license, the regulator may cancel the licenses for reasons that are not covered by § 525 (a)." *Id.* at 309-10. As to the latter, "given the fact that the Commission has a secured interest in the license, if the licensee can obtain the financing that will enable it to perform its obligations in full, the debt will ultimately be paid." *Id.*

127. *Id.* at 311 (Breyer, J., dissenting).

128. *NextWave*, 537 U.S. at 311.

129. *See id.* at 313-15 (Breyer, J., dissenting) (citing the statute's title, "Protection against Discriminatory Treatment," to explain the legislative history of the statute).

that product and even though every other private commercial seller enjoyed the right to repossess in the same situation.[130] In addition, Justice Breyer noted that the majority decision frustrated legitimate debt collection efforts, and permitted the following perverse result: a company could promise "to pay for a public asset, go into bankruptcy, avoid the payment obligation, and keep the asset."[131]

III. *NEXTWAVE* AND LITIGATION IN THE PRIVATE-PUBLIC REGIME

A. Litigation in the Private-Public Regime

As privatization of governmental functions has increased, it has been accompanied by litigation over the government's decision to privatize. When the government employs a private or market form to accomplish a regulatory function, the central question raised in litigation over the government's actions is whether the government is entitled to deferential treatment because it is acting in a public or regulatory capacity.

Placing the functions performed by the federal government on a spectrum may prove helpful. Ordinary procurement contracts—"humdrum supply contracts," such as a contract "to buy food for the army"—occupy one end of the spectrum.[132] In litigation over procurement contracts, the government is treated essentially the same way as a private party in a commercial contract.[133] On the other end of the spectrum are sovereign acts, such as taxation—a paradigmatic example of the government acting exclusively in a regulatory capacity.[134] In the middle of the spectrum are cases in which the federal government acts in a hybrid, or dual, capacity.

The leading Supreme Court case on whether the federal government may be treated as a private party is *United States v. Winstar Corp.*,[135] in which the Court upheld claims asserted by three savings and loan institutions for breach of regulatory contract.[136] The thrifts claimed that during the 1980s, when the savings and loan industry was troubled, they acquired ailing

130. *See id.* at 312 (Breyer, J., dissenting) (explaining that the majority's interpretation indicates that "a government cannot ever enforce a lien on property that it has sold on an installment plan as long as (1) the property is a license, (2) the buyer has gone bankrupt, and (3) the government wants the license back solely because the buyer did not pay for it").

131. *See id.* at 317 (Breyer, J., dissenting); *see also Leading Cases*, 117 HARV. L. REV. 390, 399-400 (2003) (explaining that "[b]y allowing companies to hoard valuable public assets in bankruptcy, the Court opened the door to the greater strategic use of Chapter 11 filings" and that "[u]nder *NextWave*, companies can effectively purchase options on considerable public assets, lock up these resources to prevent competition, and enhance their own creditworthiness by, paradoxically, using bankruptcy as a value-enhancing asset").

132. United States v. Winstar Corp., 518 U.S. 839, 880 (1996).

133. *Id.*

134. *Id.*

135. *Id.* at 839.

136. *Id.* at 843.

savings and loan institutions in exchange for favorable regulatory treatment from industry regulators.[137] In exchange for acquiring troubled thrifts and relieving the relevant regulatory agencies of the obligation to deal with those thrifts, the acquirers asserted that they received a promise from the regulators that they could use a particular accounting treatment (known as "supervisory goodwill") for the transaction. Furthermore, the acquirers asserted that Congress breached this contract by enacting the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) in 1989.[138] Among other things, FIRREA accelerated the phase out of supervisory goodwill for regulatory accounting purposes.[139]

In *Winstar*, the United States contended that the federal government was excused from liability for breach of contract because of defenses available to it as a sovereign.[140] The government's principal argument was that the agreements with the acquirers were not "unmistakably clear" restrictions on future regulatory authority and that the thrifts therefore assumed the risk of regulatory change.[141] The government also asserted that FIRREA was a "public and general" act and that the Sovereign Acts doctrine, excused it from breach of contract liability.[142]

The Supreme Court ultimately rejected the United States' arguments and issued a 7-2 decision in *Winstar* upholding the lower courts' decisions that the government was liable for breach of contract.[143] Significantly, Justice Souter's plurality opinion emphasized that, in its dealings with the acquirers, the thrift agencies were no different from private parties in offering favorable regulatory treatment to acquirers in exchange for relieving the government of its obligations to troubled savings and loan institutions.[144] The United States asserted that the regulators acted in a

137. *Winstar*, 518 U.S. at 860-71.

138. The Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1811 (2000).

139. *See Winstar*, 518 U.S. at 856-58; *see also* Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313, 360-64 (1999) (detailing the accounting techniques employed by the savings and loan industry in their dealings with regulators in the 1980s).

140. *See Winstar*, 518 U.S. at 860.

141. *See id.* at 871-87; *see also* Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 51 (1986) (discussing the unmistakablity defense).

142. *See Winstar*, 518 U.S. at 891-904 (concluding that FIRREA was not a "public and general act" in rejecting sovereign acts defense); *see also* Horowitz v. United States, 267 U.S. 458, 461 (1925) (articulating "public and general" requirements for sovereign acts doctrine).

143. *See Winstar*, 518 U.S. at 843. Despite the 7-2 vote, there was no majority opinion for the Court. *Id.* Justice Souter's plurality opinion was joined in full by Justices Stevens and Breyer and in part by Justice O'Connor. *Id.* Justice Scalia's concurring opinion was joined by Justices Thomas and Kennedy. *Id.* Chief Justice Rehnquist and Justice Ginsburg dissented. *See* Joshua Schwartz, *Assembling Winstar: Triumph of the Ideal of Congruence in Government Contracts Law*, 26 PUB. CONT. L.J. 481 (1997) (summarizing the Court's decision in *Winstar*).

144. *See Winstar*, 518 U.S. at 843, 860, 870-71, 887, 896, 904.

regulatory capacity in their initial dealings with the thrifts and that Congress also acted in a regulatory capacity in reforming the industry's accounting rules. The Supreme Court disagreed and concluded that the government acted in a private capacity—a conclusion based, in part, upon the fact that the government employed a private law form (a contract) in its dealings with the thrifts.[145]

B. Lessons from NextWave *About Litigation in the Private-Public Regime*

Nearly ten years after the Supreme Court's decision, it is difficult to discern the reach of *Winstar*.[146] *Winstar* arose in a different context than *NextWave* because the private parties in *Winstar* sought only compensation for regulatory change and did not attempt to prevent the government from implementing the new regulatory regime. *Winstar*, however, is analogous to *NextWave* for at least two reasons. First, the government acted in a hybrid capacity in its dealings with the acquiring thrifts; according to the Supreme Court, savings and loan regulators employed a private or market law form (a contract) to enlist private parties in the performance of a public function (dealing with troubled thrifts).[147] Second, when an entity challenges governmental actions in court, the court ultimately treats the regulatory agency like a private party and does not afford the agency deference for actions the government characterizes as regulatory. Had the Supreme Court agreed with the United States that it acted in a regulatory capacity when Congress accelerated the phase out of the promised regulatory accounting treatment, it almost certainly would have entered judgment for the government on the basis of one of its sovereign defenses.[148]

NextWave similarly illustrates how the government acts in a hybrid, or dual, capacity when it employs private law forms to perform public functions. On one hand, in performing the public function of awarding spectrum licenses, the Commission must act in the "public interest."[149] It

145. *Id.* at 843 (framing the issue as "the enforceability of contracts between the Government and participants in a regulated industry" and holding that "the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable" for breach of contract).

146. *See* Joshua Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of Winstar: An Interim Report*, 51 ALA. L. REV. 1177 (2000) (attempting to determine how courts have interpreted *Winstar*).

147. Whether the acquiring savings and loan institutions actually conferred a benefit upon the government has been challenged in the academic literature. *See* Fischel & Sykes, *supra* note 139, at 313, 380 (criticizing *Winstar* for incorrect economic analysis, which led the Supreme Court to an incorrect decision).

148. Professors Fischel and Sykes, for example, contend that "[t]he Supreme Court should have ruled against the complaining thrifts." *Id.* at 365 (explaining that "the Court could have held that the powers to regulate the safety and soundness of financial institutions [are] inalienable").

149. *See supra* note 21 and accompanying text.

remains the case that "public law notions of deference to agency action" apply to judicial review of actions taken by the agency in its regulatory capacity.[150] Deferential judicial review provides the agency with the flexibility to respond to changed circumstances and enables the agency to take a pragmatic approach to regulation.

On the other hand, in awarding the spectrum through an auction and becoming a creditor of NextWave, the Commission employed a market or private law form with the company. In the wake of *NextWave*, an agency's use of private law forms result in the risk that courts will not defer to the agency's actions, even those taken to perform a public function. Professor Jody Freeman has noted, for example, that the use of contracts as an administrative regulatory tool "may impose great pressure on courts to reconcile principles of private contract law, which do not necessarily afford agencies deference, with principles of administrative law, which do."[151] In cases in which private law principles govern, the emphasis is not on the goal of the government's program but instead on the terms of its transaction with the private party. This approach is more protective of the private party's reliance interest and may provide a bright-line rule for resolving disputes between the government and the private party.[152] To put it succinctly, in the Supreme Court's decisions in *Winstar* and *NextWave*, form has trumped function.

Hence our first lesson from the *NextWave* litigation: If an agency elects to employ private law forms to perform public functions, it should anticipate the possibility of litigation over its use of those forms. Furthermore, the legal challenge may not be limited to an administrative law challenge in a federal court of appeals.[153] The agency's use of a private law form may result in its being sued in another court—such as a Bankruptcy Court or the Court of Federal Claims—instead of or in addition to the federal court of appeals where an administrative law challenge is heard. Such courts may be less familiar with, and therefore less committed to, traditional administrative law principles.[154]

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150. *See* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 207 (2000); *see also* Mark Seidenfeld, *An Apology for Administrative Law in The Contracting State*, 28 FLA. ST. U. L. REV. 215, 239 (2000) (commenting on the Freeman article and suggesting "that although administrative law doctrine rarely explicitly recognizes the contract as a regulatory mechanism, that doctrine includes understandings that allow for the use of contracts as a regulatory mechanism").

151. Freeman, *supra* note 150, at 158.

152. *See generally* William N. Eskridge, *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21-22 (1998) (discussing differences between formalist and functionalist methodologies).

153. A petition for review of an FCC order must be filed in a federal court of appeals. 47 U.S.C. § 402(a) (2000); 28 U.S.C. § 2342(1) (2000). An appeal of an FCC order must be filed in the D.C. Circuit. 47 U.S.C. § 402(b) (2000).

154. The irony of the results in the *NextWave* litigation is not lost on us. The Second

Regardless of the forum in which the agency is sued, the crucial—perhaps controlling—issue in the litigation is whether the agency's actions are classified as "regulatory." Moreover, although the agency may act in a dual capacity, the characterization of the government's actions is likely to be an "either-or" determination.[155] In the *NextWave* litigation, the Commission prevailed when the Second Circuit determined that the FCC acted in a regulatory capacity and that the agency possessed the regulatory authority to cancel the licenses.

At the time NextWave defaulted on its initial installment payment, its only obligation—both financial and regulatory—was to make a timely payment. NextWave was obligated to build out its telecommunications network over the course of its installment plan.[156] However, at the time its first installment payment was due, it did not have to meet any of the build-out requirements. The Commission had no other basis for determining whether NextWave in fact was complying with its public interest obligation to rapidly deploy spectrum and develop services. Before the Supreme Court, this question was raised principally in the dispute over whether the sole cause of the FCC's decision to terminate the licenses was due to NextWave's failure to pay its dischargeable debt. Ultimately, the Supreme Court ruled against the Commission on this question.[157] However, the Commission did not have merely a "regulatory motive" in canceling NextWave's licenses after the company missed its initial installment payment. Because the auction was the mechanism used by the Commission to award the spectrum licenses to NextWave, any steps by the Commission to enforce NextWave's public interest obligation after the company received the licenses required the Commission to act as both a regulator responsible for ensuring the widespread deployment and rapid development of spectrum in the public interest, and a creditor due to the

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Circuit—probably the forum in which the most sophisticated commercial law disputes are litigated—consistently reversed the bankruptcy court because it viewed that court's actions as an intrusion on the Commission's regulatory authority. Subsequently, the D.C. Circuit, known for its expertise in administrative law, held that the Commission's order violated a provision of the Bankruptcy Code and therefore should be set aside under the APA.

155. As Professor Freeman has observed in a related context:

> [C]ourts have struggled with the conflict between government as regulator and government as contractor, drawing sharp lines between the two. They have consistently approached government's use of contract by categorizing the nature of the government intervention as either regulatory or contractual and according the government deference when it acts in its regulatory capacity.

Freeman, *supra* note 150, at 208.

156. *See* 47 C.F.R. § 24.203(a) (2003) (describing five-year and ten-year build out requirements for C block licenses); *see also* 47 C.F.R. § 24.203(b) (2003) (requiring a five-year build out for F block licenses).

157. FCC v. NextWave Pers. Communications Inc., 537 U.S. 293, 301-02 (holding that the government's "motive" was "irrelevant" when § 525 of the statute refers to a failure to pay debt as the sole cause of cancellation).

structure of its transaction with NextWave. The Supreme Court could arrive at the result that it did only if it construed the term "solely" in section 525(a) to mean "proximate."[158]

That the Commission acted in a dual capacity when it cancelled NextWave's licenses for default on the payment obligation is reinforced by the fact that the subject of the transaction, the spectrum, itself had a dual function. As the necessary asset for NextWave's business dealings, it also was the means by which the public interest in the use of spectrum for wireless service would be deployed. This distinguishes *NextWave* from other cases under § 525(a), in which the principal determination is whether, focusing exclusively upon the dealings between the agency and the licensee, there is a sufficiently distinct public purpose to the agency's decision to deny or revoke a license.[159] When NextWave defaulted, it failed to meet the *only* regulatory obligation it was required to satisfy at the time payment was due, and the Commission had no other means to determine whether the company was meeting its public interest obligation to rapidly deploy the spectrum.[160]

To reiterate our first lesson: In litigation over the capacity in which the government is acting when it employs a market mechanism or private law form to accomplish a public function, it is essential for an administrative agency to establish that it is exercising its regulatory authority in order to receive the deference necessary to prevail in the litigation.

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158. *Id.*

159. *See, e.g., In re* Stoltz v. Brattleboro Hous. Auth., 315 F.3d 80, 88, 95 (2d Cir. 2002) (holding that a public housing agency may not deny continued occupancy in public housing based upon nonpayment of past rent).

160. With respect to the clash between communications law and the Bankruptcy Code, one commentator has proposed a way in which the two regimes could coexist:

> The jurisdiction of the FCC in bankruptcy proceedings should be defined by its regulatory competence. The FCC is competent to regulate use of the electromagnetic spectrum by bankrupt licensees, and bankruptcy and district courts should respect the FCC's jurisdiction in this area. However, enforcing promissory notes against debtors in bankruptcy is beyond the FCC's regulatory competence.

Nicholas J. Patterson, Comment, *The Nature and Scope of the FCC's Regulatory Power in the Wake of the NextWave and GWI PCS Cases*, 69 U. CHI. L. REV. 1373, 1398 (2002). This proposal, however, offers no more middle ground than that permitted by the Supreme Court's decision in *NextWave*, at least under the facts of that case. *Id.* NextWave was not using the electromagnetic spectrum when it entered into bankruptcy and had defaulted on its only "regulatory" obligation—to make an installment payment—to the agency. Moreover, this recommendation does not account for the fact that in its dealings with NextWave, the commission acted in a dual capacity, as both the regulator responsible for allocating spectrum, and as a creditor with a security interest in the licenses. Accordingly, its area of regulatory competence was completely coextensive with its interests as a creditor. In the litigation, no court could accommodate both of the agency's roles. One legal regime had to prevail, and the Supreme Court ultimately decided that it would be that of the Bankruptcy Code.

The second lesson is related and is advice offered to both the agency client as well as the agency counsel, with the goal of avoiding litigation. In the current embrace of privatization government actors must exercise care in deciding what tasks they want to perform through private law or market forms, and how they do so. (The Commission, for example, continues to conduct spectrum auctions, but has terminated its installment payment program.)[161] In a perfect world, government agencies would receive express guidance from Congress on the scope and standard of judicial review when the agency is required to employ a private law form to perform a public function.[162] Absent guidance from Congress, the agency must exercise care in how it structures a transaction with a private party, as the form of that transaction may dictate the judicial determination of whether the agency acted in a private or a public capacity and therefore whether the agency receives deference when its actions are reviewed in court. For example, in connection with § 525(a), the agency could adopt a "multi-factor inquiry" that would incorporate regulatory objectives into the transaction with the private party responsible for accomplishing a public function.[163]

CONCLUSION

The Supreme Court's decision in *NextWave* limited the Commission to acting in a single capacity—that of creditor—in its dealings with the company. The Commission embraced that role, even retaining outside counsel and financial advisors to assist the agency in the negotiations with NextWave. In April 2004, the Commission reached a settlement agreement with NextWave, which was approved by the Bankruptcy Court in May 2004.[164] The settlement immediately made available for other uses much

161. *See In re* Amendment of the Commission's Rules Regarding Installment Payment Financing for Pers. Communication Services Licensees, 13 F.C.C.R 15,743, 15,769-70 ¶ 50 (1998). The FCC suspended the installment payment program even before the NextWave litigation began because it foresaw that its statutory goal of speeding "service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court." *Id.*

162. *Cf. NextWave*, 537 U.S. at 302 (stating that "where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly").

163. William J. Perlstein and Kenneth A. Bamberger, *At the Intersection of Regulation and Bankruptcy:* FCC v. NextWave, 59 BUS. LAW. 1, 21 (2003). The authors propose the following:

> Because the inquiry would include a number of elements—such as the financial health of the licensee and the successful use of the licensed resource—any resulting cancellation should not be attributed 'solely' to one cause in the matter proscribed by § 525. Similarly, by scheduling the assessment periodically, revocations would not be attributable to a nonpayment trigger.

Id.

164. *See* Bloomberg News, *Technology Briefing Telecommunications: NextWave Settlement Approved*, N.Y. TIMES, May 26, 2004, at C5.

of the spectrum that had been tied up in litigation since NextWave declared bankruptcy in 1998.

The FCC pursued three overarching goals in settling the case: putting the NextWave spectrum that lay dormant for so long to active use, recouping value from NextWave for the U.S. government and facilitating a final resolution to the entire matter within the context of the Supreme Court's *NextWave* opinion. Specifically, the agreement provided for the immediate return of spectrum licenses that accounted for at least 90 percent of NextWave's spectrum (when licenses already sold to Cingular Wireless were taken into account); contemplated total cash recovery (including NextWave's down payment) of $1.6 billion if anticipated sales occur; enabled a total cash and spectrum recovery of at least $4 billion based on NextWave's original purchase price; required additional cash payments to the U.S. Treasury, if the value and sale of the spectrum that NextWave retained dramatically increased; extinguished any potential claims for damages against the FCC and the U.S. government; built in safeguards to ensure prompt and timely payment by NextWave; and avoided the use of debt instruments, which could have resulted in further default and delay.[165]

Our last lesson, therefore, is a suggestion that agency counsel embrace the private role assigned to the agency in the event that a reviewing court deems the agency's actions to be public or regulatory. Acting with zeal to maximize the government's recovery when the government is acting in a proprietary capacity is entirely in the public interest.

165. *See* Press Release, FCC Announces NextWave Settlement Agreement (Apr. 20, 2004), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246284A1.pdf. The settlement agreement also provided for a $10 million payment by NextWave to the Commission to reimburse the agency for costs incurred in retaining outside counsel and financial advisors. *Id.* The Commission actually recovered approximately $1.68 billion in cash: $500 million on NextWave's initial deposit; $714 million in payments resulting from Cingular's purchase of former NextWave licenses; $398 million in payments resulting from the sale of former NextWave licenses to Verizon Wireless and MetroPCS; and $71 million resulting from another sale of former NextWave licenses to Verizon Wireless. *See also* "NextWave Outlines Reorganization Plan," International Telecommunications Intelligence (Nov. 9, 2004), 2004 WLNR 12930006 (noting additional payment of $71 million by Verizon Wireless).