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NEXTWAVE V. FCC: BATTLE FOR THE C-BLOCK LICENSES

Andrea J. Serlin⁺

Throughout its history, the U.S. government has held important natural resources in public trust, primarily to ensure their optimal efficiency for all citizens.¹ Radio frequency spectrum has been categorized as such a resource because it is “vitaly important to our economic success and social well-being,” yet can accommodate only a limited number of users.² Thus, in the Communications Act of 1934,³ Congress confirmed that the Federal Communications Commission (FCC or Commission) would allocate the radio frequency spectrum.⁴ All broadcasting and telecommunications systems would operate through this system, yet its users would hold no property rights.⁵

In 1993 Congress directed the FCC to issue certain licenses through a system of competitive bidding carefully designed to promote the efficient, fair, and intensive use of the spectrum.⁶ The current auction program, embodied in the Federal Communications Act (FCA),⁷ awards licenses for specific blocks of frequency according to a competitive bidding system.⁸ The FCC ultimately approves how and by whom the licenses

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1. See, e.g., *Casey v. United States*, 240 U.S. 399, 402 (1916).

2. H.R. REP. NO. 103-111, at 247-48 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 574-75. In reorganizing allotment of radio spectrum, Congress referred to the purpose behind government ownership and management of the spectrum. See *id.* at 247-48.

3. Communications Act of 1934, 47 U.S.C. § 151 (1994 & Supp. III 1997).

4. *Id.* § 301 (1994).

5. See *id.*

6. See H.R. REP. NO. 103-111, at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580. In 1993, Congress amended the Communications Act to include § 309(j). See Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993).

7. Pub. L. No. 104-104, 110 Stat. 56 (1996) (explaining that the Communications Act of 1934 was amended by the Telecommunications Act of 1996).

8. See 47 U.S.C. § 309(j)(3) (1994 & Supp. III 1997). The FCC authorizes the auctioning of licenses within spectrums categorized geographically and by frequency. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 282 (Bankr. S.D.N.Y. 1998) (*NextWave I*); see also *In re FCC Report to Congress on Spectrum Auctions*, 13 F.C.C.R. 9601, 9616-17 (Oct. 9, 1997) [hereinafter *Spectrum Report*]; *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 9 F.C.C.R. 2348, 2376, para. 164 (Apr. 20, 1994) [hereinafter *Second Report and Order*]. Prospective licensees apply for the opportunity to bid and may only participate in the auction if selected by the FCC.

are used, and it issues them conditionally to ensure the legislative intent of promoting the public interest.⁹ But even those businesses licensed by the government can fail financially, creating a situation where the licenses become important factors in bankruptcy proceedings.¹⁰

The United States Bankruptcy Code, in part, promotes equitable distribution amongst creditors and protection from debtor transactions that would "deprive creditors of property from which their claims can be satisfied."¹¹ Consequently, when the government acts as a creditor, it is also subject to, for better or worse, bankruptcy laws.¹² In certain circumstances, however, federal law protects government functions from bankruptcy proceedings to advance the public interest.¹³

Although it is not uncommon for FCC licenses to be included in bankruptcy filings,¹⁴ a recent auction has raised new questions regarding the

See id. at 2376-77, paras. 165-68. At the close of the auction, the highest bidder wins the right to exclusively apply for the licenses for which it bid. *See id.* at 2383, para. 199. The FCC will subsequently award licenses to the winning bidder once the application is approved and a down payment is made. *See id.*

9. *See* 47 U.S.C. §§ 301, 309(h) (1994).

10. *See* 11 U.S.C. § 541(a) (1994) (defining property of the bankruptcy estate under the Bankruptcy Code); *see also, e.g., In re Ridgely Communications, Inc.*, 139 B.R. 374, 376 (Bankr. D. Md. 1992) (holding that FCC licenses become property of the estate under 11 U.S.C. § 541 when the licensee files for bankruptcy and reiterating that the licenses do not constitute assets or vested property interests); *In re Merkley*, 94 F.C.C.2d 829, 837 (1983) (holding that FCC licenses have been included as assets in the bankrupt estate).

11. *In re Stoecker*, 131 B.R. 979, 984 (Bankr. N.D. Ill. 1991); *see also In re Giordano*, 188 B.R. 84, 88 (Bankr. D. R.I. 1995) (showing that § 544 of the Bankruptcy Code promotes the central policy of ensuring that "the equities among creditors . . . are respected" when the estate is distributed); H.R. REP. 95-595, at 1, 178 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138.

12. *See* 11 U.S.C. § 106(a)(1)(3), (b) (1994) (providing that governmental units are subject to § 544 of the Bankruptcy Code, which governs avoidance claims, and allowing the court to issue an order, judgment, or award monetary relief against a governmental unit); *see also, e.g., Anderson v. FDIC*, 918 F.2d 1139, 1142 (4th Cir. 1990) (holding that the Federal Deposit Insurance Corporation (FDIC) was subject to a failed bank's bankruptcy protections); *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984) (finding that when the government acts in a proprietary capacity, it acts as a private entity); *cf. United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 736-37 (1979) (noting that the U.S. government is essentially the same as a private lender when certain government entities make loans).

13. *See, e.g.,* 11 U.S.C. § 362(b)(4) (1994 & Supp. IV 1998) (exempting the government's exercise of police and regulatory powers from certain bankruptcy provisions); *see also infra* note 74 and accompanying text (listing several statutory provisions exempting particular debts owed to the government from standard bankruptcy law protections).

14. *See, e.g., LaRose v. FCC*, 494 F.2d 1145, 1146-47 n.2, 1148 (D.C. Cir. 1974) (articulating the FCC's approval process for transfer and subsequent resale of a bankrupt's broadcast license); *see also, e.g., In re TAK Communications, Inc.*, 985 F.2d 916, 917-18 (7th Cir. 1993) (exemplifying how courts have included licenses as assets in bankruptcy proceedings). The FCC has accepted the fact that licenses are valuable assets to bankrupt

role of the Commission and the courts in such proceedings.¹⁵ The largest companies holding licenses awarded in the 1996 C-Block auction filed for bankruptcy after failing to meet payment deadlines,¹⁶ and by 1999 four companies had filed proceedings against the FCC in bankruptcy court seeking to retain their licenses without having to pay their winning bid amounts in full.¹⁷

NextWave Personal Communications, Inc. (NextWave), which held the majority of the C-Block licenses at that time, initiated the most publicized bankruptcy case in this auction.¹⁸ NextWave filed a fraudulent con-

license holders and thus, has agreed to license transfers that occur as a result of reorganization on the stipulation that the parties adhere to the regulatory conditions on the licenses. See *In re Merkley*, 94 F.C.C.2d at 837.

15. See *infra* note 18 and accompanying text (discussing the series of cases that acted as the vehicle for bringing this new issue to the courts).

16. See *FCC Releases Official C-Block Election Results; Numbers Still Likely to Change via Bankruptcy Cases*, PCS WEEK, June 24, 1998, available in 1998 WL 8015944 (announcing that NextWave, Telecom, Inc., Pocket Communications Inc., and General Wireless, Inc. had all filed for bankruptcy).

17. See *In re GWI PCS1, Inc.*, 245 B.R. 59, 61 (N.D. Tex. 1999); *In re Urban Comm-North Carolina, Inc.*, Adversary No. 99-8125 (Bankr. S.D.N.Y. 1999); *In re DCR PCS, Inc.* Adversary No. 98-6223 (Bankr. Md. 1998); *In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998) (*NextWave I*). The FCC has sought to reclaim C-Block licenses from other bankrupt licensees who defaulted on their installment payments. See, e.g., *In re Kansas Personal Communications Servs., Ltd.*, No. 99-21747-11-JAR, 2000 WL 1199798, at *2, *12 (Bankr. D. Kan. 2000); *In re Personal Communications Network, Inc.*, 249 B.R. 233 (Bankr. E.D.N.Y. 2000).

18. See *NextWave I*, 235 B.R. at 263. NextWave's first amended complaint alleged two claims against the FCC. See *id.* at 265. The court accepted the first claim of fraudulent conveyance and dismissed the second claim of alleged misconduct by the FCC in regulating and managing the auction process for want of subject matter jurisdiction. See *id.* at 265, 270; see also *In re NextWave Personal Communications, Inc.*, 235 B.R. 272, 273-74, 276 (Bankr. S.D.N.Y. 1999) (*NextWave II*) (finding that the date of company's obligation to the FCC sufficiently supported a fraudulent conveyance claim); *In re NextWave Personal Communications, Inc.*, 235 B.R. 277, 304 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*) (finding that the FCC fraudulently conveyed the C-Block licenses to NextWave because the value of the licenses did not equal the bid amount); *In re NextWave Personal Communications, Inc.*, 235 B.R. 305, 309 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*) (granting NextWave the remedy of avoidance of the debt it owed to the FCC); *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 318 (Bankr. S.D.N.Y. 1999) (*NextWave V*) (denying the FCC's request to lift the automatic stay and repossess the licenses due to non-payment); *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 321 (S.D.N.Y. 1999) (*NextWave VI*) (affirming the bankruptcy court's decisions and orders); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 62 (2d Cir. 1999) (*NextWave VII*) (reversing the lower court's finding of a fraudulent conveyance by the FCC and remedy (allowing avoidance of full payment on the C-Block licenses), and remanding for further proceedings), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 257, 283 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*) (granting NextWave's motion to enforce the automatic stay and to nullify cancellation of C-Block licenses); *In re FCC*, 217 F.3d 125, 129, 141 (2d Cir. 2000) (*NextWave IX*), *petition for cert. filed*, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000)

veyance claim in the U.S. Bankruptcy Court to avoid paying the \$4.7 billion it bid to secure licenses in the 1996 C-Block auction.¹⁹ The company alleged that the FCC fraudulently conveyed the licenses by requiring NextWave to pay its winning bid, rather than the value of the licenses at the time the FCC actually issued the licenses six months after the auction.²⁰ The bankruptcy court, which found that the reasonable value of the licenses, when issued, amounted to a little more than \$1 billion, agreed and subsequently avoided the remaining \$3.7 billion NextWave owed to the government.²¹

FCC regulations automatically cancel licenses unless bidders tender their winning bid payments in full and on time.²² The bankruptcy court, nevertheless, ruled that the licensing transaction was a purely fiscal matter and that, as a creditor, the FCC was subject to the modification of the payment amount under the Bankruptcy Code.²³ On appeal, however, the

(No. 00-447) (granting FCC's petition for a writ of mandamus and directing the bankruptcy court to lift the automatic stay in compliance with the Second Circuit's December 22, 1999 *NextWave* holding).

19. See *NextWave I*, 235 B.R. at 265 (upholding the fraudulent conveyance claim). A fraudulent conveyance claim is a bankruptcy action by which a debtor can obtain relief from debts that the bankruptcy court determines were invalid at the time they were incurred. See 11 U.S.C. §§ 544, 548(a)(2)(A) (1994 & Supp. IV 1998).

20. See *NextWave I*, 235 B.R. at 269 (alleging that the amount NextWave bid at the auction should not have to be honored because the licenses were not technically granted to the company until six months later). The court found that NextWave's obligation to the FCC commenced on January 3, 1997, the day the FCC awarded the licenses to NextWave, not when the company won the winning bid at auction in May and July of 1996. See *NextWave II*, 235 B.R. at 273-76.

21. See *NextWave IV.A*, 235 B.R. at 280, 304 (finding that the bid amount did not reasonably reflect the value of the licenses at the time of the auction or at the time the FCC finally conveyed the licenses to NextWave). Avoidance, a legal remedy under the Bankruptcy Code, allows a bankrupt debtor to avoid paying certain debts. See 11 U.S.C. §§ 544(b)(1), 548(a)(1). Throughout the remainder of this Comment, references to the "NextWave court," the "bankruptcy court," and unless identified otherwise, the "court," shall mean the Bankruptcy Court of the Southern District of New York, which is the bankruptcy court that presided over the *NextWave* cases.

22. See 47 C.F.R. § 1.2110(f)(4) (1999). The regulations governing the payment of the C-Block licenses directs that the licenses be conditioned "upon the full and timely performance of the licensee's payment obligations under the installment plan." *Id.* In the event that a licensee fails to make payments as scheduled, the license will automatically cancel. See *id.* § 1.2110(f)(4)(iv).

23. See *NextWave I*, 235 B.R. at 269; *NextWave IV.B*, 235 B.R. at 314; *NextWave V*, 235 B.R. at 316-18; *NextWave VI*, 241 B.R. at 316 (holding that regardless of the Commission's regulatory role in issuing spectrum licenses, it is nonetheless a creditor when it collects money). All property that is deemed part of a bankrupt estate is automatically stayed and receives protection from any legal claims of creditors. See 11 U.S.C. § 362(a)(2) (1994); see also *infra* note 65 and accompanying text (discussing further 11 U.S.C. § 362). The FCC claimed that NextWave's failure to comply with the regulations warranted relief from the stay "to permit the FCC, in effect, to reclaim the 'cancelled' li-

U.S. Court of Appeals for the Second Circuit found that bankruptcy and district court rulings contravened the FCA and the FCC's regulations, and held that no fraudulent conveyance had occurred.²⁴ NextWave then offered to pay the full amount of its debt, but the FCC declared that the licenses had already terminated for nonpayment.²⁵ The bankruptcy court responded by enforcing the automatic stay afforded to NextWave's bankruptcy estate, which effectively nullified the cancellation of the licenses.²⁶ In the May 2000 ruling, the Second Circuit once again struck down the bankruptcy court's decision, holding that the FCC's actions were within its mandated role for regulating spectrum licenses, and, therefore, not subject to the jurisdiction of the bankruptcy court nor any of the Bankruptcy Code's creditor provisions.²⁷ NextWave subsequently appealed to the Supreme Court and petitioned both the FCC and the U.S. Court of Appeals for the District of Columbia Circuit to review the January 12, 2000 Cancellation Order.²⁸

censes." *NextWave V*, 235 B.R. at 316.

24. See *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 62 (2d Cir. 1999) (*NextWave VII*) (holding that the bankruptcy court lacked the power to interfere with the FCC's licensing system because its inherent regulatory role prevented the court from modifying the amount NextWave was obligated to pay for the licenses), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980).

25. See generally *Statement from NextWave Telecom: FCC Rejects \$4.3 Billion Payment From NextWave*, BUS. WIRE, Jan. 13, 2000 [hereinafter *NextWave Statement*] (discussing how NextWave offered to comply with the appellate court's ruling and pay the entire \$4.3 billion for its C-Block licenses); FCC Public Notice, *FCC Informs Court That NextWave Licenses Have Cancelled and Sets Date for Auction*, Jan. 12, 2000, available in 2000 WL 19244 [hereinafter *Cancellation Notice*] (declaring publicly that the NextWave licenses had automatically cancelled under 47 C.F.R. § 1.2110 because payment deadlines were not met); FCC, *Objection of Federal Communication Commission to Debtors' Modified First Amended Joint Plan of Reorganization*, Jan. 12, 2000, available in 2000 WL 19244 [hereinafter *FCC Objection to Modified Plan*] (filing an objection in the bankruptcy court to NextWave's modified reorganization plan because it is premised on the Company's retention of the cancelled licenses). NextWave subsequently petitioned the bankruptcy court to enforce the automatic stay to prevent the FCC from reclaiming the licenses. See *NextWave Statement, supra*; see also *Spectrum Auctions, Technology and the Federal Budget: Hearing Before the Senate Budget Comm.*, 106th Cong. (2000) [hereinafter *Senate Hearing*] (statement of Raymond P. Dolan, Chief Operating Officer, NextWave Telecom, Inc.) (testifying that NextWave is entitled to keep the licenses by virtue of its offer to pay for them in full).

26. See *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 257-58, 267, 274 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*) (holding that the FCC acted as a creditor by finding NextWave in default for not paying for the licenses on time and that the cancellation violated the Bankruptcy Code).

27. See *In re FCC*, 217 B.R. 125, 138-39, 141 (2d Cir. 2000) (*NextWave IX*), *petition for cert. filed*, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447).

28. See Heather Forsgren Weaver, *Court Refuses to Stay Re-Auction, Sends Appeal to FCC*, RCR RADIO COMM. REP., July 10, 2000, available in 2000 WL 9541820. Parties may appeal the FCC's final orders to the U.S. Court of Appeals for the District of Columbia

This Comment focuses on whether the FCC's regulations governing spectrum licenses are subject to bankruptcy law in light of the myriad of issues raised by the *NextWave* case. Part I outlines the government's role in spectrum allocation and the provisions governing assets under the Federal Bankruptcy Code. Part I also details the history of the 1996 C-Block auction and the *NextWave* case. Part II examines the statutory and regulatory purposes of spectrum licensing, the disagreement between the government and the bankruptcy court regarding the FCC's role as regulator and creditor of the licenses, and the conflict between the congressional purposes behind the Bankruptcy Code and the FCA. Part III assesses the impact of the Second Circuit's rulings on commercial spectrum licensees, the telecommunications industry, and the regulation of radio spectrum. This Comment concludes that the U.S. Court of Appeals for the Second Circuit correctly held that the bankruptcy court lacks the power to interfere with or attack the FCC's regulatory power through avoidance remedies or stay provisions in the Bankruptcy Code. The court found that the FCC's actions furthered a congressional mandate to ensure efficient and effective use of the radio spectrum for the public interest and, thus, bankruptcy law cannot impede this power.

I. REGULATED RESOURCES IN THE FREE MARKET: PUBLIC INTEREST AND THE AMERICAN DREAM

Property ownership, especially when in the context of natural resources, has played an important role in the history of this country.²⁹ As the United States industrialized, however, the need for government regulation developed to preserve the public's right to enjoy these resources.³⁰ Congress therefore precluded the private ownership of natural resources because they are essential to the public, yet limited in supply.³¹

Circuit. See 47 U.S.C. § 402(b)(4) (1994).

29. See Brian C. Fritts, Note, *Private Property, Economic Efficiency, and Spectrum Policy in the Wake of the C Block Auction*, 51 FED. COMM. L.J. 849, 877-78 (1998) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 128 (Mark Goldie ed., Guernsey Press Co. 1996) (1690)). In 1690, John Locke argued that because a person has ownership over himself, anything taken from nature and combined with his labor should be deemed his own property. See *id.*

30. Cf. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 & n.5 (1969) (citing a Congressman's call for governmental regulation of radio frequency by the government in order to preserve the public's right to enjoy this medium of communication).

31. See, e.g., *id.* at 376-77, 394-95; *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 50 (2d Cir. 1999) (*NextWave VII*) (analogizing radio spectrum to air space and territorial waters as examples of natural resources that the government cannot own, buy, or sell), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); see also 67 CONG. REC. 5479 (1927) (statement of Rep. White during the enactment of the Radio Act of 1927). Former FCC Chairman Reed Hundt argued that maintaining natural resources

Although the private sector's utilization of natural resources may "maximize[] economic benefits," the government is cautious when it allows personal gain through public property.³²

A. Radio Frequency Spectrum Licenses

Prior to 1927, the private sector managed all non-government use of radio spectrum frequencies and consequently caused a "cacophony of competing voices, none of which could be clearly and predictably heard."³³ Congress resolved that radio spectrum's limited nature and the public's right to benefit from its use required government control.³⁴ The Radio Act of 1927 directed the government to grant spectrum licenses only to those who would serve the public interest, convenience, or necessity.³⁵ The Communications Act of 1934 included a similar requirement that vested the exclusive control of all spectrum frequencies and licenses with the FCC.³⁶ Neither the government nor private entities may own radio spectrum because it constitutes a limited natural resource.³⁷ Therefore, a license conveys no property rights, but only the right to use the spectrum in accordance with the conditions accompanying the license. Furthermore, no license or any associated rights "shall be transferred, assigned, or disposed of" without the express approval of the FCC.³⁸

For many years, the FCC allocated spectrum through comparative

as public property ensured that their benefits were equally accessible to all citizens. See William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 FED. COMM. L.J. 1, 5 (1997).

32. Fishman, *supra* note 31, at 5.

33. *Red Lion Broad. Co.*, 395 U.S. at 375, 376.

34. *Cf. id.* at 375 n.4, 376 n.5 (noting the series of National Radio Conferences between 1922 and 1925 and the call for legislation to limit the number of broadcasters infringing upon the public's right to enjoy and benefit from radio communication).

35. See Radio Act of 1927, ch. 169, 44 Stat. 1162, 1163 (1927) (establishing the Federal Radio Commission and providing it with authority to grant spectrum licenses). The Communications Act of 1934 created the FCC, which assumed spectrum authority. 47 U.S.C. §§ 151, 303 (1994).

36. 47 U.S.C. § 301 (1994) (defining the purpose of the Communications Act as ensuring that the government maintains control of radio spectrum); *id.* § 303 (authorizing the FCC to manage radio spectrum to further the public interest); *id.* § 307 (directing the FCC to allocate spectrum in furtherance of the public interest).

37. See *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 50 (2d Cir. 1999) (*NextWave VII*), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980).

38. 47 U.S.C. § 310(d) (1994). The Supreme Court confirmed that the Commission can determine who gets licenses "only within the scope of its licensing power, *i.e.*, to grant or deny the license on the basis of the situation of the applicant." *In re Pacific Land Sales, Inc.*, 187 B.R. 302, 311 (B.A.P. 9th Cir. 1995) (quoting *Regents of Univ. System of Ga. v. Carroll*, 338 U.S. 586, 602 (1950)). The Ninth Circuit stated: "The public interest, after all, is in the effective use of the available channels, and only to that extent in what particular applicant receives a license." *Id.*

hearings, and granted licenses to parties that the Commission determined would best utilize the spectrum in the "public interest, convenience, and necessity."³⁹ The FCC abandoned this process in 1981 because it was vague and inefficient.⁴⁰

These problems led Congress to amend the FCA and create a lottery system for the allocation of spectrum licenses, which proved to be just as arbitrary and administratively cumbersome as the hearing method.⁴¹ Any party who paid for an application and met the minimum requirements could be eligible for a license because the FCC randomly selected licensees.⁴² This system created a market of speculators, interested only in turning a profit by reselling the licenses.⁴³ While the spectrum ultimately wound up in the hands of those who valued it most, such speculation significantly affected the market price of the licenses and delayed service to the public.⁴⁴ Policymakers were uncomfortable with lottery

39. 47 U.S.C. § 309(a)-(i) (1994 & Supp. III 1997) (describing the application process for licenses).

40. See *Spectrum Report*, *supra* note 8, at 9609-12 (summarizing the history of the FCC's spectrum allocation program and proposing recommendations for improvements). Although the FCC allowed applicants to show why their qualifications surpassed their competitors', the allocation procedure imposed heavy fiscal and administrative burdens on the Commission. See *id.* at 9610. In addition, the procedure sometimes lasted for more than 20 months, delaying financial opportunities in the market. See *id.* at 9609.

41. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 736-737 (1981), amended by, Communications Amendment Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094-95 (1982). In 1991, it took over a year to award a license, at a cost to the Commission of approximately \$190 million in administration expenses. See *In re* Amendment of the Commission's Rules to Establish New Personal Communications Services, Proposed, 7 F.C.C.R. 5676, 5699 n.41 (1992). The Commission became so overburdened with administrative demands that service delays intensified. See *Spectrum Report*, *supra* note 8, at 9610.

42. See Christine E. Enemark, *Adarand Constructors, Inc. v. Peña: Forcing the Federal Communications Commission into a New Constitutional Regime*, 30 COLUM. J.L. & SOC. PROBS. 215, 219 (1997) (explaining how the system remained open to anyone who applied because the Commission could not discriminate against the applicants as long as they met the application's basic requirements).

43. See *Spectrum Report*, *supra* note 8, at 9609-10 (reporting that almost 400,000 firms claimed to be spectrum "providers," but had no intention of providing services to the public). The rapid resale of the licenses created an additional market, which also required FCC regulation. See *id.* at 9609.

44. See *id.* at 9610. Licensing delays lasted for 10 years and "cost the U.S. economy the equivalent of two percent of Gross National Product," calculated in 1991 numbers. *Id.* Application production cost the government approximately \$300 million, and resale transaction costs were approximately \$190 million. See *id.* The fact that the nominal application fees constituted the lotteries' only revenues compounded these expenses. See *id.* Lotteries encouraged greater speculation because of the inexpensive risk and huge potential profits from resale, thus service delays naturally resulted from administrative burdens and multiple license owners. See *id.*; see also H.R. REP. NO. 103-111, at 248-49 (1993), *re-*

winners making a profit on a free public resource as well as the inefficiency created when large amounts of radio spectrum remained unused during the time it would take for these speculators to find buyers for their licenses.⁴⁵

In 1993 Congress amended the FCA to implement competitive bidding for licenses through auctions conducted by the FCC.⁴⁶ Section 309(j) of the FCA charged the Commission with, among other things, the following four objectives:

- (A) the development and rapid deployment of new technologies . . . for the benefit of the public . . . without administrative or judicial delays;
- (B) promoting economic opportunity and competition . . . by disseminating licenses among a wide variety of applicants, including small businesses . . . ;
- (C) recovery for the public of a portion of the value of the public spectrum resource . . . ; and
- (D) efficient and intensive use of the electromagnetic spectrum.⁴⁷

Now the FCC exclusively manages the auctions through an elaborate electronic system that allows qualified entities to bid against each other on a certain category of licenses.⁴⁸ During the first step of this process,

printed in 1993 U.S.C.C.A.N. 378, 575-76 (finding inherent policy problems in competitive hearing and lottery allocations, and concluding that payment for spectrum was in the public interest).

45. See *supra* note 44 and accompanying text (explaining two of the major problems with spectrum license lotteries). Administrative delays prevented the initial lottery winners from receiving licenses for approximately one year and subsequent resales resulted in additional lag time before the services were actually up and running on the spectrum. See *Spectrum Report, supra* note 8, at 9609-10. In its decision to eliminate the lottery system, Congress determined that the lottery system exploited a natural resource, and the fact that unqualified entities received the licenses misconstrued its initial objective. See H.R. REP. NO. 103-111, at 248-49

46. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387-392 (1993) (codified as amended at 47 U.S.C. § 309(j) (1994 & Supp. III 1997)). Congress intended for auctions to reconcile the problems associated with the lottery and competitive bidding systems by attaching a cost to the spectrum in order to dissuade speculators and place the licenses in the hands of those who would efficiently use the spectrum. See H.R. REP. NO. 103-111, at 246, 253; see also *Second Report and Order, supra* note 8, at 2360, para. 70 & n.64. In addition, the public would receive compensation for the use of public airwaves. See *Spectrum Report, supra* note 8, at 9612.

47. 47 U.S.C. § 309(j)(3)(A)-(D).

48. See *id.* § 309(j)(3),(4); see also 47 C.F.R. §§ 1.2101, 1.2103, 1.2105 (1999) (outlining the bidding application procedures and general auction designs for all types of auctioned spectrum); *id.* § 1.2109 (providing the guidelines for an auctioned license grant, denial, disqualification, and default); *id.* §§ 1.1911, 1.2106, 1.2107 (listing the requirements and FCC procedures regarding payment for licenses); *id.* §§ 24.302, 24.303, 24.711 (pro-

the FCC announces an upcoming auction in an official public notice, which specifies the spectrum geographically and provides guidelines for each licensee's application.⁴⁹ The Commission may require applicants who are elected to participate in the auction to make an upfront payment based on the amount of spectrum for which they intend to bid.⁵⁰ This payment is intended to ensure that only serious bidders participate in the auctions.⁵¹

A winning bid, however, does not automatically result in a license grant because the bidder has only won the exclusive right to apply for the license.⁵² Upon submitting its license application, the winning bidder must make a nonrefundable down payment that equals a certain percentage of its total bid.⁵³ The Commission, by a subsequent public notice,

viding the types of bidding auctions and accompanying rules FCC uses to award Personal Communications Services (PCS) licenses).

49. See *Second Report and Order*, *supra* note 8, at 2376, paras. 164-65. The public notice will be issued not less than 75 days before the auction and normally contains the following information: "the license[s] to be auctioned and the time, place and method of competitive bidding to be used, including applicable bid submission procedures, bid withdrawal procedures and penalties[.]" timelimes for filing various forms, fees and upfront and down payments. *Id.* para. 164. The FCC would subsequently provide an auction information package to prospective bidders. See *id.* Bidders must submit auction applications and bidder certification forms that identify the licenses for which the applicant seeks to bid, the applicant's name, those who are authorized to make or withdraw bids, certifications that the applicant is "legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the [FCA]" and any of the Act's other applicable service-specific qualifications, and certification that the applicant satisfies any financial requirements. *Id.* at 2376-77, para. 166 (footnotes omitted). The Commission then issues a second public notice, listing all defective applications, and requests corrections from the applicants. See *id.* at 2377, para. 168. The third public notice lists the applicants that are eligible to bid and requires such applicants to submit the full amount of their upfront payments. See *id.*

50. See *id.*; 47 C.F.R. §§ 1.2106, 24.306(a) (discussing the conditions under which the Commission could require upfront and/or down payments); see also 47 U.S.C. § 309(j)(4) (authorizing the Commission to establish regulations regarding alternative payment methods); *Second Report and Order*, *supra* note 8, at 2378, para. 171. The FCC will determine the amount of the upfront payment on an auction-by-auction basis to ensure its reasonableness and applicability to the type of licenses being auctioned. See *id.* The upfront payment is also designed to subsidize any future penalties that may arise if a bidder withdraws or defaults during the process. See *id.* at 2379, para. 176.

51. See *Second Report and Order*, *supra* note 8, at 2378, para. 171. The Commission determined that upfront payments "[are] necessary to deter frivolous or insincere bidding." *Id.*

52. See generally *id.* at 2383, para. 199 (indicating that the FCC will not automatically award the licenses at the close of the auction because the winning bidder must still tender the down payment and file a long-form application that the Commission will either approve or deny).

53. See *id.* at 2381, para. 189; 47 C.F.R. §§ 1.2107(b), 24.306(b) (requiring each winning bidder to make a down payment equal to 20% of its total winning bid).

then announces the highest bidders and the licenses for which they bid.⁵⁴ At this time, interested parties may provide specific allegations as to why a grant of an application to the winning bidder would be inconsistent with the public interest.⁵⁵ Next, the Commission evaluates the winning bidder's application in light of its qualifications and any petitions that challenge them, and either grants or denies the license application.⁵⁶ After the FCC grants an application, it awards the license upon full payment of the winning bid.⁵⁷

B. The U.S. Bankruptcy Code: Furthering the American Dream Through Equitable Protection of Property

1. Protecting the Estate for Reorganization and a Fresh Start

The Bankruptcy Code permits a debtor "to carry on and rebuild his life" by making a "fresh start," while at the same time protecting a creditor from significant losses by an insolvent debtor.⁵⁸ Property, whether

54. See generally *Second Report and Order*, *supra* note 8, at 2383, paras. 199-202. At this time, the winning bidders must submit long-form applications that are tailored to the type of service that they will offer through the licenses. See *id.* at 2383, para. 199 n.151.

55. See 47 U.S.C. § 309(d)(1) (Supp. III 1997). The public notice will announce a filing window when parties in interest may submit petitions to deny the long-form application. See *id.*; see also 47 C.F.R. § 1.2108(b) (1999). FCC regulations define a "party in interest" as "a person aggrieved or whose interests are adversely affected by the Commission's authorization" of an application. *Id.* § 1.120(b)(1) (1999). Petitioners must set forth specific allegations of fact sufficient to show that "a grant of the application would be prima facie inconsistent" with the public interest. 47 U.S.C. § 309(d)(1). Applicants are then permitted to file responses, which will be considered in the final analysis. See *id.*

56. See *Second Report and Order*, *supra* note 8, at 2383, paras. 199-200. If there are no "substantial and material question[s] of fact" in the application or any other pleading, and granting the application would be in the public interest, the FCC will grant the license. 47 U.S.C. § 309(d)(2); see also *id.* § 309(j)(5) (1994) (prohibiting the FCC from granting a license unless the application is found to be in the public interest pursuant to 47 U.S.C. § 309(a) and meets specific qualifications pursuant to 47 U.S.C. §§ 308(b), 310). In addition, § 308 requires that license applications set forth facts regarding the applicant's "citizenship, character, and financial, technical, and other qualifications," as well as any additional information the Commission may require in determining whether to grant or deny the license. *Id.* § 308(b); see also *id.* § 310 (addressing limitations on licenses owned or held by foreign entities).

57. See *Second Report and Order*, *supra* note 8, at 2383, para. 199.

58. *In re Andrews*, 80 F.3d 906, 909-10 (4th Cir. 1996). The Bankruptcy Code's policy not only prevents the debtor from having to liquidate all assets, it further permits his successful rehabilitation, which necessarily involves balancing the estate's interests with those of the creditor. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-28 (1984); *In re Chateaugay Corp.*, 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996) (noting that reorganization of a company favors the public and the government because it preserves jobs and the local economy, and arguing that persons or legal entities who file a petition under the Bank-

tangible or intangible, generally plays a central role in bankruptcy proceedings.⁵⁹ Section 541 of the Bankruptcy Code identifies what property becomes part of the bankruptcy estate.⁶⁰ Specifically, such property includes “[a]ll interests of the debtor . . . as of the commencement of the case” and that which “the estate acquires after the commencement of the case.”⁶¹ The Code protects a debtor’s property by halting any actions against the estate, suspending debts owed to creditors, and either modifying payment plans or granting a total or partial avoidance of the debts.⁶² The Code similarly protects creditors, even when the estate is not large enough to cover all debt in full, by distributing the debtor’s property fairly to satisfy the creditors’ claims.⁶³

The automatic stay constitutes one of the basic debtor protections within the Bankruptcy Code.⁶⁴ Section 362(a) stays debt collection efforts, foreclosures, and actions to possess or control property of the es-

ruptcy Code should be permitted to enjoy its benefits); *see also* 11 U.S.C. § 101(13) (1994) (defining debtor as “a person or municipality concerning which a [bankruptcy] case . . . has been commenced”); *id.* § 101(10)(A) (defining a “creditor” as one who “has a claim against a debtor that arose at the time of or before” such debtor’s petition for relief under bankruptcy law).

59. *See supra* note 58 and accompanying text (recognizing that the value of all assets, including the debt owed on them, needs to be governed by a body of law that can equitably determine the best way to retain such value in the best interests of all the parties associated with the assets).

60. 11 U.S.C. § 541 (1994 & Supp. IV 1998). When the Bankruptcy Code fails to do so, state law must define the property in which the debtor actually has an interest. *See In re Ben Kennedy & Assocs.*, 40 F.3d 318, 319 (10th Cir. 1994); *see also In re White*, 851 F.2d 170, 173 (6th Cir. 1988). Once a debtor’s interests are determined, federal bankruptcy law dictates the extent to which those interests become part of the estate. *See In re Omegas Group, Inc.*, 16 F.3d 1443, 1450 (6th Cir. 1994).

61. 11 U.S.C. § 541(a)(2), (7). Property includes, among other things: bank deposits and accounts, checks, insurance owned by debtor, land sale contracts, leased property, accounts receivable, airport slots, assets of a corporation in which the debtor is a shareholder, cars and other vehicles, community property, crops, deposits, escrow funds, stock exchange seats, franchises, licenses and permits, livestock, marital property or obligations such as alimony, and various personal property. For a complete listing, see 11 U.S.C.A. § 541 and accompanying notes (Supp. 2000).

62. 11 U.S.C. § 362(a) (1994); *id.* § 1129 (detailing the requirements of a reorganization plan).

63. *Id.* § 1129(a)(5)(A)(ii) (ensuring that the bankruptcy plan is “consistent with the interests of creditors and equity security holders and with public policy”); *see id.* § 1129(b)(1) (requiring the court to confirm a reorganization plan, upon request, if it is fair and equitable to each class of impaired claims or interests, regardless of whether a creditor accepts the plan).

64. *Id.* § 362(a) (stating that a petition filed under the Code or an application filed under the Securities Investor Protection Act of 1970 may operate as a stay); *see also* H.R. REP. NO. 95-595, at 340-44 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-6300; S. REP. NO. 95-989, at 54-55 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840-41 (providing the legislative history behind 11 U.S.C. § 362).

tate once the debtor has filed a petition for bankruptcy.⁶⁵ The stay helps to preserve the assets' maximum values for the benefit of the debtor and its creditors.⁶⁶ The stay also relieves the debtor or the bankruptcy trustee from further financial burdens while they plan reorganization, repayment of debts, and seek other remedies to further the Code's purposes.⁶⁷

One such remedy allows the debtor to avoid the full or partial amount of a debt if such obligation resulted from a fraudulent conveyance.⁶⁸ The petitioner must prove he incurred an obligation when he was engaged in or was about to engage in a transaction where his remaining assets were unreasonably small in relation to the cost of the transaction for which he allegedly did not receive a reasonably equivalent value.⁶⁹ In deciding such a case, the court must ultimately determine the value of the asset.⁷⁰

2. Government as a Regulator and the Exemption from Bankruptcy Provisions

Federal courts recognize the power of the Bankruptcy Code to protect

65. 11 U.S.C. § 362(a)(1)-(8). Under this section, the commencement or continuation of the following actions, among others, against a debtor are stayed: "judicial, administrative, or other action or proceeding" that began or could have begun before the bankruptcy, and any claims prior to bankruptcy; enforcement of a judgment obtained before bankruptcy; obtaining or exercising control of estate property; creation, perfection or enforcement of a lien against estate property; collection, assessment or recovery of claims that arose before bankruptcy. *Id.* § 362 (a)(1)-(6).

66. See 3 COLLIER ON BANKRUPTCY ¶ 362.03[2] (Lawrence P. King ed., 15th ed. rev. 1999) (explaining that the stay is particularly important because without it, the debtor's assets may be taken apart or destroyed).

67. *E.g.*, 11 U.S.C. § 363(b), (c)(1) ("[T]he trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business . . ."); see also *id.* § 1108 (allowing the trustee to operate the debtor's business unless the court orders otherwise). Case law has determined what constitutes an "ordinary course of business" transaction by developing a "vertical test" and a "horizontal test" that are based on business objectives and the Bankruptcy Code's policy of maintaining the estate's value. *In re Lavigne*, 114 F.3d 379, 384, 385 (2d Cir. 1997); see also *In re H & S Transportation Co.*, 115 B.R. 592, 598, 599 (M.D. Tenn. 1990). Any transaction not made in the "ordinary course of business" requires a hearing. 11 U.S.C. § 363(b)(1). A debtor may cure defaults on pre-petition claims by reversing the event that caused the default, such as a payment deadline, and reinstating the obligation. See generally *id.* § 1123 (a)(5)(G) (allowing the implementation of a debtor's reorganization plan through "curing or waiving of any default"); *id.* § 1124(2)(A) (allowing a reorganization plan that cures defaults occurring before or after bankruptcy regardless of any contract or law that entitles a creditor to accelerated payment); S. REP. NO. 95-989, at 120, reprinted in 1978 U.S.C.C.A.N 5787, 5906 (explaining the congressional intent of 11 U.S.C. § 1124(2)).

68. See 11 U.S.C. § 544(b) (Supp. IV 1998); *id.* § 548 (b) (1994 & Supp. IV 1998). A bankrupt entity must first assert a fraudulent conveyance claim against a creditor. See *supra* note 19 and accompanying text (defining a fraudulent conveyance claim).

69. See 11 U.S.C. § 548(a)(1).

70. See *In re Curtina Int'l., Inc.*, 23 B.R. 969, 974 (Bankr. S.D.N.Y. 1982).

a debtor's property, but they also consider "the countervailing policy favoring state control of natural resources."⁷¹ "Absent clear intent by Congress to place control of natural resources in the hands of bankruptcy courts," courts generally have no authority to issue injunctions against a debtor's government regulated property.⁷² Furthermore, any court-ordered remedy applied to such property is subject to attendant regulations.⁷³ The Bankruptcy Code expressly provides that certain debts owed to the government must be paid, notwithstanding a grant of avoidance or similar pardon to the debtor.⁷⁴ Section 362(b)(4) of the Bankruptcy Code serves a similar purpose by granting an exception to the automatic stay for government regulatory actions or proceedings.⁷⁵ The action, however, must involve a regulatory enforcement; it must not be used to advance the government's pecuniary interests.⁷⁶ The courts also consider whether the government's assertion of regulatory power furthers public policy, as opposed to merely adjudicating the debtor's private rights.⁷⁷

C. Licenses in Bankruptcy Proceedings

Bankruptcy courts recognize that licenses, in many instances, come to the estate encumbered with specific conditions and restrictions imposed

71. *In re* D.H. Overmyer Telecasting Co., 35 B.R. 400, 402 (Bankr. N.D. Ohio 1983) (discussing *California Oil Co. v. Huffstutler*, 332 F.2d 596 (5th Cir. 1963), in which the court held that actions involving regulated state property filled with oil reserves could not be stayed by a bankruptcy court).

72. *Id.*

73. *See* *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 130-33 (1945) (condemning a state court's annulment of a radio station transfer that returned all assets to the licensee because the court had no authority over claims relating to FCC licenses). The Supreme Court determined that the FCC's regulatory power controls any and all actions pertaining to spectrum licenses, and, thus, remedies provided by the courts must accommodate that purpose. *See id.*

74. *See* 11 U.S.C. § 362(b)(9) (1994) (preventing a stay from interfering with the government's tax collection procedures); *id.* § 362(b)(8) (allowing the government to enforce Housing and Urban Development mortgages); *id.* § 365(o) (requiring that the trustee honor the debtor's commitments to federal depository institutions' regulatory agencies in an order to maintain the governing institution's capital); *id.* § 523(a)(1) (preventing the discharge of certain taxes owed to the IRS); *cf.* 37 U.S.C. § 302(i) (1994) (exempting refunds of special retention pay given to medical military officers from the Bankruptcy Code).

75. 11 U.S.C. § 362(b)(4) (Supp. IV 1998). Section 362(b)(4) may exempt debt that resulted from the enforcement of the government's regulatory power although no body of law provides an express exemption. *See, e.g.,* *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1025 (2d Cir. 1991).

76. *See In re* Universal Life Church, Inc., 128 F.3d 1294, 1297, 1299 (9th Cir. 1997); *see also* S. REP. NO. 95-989, at 1, 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838 (explaining the scope of 11 U.S.C. § 362(b)(4)).

77. *See, e.g., In re* Yellow Cab Coop. Assoc., 132 F.3d 591, 597 (10th Cir. 1997).

by the issuing entity.⁷⁸ Several courts have held that, in bankruptcy proceedings, the estate takes the license with accompanying restrictions or conditions because “the estate may take no greater interest than that held by the debtor.”⁷⁹ Thus, in most instances, the bankruptcy estate or creditors that received transferred licenses, permits, or leases must honor restrictions on use, back taxes, levies, or fees that accompany the property.⁸⁰

The Federal Communications Act authorizes the Commission to award and rescind spectrum licenses.⁸¹ Yet when the licenses become a

78. Cf. *Board of Trade of Chicago v. Johnson*, 264 U.S. 1, 8-9, 12 (1924); *Hyde v. Woods*, 94 U.S. 523, 524-25 (1876) (upholding a stock exchange board’s constitutional provision that required proceeds from the assignment of a bankrupt member’s seat to go to his creditors who were board members before going to nonmember creditors). In both decisions, the Supreme Court “app[lied] property rights analyses in finding that restrictions imposed by a debtor’s transferor are valid in bankruptcy.” *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986).

79. *In re Farmers Markets, Inc.*, 792 F.2d at 1403. In *Farmers Markets*, the court held that “the debtors’ estates took the liquor licenses subject to the [s]tate’s right to payment” of delinquent taxes. *Id.* at 1404; see also 11 U.S.C. § 541(c)(1)(A) (1994) (stating that the debtor’s property interest may transfer to the bankruptcy estate notwithstanding any law that “restricts or conditions transfer of such interest by the debtor”). This technical provision ensures a seamless transfer of property from the debtor to the estate. Section 541(c)(1)(A) applies to conditions on an asset that restricts transferability, as opposed to conditions that pertain to current possessory assets or the acquisition process of assets. See, e.g., *In re Farmers Markets, Inc.*, 792 F.2d at 1402 (quoting *In re Polycorp Assocs., Inc.*, 47 B.R. 671, 672 (Bankr. N.D. Cal. 1985): “The plain meaning of [the legislative history] is that 541(c)(1)(A) is intended to eliminate barriers to the transfer of property to the estate, and nothing more.”).

80. See 5 COLLIER ON BANKRUPTCY ¶ 541.07[2] (Lawrence P. King ed., 15 ed. rev. 1999) (stating that “a trustee must conform in all respects to a license which comes into the estate upon the bankruptcy of a licensee [because] the trustee occupies the same position as the debtor” and is thus responsible for all burdens that accompany the license); see generally *In re Gull Air, Inc.*, 890 F.2d 1255, 1263-64 (1st Cir. 1989) (holding that a debtor airline’s proprietary interest in airport landing slots issued by the Federal Aviation Administration (FAA) hinged upon a rule revoking the slots pursuant to FAA regulations, notwithstanding the bankruptcy ruling that counted them as assets of the estate); *In re Farmers Markets, Inc.*, 792 F.2d at 1404 (concluding that taxes on liquor licenses must be paid upon transfer to the bankruptcy estate); *In re Professional Bar Co.*, 537 F.2d 339, 340 (9th Cir. 1976) (en banc) (finding that the value of the bankrupt estate equaled the debtor’s liquor licenses minus any back taxes or fees owed on those licenses, and that any claims against the estate are limited to this difference in value); *In re Access Beyond Technologies, Inc.*, 237 B.R. 32, 38 (Bankr. D. Del. 1999) (stating that a Chapter 11 trustee assumed all rights and limitations that the debtor-licensees had in patent license agreements, which included restrictions on alienation without the licensor’s prior approval).

81. 47 U.S.C. § 301 (1994) (providing that the FCC grants licenses with its exclusive authority under the FCA and the rules promulgated thereby); *id.* § 151 (1994 & Supp. III 1997) (stating that the FCC “shall execute and enforce the provisions of [the Communications Act of 1934]”); *id.* § 303 (1994) (outlining the FCC’s authority regarding radio spectrum licenses); *id.* § 307(c) (1994 & Supp. III 1997) (outlining the terms of allocating spec-

central factor in bankruptcy proceedings, the Commission "is obliged to reconcile its policies under the Communications Act with the policies of other federal laws and statutes, including the federal bankruptcy laws in particular."⁸² In several cases, the FCC's initial role is to grant or deny a license transfer occurring under the direction of a bankruptcy court, without addressing whether the licenses were included in the distribution or reorganization of the debtor's estate.⁸³ Under the FCA, licenses do not confer any property rights on the licensees per se, and the supremacy of the government's regulatory power to prohibit the transfer of licenses as property to the bankrupt estate is affirmed.⁸⁴ The FCC's normal procedure, however, is to recognize licenses as assets in the estate because the Commission retains final approval of who uses the licenses.⁸⁵

trum licenses); *id.* § 309 (1994 & Supp. III 1997) (outlining the conditions attached to spectrum licenses); *see also* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553 (1990) (stating that Congress vested the FCC with exclusive power to grant licenses "based on public convenience, interest, or necessity"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (noting that Congress expected the FCC to be the only agency with jurisdiction and "regulatory power over all forms of electrical communication").

82. *In re Dale J. Parsons, Jr.*, 10 F.C.C.R. 2718, 2720, para. 11 (Mar. 7, 1995) (mem.); *see also In re O.D.T. Int'l*, 9 F.C.C.R. 2575, 2576, para. 7 (June 9, 1994) (mem.); *In re Arecibo Radio Corp.*, 101 F.C.C.2d 545, 550 & n.12 (1985). Courts recognize that the FCC's authority concerning spectrum rights requires a careful balance between the rights of bankrupt licensees and their creditors. *See LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (1974). Although "the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest[,] the Commission must also consider the Bankruptcy Code's inherent protection of innocent creditors. *Id.* The FCC agreed to continue to defer generally to bankruptcy laws on many matters, assuming that the transferee in bankruptcy proceedings is qualified to hold a license. *See In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, 10 F.C.C.R. 403, 471-72, para. 135 (Apr. 20, 1994) [hereinafter *Fifth Memorandum Opinion & Order*].

83. *See, e.g., In re Central Ark. Broad. Co.*, 68 F.3d 213, 214-15 (8th Cir. 1995) (per curiam) (finding that the court should determine whether FCC licenses constitute property of the estate, but that such a finding does not negate the fact that subsequent transfer of the licenses as a result of bankruptcy is contingent upon the Commission's approval); *In re PBR Communications Sys., Inc.*, 172 B.R. 132, 134 (Bankr. S.D. Fla. 1994) (finding that a licensee's proprietary interest in a license "does not allow any party to assert any rights contrary to the FCC's regulatory powers").

84. *See, e.g., In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400, 401, 403-04 (Bankr. N.D. Ohio 1983) (holding that FCC licenses could not be included in the bankruptcy estate because they were rights to use the public radio frequency and not freely transferable property).

85. *See Central Ark. Broad. Co.*, 68 F.3d at 214-15. Whether spectrum licenses can actually be considered as property of a bankrupt estate presents a broad question. *See id.* at 214-15; *In re Merkley*, 94 F.C.C.2d 829, 837 (1983). *But see D.H. Overmyer Telecasting Co.*, 35 B.R. at 401, 404 (finding spectrum licenses did not constitute property of the estate as commonly defined). The *Overmyer* court held that the licenses conveyed "a right granted by a government agency, subject to the use restrictions imposed by that agency." *Id.* at 401. The court expressed concern that a licensee may use bankruptcy law to restrict

Generally, the Commission is not financially implicated in a licensee's bankruptcy proceeding because the licenses are paid for in full and, thus, its regulations are almost always accommodated.⁸⁶ Installment plans and the Commission's new role as a lender, however, have challenged the Commission's power in the most recent wave of C-Block license bankruptcies.⁸⁷

D. Opportunities for the Little Fish in the Big Sea: FCC Offers Installment Plans to Enable Small Companies to Compete in the Personal Communications Services Market

In response to the concern that competitive bidding could prevent small entrepreneurs from participating in the Personal Communications Services (PCS) market,⁸⁸ Congress directed the FCC to auction specific blocks of spectrum to qualified small businesses and to offer flexible payment plans.⁸⁹ In May and July of 1996, the FCC's C-Block auction of PCS licenses resulted in bids that aggregated \$10.2 billion.⁹⁰ Successful

the governing agency's regulatory power and enhance his own property rights as a debtor, which directly violates the Bankruptcy Code. *See id.* at 404.

86. *See Fifth Memorandum Opinion and Order*, *supra* note 82, at 471-72; para. 135; *Merkley*, 94 F.C.C.2d at 837.

87. *See 3 FCC Commissioners Defend Wireless Auction Process*, COMM. DAILY, Sept. 23, 1999, available in 1999 WL 7580438; Jeffrey Silva, *Is FCC's Mission Changing?*, RCR RADIO COMM. REP., May 3, 1999, available in 1999 WL 7791035; Debra Wayne, *C-Blockers Dispute UCC Forms Existence: Without Them, Does FCC Have First Lien Rights?*, RCR RADIO COMM. REP., Sept. 15, 1997, available in 1999 WL 8325457.

88. *See HARRY NEWTON*, NEWTON'S TELECOM DICTIONARY 629 (15th ed. 1999). PCS encompasses a broad range of wireless services that allow people or equipment to communicate regardless of where they are located. *See id.* Generally, PCS may be used with lightweight phones or hand-held computers, via data and voice communication technology that is newer than cellular technology. *See id.* at 624, 629. The system compares with cellular technology, but is digital, low power, operates on a higher frequency than cellular, and is capable of offering some digital messaging on the telephone's screen. *See id.* at 624. The premise behind PCS is that "phones are cheaper, have less range, are digital; the cells [are] smaller and closer together and the airtime would be cheaper also." *Id.* The FCC awards the C-Block to 30 MHz PCS carriers serving a geographic area in the 1895-1910 MHz frequency, paired with 1975-1990 MHz frequency. *See id.*

89. *See* 47 U.S.C. § 309(j)(3)(B), (j)(4)(A) (1994).

90. *See In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 266 (Bankr. S.D.N.Y. 1998) (*NextWave I*) (stating that 90 bidders won the right to apply for 493 licenses at the C-Block auction). Two-hundred and fifty-five bidders out of an initial pool of 493 "qualified to bid in the auction, the largest number of bidders in any FCC auction thus far." FCC Wireless Telecommunications Bureau, *Broadband Personal Communications Services "C Block" Auction Closes* (visited Oct. 11, 2000) <http://www.fcc.gov/Bureaus/Wireless/News_Releases/1996/nrwl6021.txt>. The FCC issued this news release on May 6, 1996. As of August 31, 1997, the FCC garnered revenues in excess of \$12 billion from successful auctions that offered installment plans. *See Spectrum Report*, *supra* note 8, at 9603 & n.2.

bidders had to pay the Commission ten percent of the bid in cash, and the remaining ninety percent in deferred installments over ten years.⁹¹ By the end of the auction, the FCC had already announced plans to auction additional PCS licenses in the D, E, and F blocks, and accepted final bids for these blocks through January 14, 1997.⁹² The winning bids on the latter blocks were significantly lower than those of the C-Block, despite the fact that they covered many of the same geographic areas.⁹³ This decrease was not attributed to a decrease in the value of the PCS market, but to the extraordinarily high bids generated in the C-Block auction.⁹⁴ Winning bidders in the C-Block licenses had artificially raised the premium on the spectrum, which turned out to falsely reflect the actual market value of PCS spectrum.⁹⁵

91. See 47 C.F.R. §§ 1.2110(f), 24.711(b) (1999); *In re* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, 9 F.C.C.R. 5532, 5593, para. 138 (July 15, 1994) [hereinafter *Fifth Report and Order*]; see also *NextWave I*, 235 B.R. at 266.

92. See *NextWave I*, 235 B.R. at 266; see also *In re* Amendment of the Commission's Rules Regarding Installment Payment Fin. for Personal Communications Servs. (PCS) Licensees, 12 F.C.C.R. 16436, 16441, para. 9 (Oct. 16, 1997) [hereinafter *Restructuring Order*]. The FCC conducted its PCS C-Block auctions on May 6, 1996 and July 16, 1996. See *NextWave I*, 235 B.R. at 266. The D, E, and F Block auctions commenced on August 26, 1996. See *id.* Although the Commission granted licenses to 90% of the C-Block winners on September 17, 1996, some companies, such as NextWave, did not receive approval until January 3, 1997. See *id.*

93. See *NextWave I*, 235 B.R. at 266-67 & n.3. (noting that the FCC allocated the C, D, E, and F Blocks to specific geographic areas called BTAs, or Basic Trading Areas). The value of the licenses is determined, in part, by the amount of people served within a BTA, referred to as "Pops," and the capacity of the allocated spectrum to cover the BTA measured in megahertz. *Id.* at 267 n.3. NextWave bid an average of \$1.43 per MHz-Pops, while the winning bids in the D and E blocks averaged \$.35 per MHz-Pops and the F block averaged approximately \$.246 per MHz-Pops. See *id.*

94. See Fritts, *supra* note 29, at 863-64. As newcomers to the market, many of the C-Block bidders tended to overbid; consequently, many C-Block bidders gauged the price of spectrum inaccurately. See *id.* at 863. In addition, payments on the winning bids were deferred for 10 years at below market interest rates, which most likely curbed any incentive to bid conservatively at the auction. See *id.* A serious problem, however, revolved around the inability of companies such as NextWave to recognize the actual upfront costs of creating and implementing a system and failure to calculate what they could actually afford to bid. See *id.* C-Block bidders also ignored the two previous A and B Block auctions that allocated spectrum in the same markets, and chose to purchase C-Block licenses at more than triple the amount carriers paid in the A and B Blocks. See Marc Cabi, *Finding a Resolution for the FCC's C-Block PCS Auction Debacle*, RCR RADIO COMM. REP., Sept. 15, 1997, available in 1997 WL 8325499.

95. See *supra* note 94 and accompanying text (discussing C-Block bidders); see also *In re* NextWave Personal Communications, Inc., 235 B.R. 277, 286, 298-99 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*) (explaining that many of the high bidders in the C-Block auction could not obtain financing due to the fact that the investment banking community believed, based on the lower winning bids in the D/E/F Block auction, that the cost of the C-Block licenses was "grossly excessive" compared to their market value). NextWave

On March 13, 1997, the FCC suspended the installment payment deadlines for C-Block licensees because several companies sought to modify their payment obligations.⁹⁶ After a lengthy investigation, the FCC reinstated the C-Block payment deadlines and allowed the licensees to choose one of three new payment options to ease the financial burdens.⁹⁷ The options consisted of: (1) disaggregation and return of one half of the licensees' spectrum to the FCC for re-auction, (2) amnesty in the form of debt forgiveness in exchange for all of the licensees, and (3) prepayment.⁹⁸ The FCC reinstated the payment deadline as July 31, 1998, with a ninety-day grace period to October 29, 1998.⁹⁹ Licensees who failed to resume payments would be in default and their licenses would automatically cancel.¹⁰⁰ Some companies chose one of the options,

needed approximately \$700 million in public financing to implement its business plan. *See id.* at 286. Providers flooded the PCS market, most of which received their licenses at the same time as some of the C-Block licensees, but without the same amount of debt. *See* Deborah L. Schrier-Rape & Jason S. Brookner, *The FCC as Creditor: Attempts to Legislate Out of the Bankruptcy Court* (visited Sept. 18, 2000) <<http://www.abiworld.org/legis/reform/dsrsp.html>>. C-Block winners sought approximately \$1.6 billion from outside investors to assist in building facilities, but the financial markets never provided financing. *See NextWave IV.A*, 235 B.R. at 286.

96. *See In re Installment Payments for PCS Licenses*, 12 F.C.C.R. 17,325, 17,326 (Mar. 31, 1997). The Wireless Telecommunications Bureau suspended installment payments so that the FCC could consider the many payment proposals offered by financially strapped C-Block licensees. *See Spectrum Report*, *supra* note 8, at 9632.

97. *See Restructuring Order*, *supra* note 92, at 16,439, para. 6. The payment options resulted from the FCC Wireless Bureau's request for public comment on payment restructuring and subsequent public forum attended by more than 150 representatives from the industry and financial markets. *See Spectrum Report*, *supra* note 8, at 9632-33. The Bureau received more than 100 comments and an additional 200 *ex parte* filings in response to the request. *See id.* at 9633. The October 16th report reinstated the installment schedule and set the next deadline for March 31, 1998. *See Restructuring Order*, *supra* note 92, at 16,437, para. 1. The deadline for C-Block licensees to choose one of three payment options outlined in the report expired on January 15, 1998. *See id.* at 16,439, para. 6.

98. *See Restructuring Order*, *supra* note 92, at 16,439, para. 6. Following a series of comments on the new installment schedule, the Commission modified the October 16 *Restructuring Order* to give additional flexibility to companies. *See In re Amendment of the Commission's Rules Regarding Installment Payment Fin. for Personal Communication Servs. (PCS) Licensees*, 13 F.C.C.R. 8345, 8346, para. 2, 8350-51, paras. 11-15 (Mar. 24, 1998) [hereinafter *Reconsideration Order*]. Pursuant to the order, companies could also opt to continue payment on the established installment plan. *See id.* at 8347, para. 5.

99. *See* Wireless Telecomm. Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees, 13 F.C.C.R. 7413, 7413-14 (Apr. 17, 1998); *see also* 47 C.F.R. § 1.2110(f)(4)(i)-(ii) (1999); Wireless Telecomm. Bureau Provides Guidance on Grace Period and Installment Payment Rules, 13 F.C.C.R. 18,213, 18,214-15 (Sept. 18, 1998) [hereinafter *Guidance on Grace Period*] (governing the rules for installment payment grace periods including the amendment in the *Reconsideration Order* allowing a 90-day grace period for C-Block payments); *Reconsideration Order*, *supra* note 98, at 8347, para. 6, 8353, para. 23 (noting the postponement of previous election dates).

100. *See* 47 C.F.R. § 1.2110 (f)(4)(i)-(iv) (1999); *Guidance on Grace Period*, *supra* note

but many companies believed they would still be unable to remain financially stable under any of these conditions, and either returned the licenses or filed for bankruptcy.¹⁰¹

E. The NextWave Case

The largest C-Block license holder to file a fraudulent conveyance action against the FCC is NextWave Personal Communications, Inc.¹⁰² In July 1996, after bidding \$4.74 billion for sixty-three licenses in the C-Block auction, the company became a winning bidder, and paid \$474 million to satisfy the ten percent down payment requirement.¹⁰³ NextWave arranged to pay the remaining \$4.26 billion in installment payments and, in January 1997, the Commission approved the company's license applications and awarded the licenses to NextWave.¹⁰⁴

The low bidding in the D, E, and F block auctions had already begun and significantly drove down the value of the C-Block licenses to only thirteen percent of NextWave's bid price, which adversely affected the company's ability to attract investors.¹⁰⁵ NextWave claimed it suffered additional losses because the company was unable to build its PCS sys-

99, at 18,214 (reiterating that C-Block licenses will automatically cancel if a licensee's installment payment is more than 180 days delinquent); *see also In re Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 14 F.C.C.R. 6080, 6082, paras. 4-5 (Apr. 2, 1999) [hereinafter *1999 Delinquency Order*]; *In re Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments*, 13 F.C.C.R. 22,071, 22,071, para. 1 (Oct. 29, 1998) [hereinafter *1998 Delinquency Order*]. The FCC denied the requests of four licensees for deadline extensions because their situations were no different than any other financially strapped licensees. The Commission determined that strict adherence to the October 29, 1998 deadline was essential to maintaining the integrity of the rules. *See 1998 Delinquency Order, supra* at 22,072-74, paras. 3-6.

101. *See FCC Releases Official C-Block Election Results; Numbers Still Likely to Change Via Bankruptcy Cases*, PCS WEEK, June 24, 1998, available in 1998 WL 8015944; Shrier-Rape & Brookner, *supra* note 95, at 4.

102. *See In re NextWave Personal Communications, Inc.*, 235 B.R. 277, 283 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*) (naming Sprint PCS and AT&T Wireless PCS as the largest PCS licensees, holding A, B, D, and E Block licenses amounting to 99% and 93% of total U.S. Pops eligible for service respectively). NextWave was the third largest holder of PCS spectrum with 61% of the populations covered, followed by OmniPoint PCS Entrepreneurs at 36%, and Western Wireless and PrimeCo. at 23%. *See id.* at 283-84. As of 1999, all these companies held licenses in the C, D, E, and F Blocks. *See id.*

103. *See In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 266 (Bankr. S.D.N.Y. 1998) (*NextWave I*).

104. *See id.* at 266 (explaining that the FCC awarded the licenses in January 1997, but the company did not execute the corresponding promissory notes for the remaining 90% of the bid until February 17, 1997).

105. *See id.* at 267 & n.3.

tem during the period when the applications were pending approval.¹⁰⁶ The company subsequently filed for chapter 11 bankruptcy on June 8, 1998, due to financial distress.¹⁰⁷

NextWave simultaneously initiated an adversary proceeding against the FCC, through which it sought to avoid its C-Block license payment obligations.¹⁰⁸ The bankruptcy court held that under § 544 of the Bankruptcy Code, the FCC had fraudulently conveyed the C-Block licenses to NextWave because the payment obligations dramatically exceeded the actual value of the licenses by the time the company received them.¹⁰⁹ The bankruptcy court determined that NextWave did not become obligated to the FCC until the licenses were received, and it reduced the company's total debt by nearly \$3.7 billion.¹¹⁰ The Commission argued that its regulatory power and the FCA preempted actions that would modify or annul any conditions accompanying the licenses, and asserted

106. See *NextWave IV.A*, 235 B.R. at 286 (discussing how NextWave's failure to get \$700 million in financing rendered it unable to set up its PCS infrastructure).

107. See *NextWave I*, 235 B.R. at 267. After declining to select one of the Commission's payment plans by the designated deadline, NextWave filed a petition to stay this deadline. See *id.* The Court of Appeals for the District of Columbia Circuit denied the request. See *id.*

108. See NextWave's First Amended Complaint at 4, para. 6, 23, paras. 85-86, *In re NextWave Personal Communications, Inc.*, 235 B.R. 263 (Bankr. S.D.N.Y. 1998) (*NextWave I*) (seeking a reduction of the winning bid price as legal remedy).

109. *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 318 (S.D.N.Y. 1999) (*NextWave VI*) (affirming the bankruptcy court's finding that the approximate value of the 63 C-Block licenses on which the company bid was just over \$1 billion when NextWave transacted with the FCC in February 1997). The court arrived at this value by comparing the price NextWave bid for the C-Block licenses with the price of the D, E, and F Block licenses. See *NextWave IV.A*, 235 B.R. at 303-04. Section 544 of the Bankruptcy Code provides a remedy of avoidance of all debts found to be fraudulently conveyed. 11 U.S.C. § 544(b) (1994); see also *supra* note 19 and accompanying text (explaining fraudulent conveyance).

110. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 316 (Bankr. S.D.N.Y. 1999) (*NextWave V*); *In re NextWave Personal Communications, Inc.*, 235 B.R. 305, 309 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*) (explaining that NextWave was not required to pay the portion of the bid price that was found to be fraudulently conveyed). Contrary to the FCC's interpretation of the auction guidelines, the court determined that NextWave did not actually become indebted to the Commission until it executed promissory notes in January of 1997. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 272, 275-76 (Bankr. S.D.N.Y. 1999) (*NextWave II*). Although the company bid \$4.7 billion for the licenses six months earlier, this bid only guaranteed NextWave the right to seek the FCC's approval of license application. See *NextWave IV.A*, 235 B.R. at 284. According to the court, the FCC fraudulently conveyed the licenses because they were worth \$3.7 billion at the time NextWave executed the promissory notes, which was less than the amount NextWave originally agreed to pay. See *id.* at 280. The fact that the lengthy application process did not guarantee that NextWave would receive the licenses reinforced the court's finding that no valid obligation had actually been made at the close of the auction. See *id.* at 284.

that NextWave must pay its winning bid or return the licenses.¹¹¹ The court acknowledged the FCC's regulatory authority to issue licenses; however, it held that this power did not exempt the Commission from the Bankruptcy Code's definition of a creditor because the Commission sought payment from NextWave and subsequently entered into agreements to achieve that end.¹¹² Citing the Bankruptcy Code, the court determined that as a creditor, the Commission was subject to its jurisdiction and that nothing in the Communications Act or any other body of law expressly stated otherwise.¹¹³

After the district court affirmed the bankruptcy court rulings,¹¹⁴ the United States Court of Appeals for the Second Circuit agreed to hear the FCC's appeal.¹¹⁵ In December 1999, the appeals court held that the lower courts did not have jurisdiction to review the Commission's regulatory decisions nor the authority to interfere with its license allocation, and found that no fraudulent conveyance occurred because NextWave became obligated to the winning bid at the close of the auction.¹¹⁶ Shortly after the ruling, NextWave agreed to pay the full balance due on its C-Block licenses.¹¹⁷ However, on January 12, 2000, the FCC announced that NextWave's C-Block licenses had automatically cancelled due to nonpayment and that they would be reaucted later in July 2000.¹¹⁸

On January 31, 2000, the bankruptcy court held that the FCC's decision to cancel NextWave's licenses violated the automatic stay protecting the company's bankruptcy estate.¹¹⁹ The court explained that the Bank-

111. See *NextWave IV.B*, 235 B.R. at 307, 311, 314; *NextWave V*, 235 B.R. at 316-17.

112. See *NextWave V*, 235 B.R. at 316-17 ("[T]he substance of the matter is that the FCC's right to payment as a creditor is subject to avoidance under the relevant bankruptcy code provisions just like the right to payment of any other creditor.").

113. See *id.*; see also *NextWave I*, 235 B.R. at 265, 269 (citing 28 U.S.C. § 1334, which specifically grants jurisdiction over bankruptcy cases and attendant proceedings).

114. See *NextWave VI*, 241 B.R. at 321; see also *supra* note 18 (listing the *NextWave* rulings).

115. See *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, No. 99-5063 (2d Cir. 1999) (order granting motion for stay of the consummation plan and confirmation plan) (*NextWave VII*), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980).

116. See *NextWave VII*, 200 F.3d at 54, 56 (explaining that pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402, review of FCC regulatory decisions are entrusted solely to the federal courts of appeals). Although the FCC regulated the conditions of the licenses and the auction process, the court noted that "[the FCC] may find itself acting as a creditor" if it sought recovery from NextWave. *Id.* at 59 & n.15.

117. See *Senate Hearing*, *supra* note 25.

118. See *Cancellation Notice*, *supra* note 25.

119. See *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 257-58 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*).

ruptcy Code protected NextWave from defaulting on its payments.¹²⁰ In addition, the court held that the “timely payment” condition on the licenses did not serve a regulatory purpose and that the FCC acted solely as a creditor to further the government’s pecuniary interests.¹²¹ Accordingly, the court determined that the Commission violated the automatic stay,¹²² abridged NextWave’s rights to cure its defaults,¹²³ and discriminated against the company because of its bankruptcy status.¹²⁴

The FCC subsequently filed a petition for a writ of mandamus with the Court of Appeals for the Second Circuit, which contended that the bankruptcy court’s opinion contravened the Second Circuit’s December 22, 1999 ruling.¹²⁵ In May 2000, the Second Circuit granted the FCC’s petition, and directed the bankruptcy court to vacate its February 7, 2000 order and lift the automatic stay as it applied to the FCC’s jurisdiction over the licenses.¹²⁶ The appeals court agreed with the Commission, explaining that the “timely payment” condition on the licenses is just as much a regulatory provision as the payment in full condition because “whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory” and thus immune from

120. *See id.* at 257-58, 264 (stating that the Code prohibits a debtor from making payments on pre-petition claims unless a court orders it to do so). The court also found that the FCC violated the doctrines of equitable estoppel and waiver in its third reason for enforcing the automatic stay. *See id.* at 257-58.

121. *Id.* at 261, 274-75, 281 n.26 (finding that NextWave’s timeliness in payments is a function of debtor-creditor economics and asserting that the FCC acts as a creditor regarding pre-petition claims, which falls under the jurisdiction of the Bankruptcy Code).

122. *See id.* at 267.

123. *See id.* at 268-69. The Bankruptcy Code allows NextWave’s reorganization plan to suspend any default payments and reinstate its obligations to their pre-bankruptcy status. 11 U.S.C. §§ 1123, 1124 (1994); *see supra* note 67 and accompanying text (explaining these sections in greater detail).

124. *See NextWave VIII*, 244 B.R. at 269-70. The court concluded that the FCC violated § 525 of the Bankruptcy Code because it cancelled NextWave’s licenses due to the company’s non-payment of a pre-petition claim. *See id.*; *see also* 11 U.S.C. § 525(a) (prohibiting the government from denying or revoking a license solely because the debtor is in bankruptcy or has not paid a dischargeable debt). The court did not formally rule on this issue, but would do so if one of the parties reopened the issue. *See NextWave VIII*, 244 B.R. at 271.

125. *See In re FCC*, 217 F.3d 125 (2d Cir. 2000) (*NextWave IX*) (granting the FCC leave to file a writ of mandamus to address whether the bankruptcy court’s January 31, 1999 opinion is consistent with the appeals court’s December 22, 1999 ruling), *petition for cert. filed*, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447). The Order also denied NextWave’s request for a rehearing on the December 22, 1999 decision and reversed its order of January 24, 2000 that directed the FCC to appeal the bankruptcy court’s latest ruling to the district court. *See id.*

126. *See id.* at 141 (ordering the bankruptcy court to deny NextWave’s January 2000 motion to enforce the automatic stay to prohibit the FCC from reclaiming the licenses).

the bankruptcy court's jurisdiction.¹²⁷ The court also condoned the FCC's plan to reauction NextWave's licenses, finding that such action is one that invokes enforceable regulatory terms.¹²⁸

The Second Circuit did not rule on whether the FCC's cancellation was procedurally valid under administrative law, as that issue can only be addressed by the Court of Appeals for the D.C. Circuit.¹²⁹ The writ of mandamus applied specifically to the Commission's regulatory actions vis-a-vis the Bankruptcy Code, leaving unanswered the question of whether NextWave will ever recover the C-Block licenses.¹³⁰ The issue before the appeals court was whether the "timely payment" and automatic cancellation conditions on the licenses serve a regulatory function.¹³¹ Because the appeals court found that these conditions are in fact regulatory, the Commission is permitted to cancel and reauction NextWave's licenses, despite the protections afforded by the Bankruptcy Code.¹³² An analysis of how the courts arrived at their contrary rulings requires examination of several elements, including the FCC conditions placed on spectrum licenses, the FCC's mandated charge as the regulator of radio spectrum and licenses, coupled with its role as lender to the bankrupt companies, and legislative intent in enacting both the Bankruptcy Code and the FCA.

II. WHICH LAW GOVERNS: THE FATE OF THE C-BLOCK LICENSES IN BANKRUPTCY

A. *Conditions on Spectrum Licenses*

The FCA expressly provides that a radio spectrum license creates no ownership rights for licensees and can only be used pursuant to specific conditions under the FCC's authority.¹³³ Congress included these limits

127. *Id.* at 135.

128. *See id.* at 135-36 (holding that the bankruptcy court has no power to rule on whether the FCC may reauction NextWave's licenses because regulations provide, and the FCA mandates, that all licenses must be utilized pursuant to the Commission's exclusive jurisdiction).

129. *See id.* at 139-40; *see also supra* note 28 (explaining that § 402 of the FCA provides an appeal process for final FCC decisions).

130. *See NextWave IX*, 217 F.3d at 137, 140.

131. *Id.* at 134 (granting a petition for a writ of mandamus against the bankruptcy court for imposing an automatic stay against the FCC). The bankruptcy court ignored the FCC's cancellation of the licenses because it found that the condition of timely installment payments was not a regulatory function. *See id.* at 129.

132. *See id.* at 135-36.

133. 47 U.S.C § 301 (1994) (stating that the FCA shall "provide for the use of [radio spectrum] channels, but not the ownership thereof . . . for limited periods of time, under

to prevent licensees from asserting property rights against the government¹³⁴ and to provide the government with ultimate control of an important public resource.¹³⁵

Bankruptcy estate trustees usually hold an interest in estate assets, such as licenses, equal to the interest that the debtor holds¹³⁶ and subject to the same rules.¹³⁷ The FCC conditioned its grant of a license to NextWave on the “timely payment of the winning bid amount,” subject to automatic revocation if there was a failure to do so.¹³⁸ Although the bankruptcy court maintained that the Bankruptcy Code governed the li-

licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license”). The FCA provides that:

No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . or by transfer of control of any corporation holding such permit or license . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Id. § 310(d).

134. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (holding that the Act protects the public and does not shield license holders from competition in the market); see also *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400, 402 (Bankr. N.D. Ohio 1983) (suggesting that an FCC license may be a “rule designed to regulate [the holder’s] use of its . . . equipment”); *In re Merkley*, 94 F.C.C.2d 829, 830-31 (1983) (noting that the FCC has continuously held that the assumption of property rights in a license “endangers the independence of the licensee who is and who should be” accountable only to the FCC).

135. See 47 U.S.C. §§ 301, 304; see also *P & R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (upholding the automatic cancellation of an FCC license due to a licensee’s failure to agree to and to accept any and all conditions to which the particular license is subject).

136. See 11 U.S.C. § 541(a)(1) (1994) (Historical and Revision Notes, Legislative Statements, para. 6); see also *In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989) (holding that all proprietary interests held by an airline in airport landing slot licenses are limited and encumbered by the FAA’s regulations and may be revoked despite a bankruptcy court’s imposition of an automatic stay); *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986) (stating that the bankruptcy estate cannot have a greater interest in the licenses than the debtor because the estate is subject to outstanding tax liens on liquor licenses); COLLIER ON BANKRUPTCY, *supra* note 80, ¶ 541.07 [2] (“[T]he trustee occupies the same position as the debtor, including the responsibility for all burdens as well as benefits.”).

137. See 47 U.S.C. § 310(d) (expressly prohibiting voluntary or involuntary transfers or assignments of licenses without a finding by the Commission that the public interest is being served).

138. *In re FCC*, 217 F.3d 125, 135-36 (2d Cir. 2000) (*NextWave IX*), *petition for cert. filed*, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447); *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 52, 57 (2d Cir. 1999) (*NextWave VII*), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); see also *id.* § 24.708(a) (1998); *id.* § 24.711(b) (requiring each C-Block licensee to pay the net auction price in timely installments); 47 C.F.R. § 1.2110(f)(4)(iv) (1999) (stating that the license will automatically cancel upon default of payment).

censes in the NextWave litigation, the appeals court found that NextWave's avoidance of the bid payment, which the bankruptcy court granted, and its refusal to return the licenses ignored agreed-upon guidelines that legally bound NextWave.¹³⁹ The appeals court reasoned that a licensee must accept all conditions on licenses, including those that enforce obligations, and that the bankruptcy court exceeded its power by allowing NextWave to keep the licenses without adhering to their conditions.¹⁴⁰ The Second Circuit held that the bankruptcy court erroneously granted spectrum rights absent FCC authority by overriding these conditions.¹⁴¹

Although bankruptcy law dictates that licenses become property of the estate despite any conditions or restrictions, § 541(c)(1)(A) of the Bankruptcy Code "invalidates restrictions on the transfer of property of the debtor, in order that all of the interests of the debtor in property will become the property of the estate."¹⁴² In bankruptcy proceedings, the Commission usually acquiesces to the transfer of spectrum licenses to an estate trustee, with the understanding that the licenses retain all conditions, and that the Commission must approve any subsequent transfers from the estate.¹⁴³ Therefore, it can be interpreted that the Bankruptcy

139. See, e.g., *NextWave VII*, 200 F.3d at 54-55 (asserting that the bankruptcy court had no power to override the FCC's regulations or the FCA).

140. See *id.* at 54 (citing *P & R Temmer v. FCC*, 743 F.2d 918, 927 (D.C. Cir. 1984)).

141. See *id.*; see also *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942) ("[N]o court can grant an applicant an authorization which the Commission has refused."). The Ninth Circuit recently held that § 365(c)(1) of the Bankruptcy Code may preclude debtors from retaining a license when the law allows the licensor to refuse such use without the licensor's consent. See *In re Catapult Entertainment Inc.*, 165 F.3d 747, 748 (9th Cir. 1999), *cert. dismissed*, 120 S. Ct. 369 (1999). The FCA provides that no spectrum license can be granted unless the Commission finds "that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d). This proposition holds true in bankruptcy proceedings where debtors must divest assets to reorganize and pay their creditors as the FCC maintains authority to disapprove of any subsequent transfer, even if the bankruptcy court ordered such a transfer. See *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983).

142. *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402 (9th Cir. 1986) (quoting S. REP. NO. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5869); see 11 U.S.C. § 541(c)(1)(A) (1994); see also *In re Polycorp Assocs., Inc.*, 47 B.R. 671, 672 (Bankr. N.D. Cal. 1985) (requiring payment of state taxes on liquor licenses if the bankruptcy estate will eventually transfer the licenses, because such conditions, set forth by agreements, regulations, or non-bankruptcy law only intended to eliminate barriers to the transfer of liquor licenses to the estate). "[Section] 541(c)(1)(A) is intended to eliminate barriers to the transfer of property to the estate, and nothing more." *Id.*

143. See *La Rose v. FCC*, 494 F.2d 1145, 1148 (D.C. Cir. 1974); see also *In re Merkley*, 94 F.C.C.2d 829, 837 (1983) (noting that in bankruptcy proceedings, the FCC usually consents to the temporary custody of the license by the trustee, and once a qualified purchaser is found, the license is subject to all the conditions and restrictions put forth in the FCA

Code overrides only those restrictions that would have prevented NextWave's bankruptcy estate from acquiring the licenses.¹⁴⁴

A bankruptcy petition filing sets aside any action or proceeding, including those of the government, unless it is a governmental unit enforcing a regulatory power inherent in the license.¹⁴⁵ The *NextWave* bankruptcy court classified the debt owed to the FCC as a financial interest, identical to a nonexempt creditor's claim subject to avoidance under the Bankruptcy Code as opposed to a regulatory condition.¹⁴⁶

In *In re Hoffman*, a bankruptcy court determined that the Rhode Island Division of Taxation could not block the sale of a liquor license because the seller owed outstanding taxes; such a blockage constituted pecuniary interest, rather than a regulatory condition and was "not aimed at guarding the public safety, health, or welfare."¹⁴⁷ In cases factually

and the FCC's regulations).

144. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 305, 307 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*). The FCC opposed the *remedy* provided by the bankruptcy court; it did not oppose the fact that the licenses are subject to the proceedings. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 319 (S.D.N.Y. 1999) (*NextWave VI*). The FCC argued that NextWave must either pay the winning bid amount according to its installment schedule or return the licenses to the FCC. See *NextWave IV.B*, 235 B.R. at 308. Case law illustrates that when a debtor's interest in a government license expires due to an express condition, "the Bankruptcy Code does not preserve that interest and prevent termination." *In re Gull Air, Inc.*, 890 F.2d 1255, 1262 (1st Cir. 1989).

145. See 11 U.S.C. § 362(a) (staying claims against the debtor); *id.* § 362(b)(4) (Supp. IV 1998) (exempting government regulatory actions from the provisions of § 362(a)). In order for a governmental unit to enforce conditions associated with the government property at issue, and thus receive exemption from the stay, the primary purpose of the governmental unit must be to further protect or to conserve the public health, safety, or welfare. See *In re Hoffman*, 65 B.R. 985, 988 (D. R.I. 1986). Section 362's legislative history explains that exemptions for governmental proceedings are valid only when the action taken against the debtor or the property of the estate is "to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws . . ." S. REP. NO. 95-989, at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838; H.R. REP. NO. 95-595, at 340, 343 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297, 6299.

146. *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 315, 318 (Bankr. S.D.N.Y. 1999) (*NextWave V*) (denying the FCC's request for an automatic stay due to its role as a creditor in the NextWave spectrum auction). In cases where a state seeks to deny liquor license renewals to bankrupt licensees for outstanding tax debts, some bankruptcy courts have found that payment of taxes to the state only served to enhance the state's financial interests, and not its police power. See generally *In re Amasya*, 234 B.R. 224 (Bankr. D. Mass. 1999); *In re J.F.D. Enterprises, Inc.*, 183 B.R. 342 (Bankr. D. Mass. 1995); *In re North* 128 B.R. 592 (Bankr. D. Vt. 1991). *But see supra* note 142 and accompanying text (citing *In re Polycorp Assocs., Inc.*, whereby tax debt from liquor licenses could not be avoided because it served a regulatory purpose).

147. *In re Hoffman*, 65 B.R. at 988 (holding that governmental units cannot invoke a regulatory power when the purpose for such power is financially motivated to circumvent the protections afforded to debtors in bankruptcy) (citing 11 U.S.C. § 362(b)(4)). The

similar to *Hoffman*, bankruptcy courts have held, however, that although money was owed to the government, the debt could be enforced due to the government's regulation of the licenses in question.¹⁴⁸ Regarding the *NextWave* litigation, the Second Circuit disagreed with *Hoffman* and determined that the conditions requiring full payment or revocation of the C-Block licenses serve regulatory purposes within the FCC's jurisdiction.¹⁴⁹ These conditions, it asserted, enable the Commission to manage radio spectrum under Congress's guidelines.¹⁵⁰

The *NextWave* bankruptcy court found that the "timely payment" condition did not serve a regulatory function, but it did implicate a pecuniary purpose.¹⁵¹ The court reasoned that canceling a license for failure to make timely payments only serves to ensure payment to the FCC, and the FCA prohibits regulations based on the expectation of revenue.¹⁵² The Second Circuit, in its *NextWave IX* opinion, however, held that whenever the FCC asserts its power to dictate license terms, the action is regulatory, and the bankruptcy court has no authority to determine its validity.¹⁵³

B. *The FCC's Dual Role in the C-Block Auction: Regulator and Creditor*

Congress intended for the FCA "to maintain the control of the United

Hoffman court determined that the state's Division of Taxation acted as a license holder's creditor because the only issue to which it objected was the nonpayment of an outstanding debt. *Id.* at 988, 989. The court explained that the taxes only created revenue for the state, and "[i]f the law looks like a revenue collection measure and operates like a revenue collection measure, the chances are excellent that . . . it is indeed a revenue collection measure." *Id.* at 989.

148. *See, e.g., In re Farmers Markets, Inc.*, 792 F.2d 1400, 1402-03 (9th Cir. 1986).

149. *See In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 52 (2d Cir. 1999) (*NextWave VII*), *cert. denied.*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980). The court found that the "full and timely payment of the winning bid" directly related to the FCC's implementation of spectrum allocation. *Id.*

150. *See id.* at 53 (emphasizing that the conditions ensured that the appropriate entities received the licenses, as outlined by Congress). The FCC determined that the conditions of timely payment in full "would best promote congressional objectives and serve the public interest." *Id.*

151. *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 281-82 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*).

152. *See id.* The court also questioned the credibility of timeliness as a regulatory necessity by raising the fact that the FCC had reassigned the C and F Block payment deadlines on at least two occasions and routinely granted waivers of deadlines. *See id.* at 281 n.26.

153. *In re FCC*, 217 F.3d 125, 135, 137 (2d Cir. 2000) (*NextWave IX*) (holding that the FCC does not have to defend its regulations to the *NextWave* bankruptcy court, and the fact that the court found the regulations arbitrary does not authorize bankruptcy law to alter them), *petition for cert. filed*, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447).

States over all the channels of radio transmission.”¹⁵⁴ Congress also mandated that the FCC implement a competitive bidding process to ensure efficient use of the spectrum and rapid deployment of new communications services, promote competition, prevent unjust enrichment, and recover “a portion of the value of the public spectrum resource.”¹⁵⁵ The FCC regulations that insisted on payment and revoked a spectrum license in the event of nonpayment promoted these objectives by ensuring that there were financially stable companies providing the newest services to the public at all times.¹⁵⁶ Congress also permitted the FCC to offer installment plans, similar to those of a lending institution, to encourage smaller, entrepreneurial providers to enter the market.¹⁵⁷ Although the Commission was technically a creditor to NextWave, the appeals court held that any encroachment on its regulatory authority would prevent the FCC from carrying out Congress’s objectives.¹⁵⁸

1. Enforcement of Payment Conditions as a Regulatory Function

The regulations set forth in the FCC’s competitive bidding process accomplished these congressional objectives by awarding radio spectrum licenses to the highest bidders, who valued them the most.¹⁵⁹ Enforcement of the highest bid, therefore, was inextricably tied to the FCC’s regulatory functions.¹⁶⁰ The Commission determined that it was not in

154. 47 U.S.C. § 301 (1994). Since its inception, the FCC has been “the expert body which Congress has charged to carry out its legislative policy.” *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940).

155. 47 U.S.C. § 309(j)(3)(A)-(D) (1994 & Supp. III 1997); *see also* H.R. REP. NO. 103-66, at 254-55 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 581-82.

156. *See* 47 U.S.C. § 309(j)(3)(C); 47 C.F.R. § 24.708(a) (1999) (requiring that the grant of a license by the FCC is conditioned upon full and timely payment of the winning bid amount); *Second Report and Order*, *supra* note 8, at 2360-61, paras. 70-71.

157. *See* 47 U.S.C. § 309(j)(13)(C) (1994); *Second Report and Order*, *supra* note 8, at 2388, para. 227; 47 C.F.R. § 1.2110(f) (1999); *id.* § 24.711(b) (outlining the rules governing installment payments for qualified bidders). The installment plan was established, in the spirit of competition set forth in the FCA, to allow small, rural, and minority-owned businesses to compete for spectrum licenses without having to pay the full bid amount upfront, as required for other bidders. *See id.* § 1.2110(f).

158. *See In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 55, 59 (2d Cir. 1999) (*NextWave VII*), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); *see also NextWave IX*, 217 F.3d at 135.

159. *See Second Report and Order*, *supra* note 8, at 2361, para. 71. (explaining that a license’s value is increased by a bidder who is capable of getting services into the market quickly and efficiently).

160. *See* H.R. REP. NO. 103-66, at 249 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378,575-76. Congress found that the comparative hearing and lottery methods of assigning spectrum were ineffective at choosing the most qualified licensees and delayed the implementation of new services to the public because the licenses were given out on the basis of

the public's best interest to allocate spectrum to companies that could not afford to pay for licenses because such companies may have poor quality or nonexistent services.¹⁶¹ Conversely, companies "with the highest willingness to pay" would most likely provide the best services.¹⁶²

In *NextWave VI*, the district court emphasized that the FCA mandates that only "a portion of the current value of the spectrum licenses" be recovered from public auctions.¹⁶³ Therefore, NextWave's obligation to pay the actual value of the licenses \$1.023 billion satisfied the statutory requirement.¹⁶⁴ The FCC and the appeals court rejected this conclusion, and asserted that reassessing the licenses' values after a company offers a price for them would gravely undermine the auction system.¹⁶⁵

The government further argued that timely payment and enforcement of the FCC's default rules were also necessary to maintain the integrity of the auction by serving as a substitute for "detailed credit checks" and other safeguards normally employed by lending institutions.¹⁶⁶ The bankruptcy court disagreed with this idea, and stated that the rules governing the expectation of claims are purely economic and serve no regulatory purpose.¹⁶⁷ When the FCC cancelled the licenses in January 2000, however, it relied on the Second Circuit's ruling that the license conditions were primarily regulatory and argued that the auction would be undermined if NextWave could retain the licenses but default on the strict

qualifications that did not necessarily reflect the licensee's ability to use the spectrum efficiently. *See id.* Congress also found that the old methods created "rampant speculation, undermined the integrity of the FCC's licensing process and, more importantly, frequently resulted in unqualified persons winning an FCC license." *Id.* at 575.

161. *See Second Report and Order, supra* note 8, at 2360-61, paras. 70-71 (stating that relying on competitive market forces to determine the value of spectrum, which is reflected in the amount companies are willing to bid, will benefit both consumers and producers now and in the future).

162. *Id.* at 2361, para. 71.

163. *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 320 (S.D.N.Y. 1999) (*NextWave VI*).

164. *See id.* at 318 (explaining that the FCC may not recover more than court-assessed value of the *NextWave* licenses); *supra* note 110 and accompanying text (detailing the court's ruling on when NextWave became indebted to the Commission).

165. *See In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 60-61 (2d Cir. 1999) (*NextWave VII*), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); *Restructuring Order, supra* note 92, at 16447, para. 19 (rejecting the proposal to forgive large portions of the C-Block debt). Members of the Senate agreed with the Commission and expressed concerns that voiding the winning bids would contradict Congress's goals of putting spectrum licenses "into the hands of those who value them the most." *Id.*

166. *NextWave VII*, 200 F.3d at 53; *Second Report and Order, supra* note 8, at 2382-83, paras. 194, 197-98.

167. *See In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 281 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*) (finding that the timeliness condition on the licenses only serves the FCC in its capacity as a creditor attempting to collect a financial debt).

payment schedule.¹⁶⁸

The bankruptcy courts, however, found that the revenues generated by the spectrum auctions served a purely fiscal purpose, and subjected the Commission to the Bankruptcy Code, regardless of its regulatory function.¹⁶⁹ The bankruptcy court further held that the FCC's refusal to reduce the price of the licenses and its enforcement of payment deadlines and penalties supported the presumption that revenue was the Commission's primary concern.¹⁷⁰ The appeals court, however, agreed with the FCC and found that notwithstanding the monetary component of the auction, the regulatory aims of the auction program hinged upon the reliability of the winning bids.¹⁷¹

2. *If it Walks Like a Creditor and Talks Like a Creditor . . .*

The FCC concluded that despite its collection of license revenues, it did not function as a commercial entity because management of the installment plans is a regulatory charge mandated by the FCA.¹⁷² The Commission distinguished itself from the average creditor by arguing that each license allocation is not "a custom-made, hand-tailored, specifi-

168. See *Cancellation Notice*, *supra* note 25.

169. See *NextWave VI*, 241 B.R. at 315-16. In *NextWave V*, the court required the FCC to comply with the Bankruptcy Code, notwithstanding the fact that the regulations called for payment or subsequent revocation. *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 315-16 (Bankr. S.D.N.Y. 1999) (*NextWave V*). The bankruptcy court adhered to the theory that because the FCC was a creditor, all of its regulations were essentially moot, the conditions on the licenses were immaterial, and the "FCC's own regulations [we]re entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents" subject to modification by bankruptcy law. *Id.* at 317.

170. See *NextWave VIII*, 244 B.R. at 274 (Bankr. S.D.N.Y. 2000) (holding that the FCC's actions were pecuniary and thus subject to the automatic stay pursuant to 11 U.S.C. § 362(b)).

171. See *NextWave VII*, 200 F.3d at 52, 53; see also *Second Report and Order*, *supra* note 8, at 2361, paras. 72-73 (rejecting the view that an auction designed to get the highest price for spectrum licenses is only intended to maximize the government's revenue collections). Although recovering revenue from the licenses is within the legislative intent of the FCA, the Commission maintains that it is not the sole purpose or goal in the auction. See *id.* at 2361, 2373; see also 47 U.S.C. § 309(j)(3)(C) (1994 & Supp. III 1997). Again, the goal of rapid deployment of services and efficient use of the spectrum is achievable by assigning the licenses to those who value them the most because those who value them the most will bid and pay the highest for them. See *Second Report and Order*, *supra* note 8, at 2361, paras. 72-73. The court in *In re D.H. Overmyer* agreed and determined that the allocation of spectrum licenses remains "an exercise of the government's plenary power over the public airwaves," despite the revenues raised thereby. *In re D.H. Overmyer*, 35 B.R. 400, 404 (Bankr. N.D. Ohio. 1983).

172. See *NextWave V*, 235 B.R. at 316-17; *NextWave VI*, 241 B.R. at 321.

cally negotiated transaction” with the individual licensee.¹⁷³ Congress directed the Commission to utilize payment procedures that would prevent the agency from having to evaluate fully each bidder’s financial merits and protect the agency from assuming the risks that are appropriately borne by the bidder and its financial backers.¹⁷⁴ The Second Circuit, in the first appeals opinion, disagreed with the lower courts and explained that Congress directed the FCC to design an auction system to promote the most effective use of the spectrum, not to maximize revenue for the government by selling spectrum.¹⁷⁵ The appeals court also stated that the FCC’s auctioning of spectrum served the same regulatory functions as the former methods of allocation, but it did so in a more efficient manner.¹⁷⁶ The appeals court held that if the FCC acted as a creditor by collecting installment payments, it did so while carrying out its regulatory duties.¹⁷⁷

173. Reply Brief for Defendant-Appellant FCC at 16, *NextWave VI*, 241 B.R. at 311 (concluding that given the large number of bidders, and the uncertainty regarding the financial status of any bidder prior to an auction’s completion, the FCC cannot conduct a meaningful financial analysis for each license applicant). Commissioner Susan Ness remarked that the FCC “never performed the banker’s role . . . of reviewing the bidders’ balance sheets, their business plans, the wisdom of their planned bids, and the quality of their management.” *Reconsideration Order*, *supra* note 98, at 8393 (Statement of Commissioner Susan Ness). The agency instead relies, for the most part, on the strict enforcement of its rules, to discourage default, and to ensure that bidders can afford to finance their use of the valuable spectrum. *See Second Report and Order*, *supra* note 8, at 2383, para. 198.

174. *See* H.R. CONF. REP. NO. 103-213, at 399, 483 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1172. Congress believed that the FCC should not allocate licenses based on speculation of a bidder’s future financial success as a licensee, as would an average creditor, because it would assume a large litigation risk and essentially create an inefficient system. *See id.*; H.R. REP. 103-111, at 255 (1993), *reprinted in* 1993 U.S.C.C.A.N., at 582; *see also Second Report and Order*, *supra* note 8, at 2382-83, para. 197. In addition, the FCC explained that due to the public notice requirements on the post-auction applications, the C-Block license creditors had ample information as to the final bid amounts and an opportunity to examine the financial records of the companies they underwrote. *See Memorandum in Support of FCC’s Motion for Judgment on the Pleadings at 10, In re NextWave Personal Communications, Inc.*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*). The Commission, therefore, reasoned that it is not responsible for any risks taken by the bidders or creditors. *See id.*

175. *See NextWave VII*, 200 F.3d at 52.

176. *See id.* at 52, 53 (explaining that competitive auctions, compared to free license allocation, better ensure spectrum productivity, but asserting that “the FCA draws no categorical distinctions among . . . [a] comparative hearing lottery and auction”).

177. *See id.* at 51-53, 59 (inferring that the FCC is not an ordinary commercial actor when auctioning and collecting payment on spectrum licenses and finding that the bankruptcy court’s ruling that the FCC was only a creditor in the *NextWave* transaction may have ignored the dual role it played in the C-Block auction); *see also Second Report and Order*, *supra* note 8, at 2350, para. 7, 2382-83, para. 7 (explaining that it is “critically important to the success” of the competitive auction program to enforce revocation, which

The lower courts in the *NextWave* decisions declared that the FCC's transfers of the licenses and accompanying actions in instituting the licenses were characteristic of a creditor in a classic commercial transaction.¹⁷⁸ This interpretation rejected the principle that the financial agreement between the FCC and a bidder had any relation to the organization, execution, or implementation of the auctions, and instead saw the agreement to bear only on the creditor-debtor relationship.¹⁷⁹ Further, the bankruptcy court pointed out that although Congress intended for the FCC to be a creditor in allocating the C-Block licenses, neither the FCA nor the Bankruptcy Code contained language that expressly gave

enables the FCC to ensure that the public spectrum is being used efficiently on behalf of the public at large pursuant to the congressional mandate set forth by the FCA). Nowhere in any of the *NextWave* cases does the Commission deny that it is a creditor. See generally *supra* note 18 and accompanying text (discussing the *NextWave* decisions). FCC Commissioner Michael Powell stated that the Commission can be forced into a role as "both creditor and government agent." *3 FCC Commissioners Defend Wireless Auction Process*, COMM. DAILY, Sept. 23, 1999, available in 1999 WL 7580438. In the same conversation, FCC Commissioner Harold W. Furchtgott-Roth admitted "that playing creditor to license bidders isn't a statutory requirement for [the] Commission" and that the agency should not play the role of a creditor. *Id.*

178. *E.g.*, *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 316 (S.D.N.Y. 1999) (*NextWave VI*) (finding that the regulations addressing payment and default amount to contracts between a debtor and a creditor). The district court also characterized the FCC's restructuring orders as "voluntary offers of a creditor to protect the solvency of its debtor in order to assure payment." *Id.* A creditor is defined as "[o]ne to whom a debt is owed," "[o]ne to whom any obligation is owed, whether contractual or otherwise," and a "person or entity that having a claim against the debtor predating the order for relief concerning the debtor." BLACK'S LAW DICTIONARY 375 (6th ed. 1990). The Bankruptcy Code defines creditor as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A) (1994). The *NextWave VI* court further explained that the Commission is "a creditor who happens to be a federal agency" that voluntarily lends, has the power to set the agreements, and complies with the Bankruptcy Code. *NextWave VI*, 241 B.R. at 316 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 736 (1979)). The *Kimbell* case is distinguishable, however, from the instant cases because there the Court considered the government's detailed knowledge of the debtor's financial status and examined the creditor's other interests. See *Kimbell Foods*, 440 U.S. at 736. The FCC did not have such knowledge of *NextWave* or any other bidders. *Cf. Second Report and Order, supra* note 8, at 2376-77, para. 166, 2380, para. 183.

179. See, e.g., *NextWave VI*, 241 B.R. at 321 (affirming that the regulations prescribing debt collection and revocation "are not part of the auction process; they are the FCC's rules governing its status as a creditor of licensees"); see also *In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 270 (Bankr. S.D.N.Y. 1998) (*NextWave I*). Support for this interpretation is found in two similar cases where the FDIC claimed it acted in a regulatory capacity by attempting to collect on obligations owed by debtors to a failed bank. See *Atherton v. FDIC*, 519 U.S. 213, 225 (1997); *FDIC v. Condit*, 861 F.2d 853, 854 (5th Cir. 1988). The Supreme Court and the Fifth Circuit examined the FDIC's roles as insurer and creditor; both courts held that the FDIC did not promote government interests in a regulatory capacity. See *Atherton*, 519 U.S. at 225; *Condit*, 861 F.2d at 858.

the Commission additional rights in such capacity.¹⁸⁰ Thus, the bankruptcy court maintained that the agency sat in the same position as a private creditor, which rendered it equally subject to prevailing bankruptcy law.¹⁸¹

Despite the Second Circuit's opinion, the bankruptcy court relied on the same argument to nullify the cancellation of the licenses in January 2000.¹⁸² The court clung to the theory that the FCC was merely a creditor seeking to recover a claim against NextWave, and held in *NextWave VIII* that the Commission was subject to the automatic stay under the Bankruptcy Code.¹⁸³

3. Regulatory Power Under the Bankruptcy Code: The FCC's Exemption from the Automatic Stay

The FCC based its cancellation of NextWave's licenses on the company's failure to meet its installment deadlines.¹⁸⁴ The Commission contended that enforcement of payment deadlines served the same regulatory function as enforcement of the winning bid, which the appeals court confirmed.¹⁸⁵ The FCC claimed that its regulatory power to enforce mandated public policy objectives allowed it to automatically cancel the licenses notwithstanding the stay.¹⁸⁶

180. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 317 (Bankr. S.D.N.Y. 1999) (*NextWave V*) (rejecting the Commission's explanation that the language directing the agency to govern the auction process, including the installment plans, exempts the FCC from the bankruptcy remedy).

181. See *id.* at 317; cf. *Kimball Foods*, 440 U.S. at 737 (holding that when an agency acts as a lender it "is in substantially the same position as private lenders"). The Supreme Court stated that Congress advised the government to be judicious in its loan programs so as to protect particular government units from bankruptcy proceedings. See *id.*

182. See *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 276 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*) ("The FCC must, like other creditors, go through the [reorganization] plan process and have its claim administered under the bankruptcy code.").

183. *Id.* at 266, 267, 271 (finding that the FCC cancelled the licenses because NextWave failed to pay for a pre-petition claim while it was in bankruptcy). The FCC argued that its action did not violate the automatic stay within the meaning of the Bankruptcy Code. See *id.* at 271.

184. See *FCC Objection to Modified Plan*, *supra* note 25, at *3 n.1 (explaining that NextWave failed to meet the October 29, 1998 deadline).

185. See *id.* (emphasizing that PCS licenses automatically cancel unless payment is made in full and on time); see also *In re FCC*, 217 F.3d 125, 135 (2d Cir. 2000) (*NextWave IX*) (explaining that the full and timely payment requirements obviously serve the same regulatory purpose), *petition for cert. filed*, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447).

186. See *Cancellation Notice*, *supra* note 25; *FCC Objection to Modified Plan*, *supra* note 25; see also *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 53 (2d Cir.

The bankruptcy court rejected this assertion, and reasoned that the government had only financial incentives.¹⁸⁷ The court further found that the exemption under the automatic stay did not apply to the FCC's actions because they were strictly pecuniary in nature and did not promote a police or regulatory policy.¹⁸⁸ The court justified enforcement of the stay by reasoning that while payment in full may be regulatory, all procedural issues of payment—namely timeliness—are governed by the Commission's creditor function because “[n]o rational explanation ha[d] been offered” to the contrary.¹⁸⁹ However, the Second Circuit overruled the stay, holding that timeliness was indeed a regulatory requirement and that the bankruptcy court lacked jurisdiction to review the validity of FCC regulations.¹⁹⁰

C. A Difference in Interpretation Leads to a Conflict of Laws

Resolution of the present impasse between the federal government and the bankrupt C-Block licensees necessitated an assessment of the opposing FCA interpretations in relation to the FCC's dual role as creditor and regulator.¹⁹¹ Such resolution also involved examining legislative intent and public interest within these two areas of law in light of the avoidance remedy and automatic stay established by the bankruptcy court, and whether the inherent conflict between the two could be har-

1999) (*NextWave VII*) (explaining that promotion of the public interest is the purpose behind the FCC default rules and penalties), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980).

187. See *NextWave VIII*, 244 B.R. at 274 (holding that the regulatory premise asserted by the FCC is simply a guise to enforce a financial default by its debtor). The court ruled that the license cancellations were strictly claim-based, only effecting the government's role as a creditor applying collection penalties. See *id.* at 267.

188. See *id.* at 273, 274 (explaining that the automatic stay is narrow in scope and does not apply to government actions that seek to recover money).

189. *Id.* at 281. The ruling also cited that the December appeals court decision did not address timeliness. See *id.* at 283.

190. See *NextWave IX*, 217 F.3d at 135-39. The appeals court maintained that the bankruptcy court inappropriately enforced the automatic stay based on its finding that the license regulations were arbitrary. See *id.* at 137.

191. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 269 (Bankr. S.D.N.Y. 1998) (*NextWave I*) (stating that “[t]he task . . . is to determine whether the claims asserted against the FCC by NextWave affect NextWave” through the agency's role as a creditor or regulator). Judge Adlai S. Hardin, Jr., of the Bankruptcy Court of the Southern District of New York, who issued several rulings in *NextWave*, commented that the FCC's case depends on the conclusion that the agency is somehow exempt from bankruptcy laws despite its role as a creditor. See *FCC Wins Stay in NextWave Bankruptcy Proceeding*, MOBILE COMMUNICATIONS REP., Sept. 6, 1999, available in 1999 WL 8752919.

monized.¹⁹²

1. Disagreement on the Scope of the FCC's Regulatory Power: Where Does the Buck Stop?

The underlying principle in the Second Circuit's analysis was that enforcement of the license conditions constituted an implementation of an FCA mandate.¹⁹³ The appeals court held that regardless of the bankruptcy court's interpretation of the FCC's actions, the Commission's own interpretation of its regulations must be given deference.¹⁹⁴ Likewise, a court cannot perform a function expressly mandated to an agency.¹⁹⁵ This holding supports the position that the statute need not address the FCC's status in bankruptcy courts with regard to the auction process because regulations, according to the Bankruptcy Code, are not subject to conflicting bankruptcy actions.¹⁹⁶ The government further reasoned that Congress mandated that the FCC act in its *regulatory* function as a creditor in order to afford competitive opportunities to small businesses.¹⁹⁷ The Commission did not act as a traditional lender, but as a licensing agency charged with allocating licenses, and set payment terms applica-

192. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 319 (S.D.N.Y. 1999) (*NextWave VI*) (referring to the bankruptcy court's three page delineation of how the avoidance remedy meets the policy and statutory objectives of the FCA and the Bankruptcy Code).

193. See *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 52, 54-55 & n.10 (2d Cir. 1999) (*NextWave VII*), cert. denied, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); 47 U.S.C. § 309(j)(13)(C) (1994) (mandating the implementation of license payment on installments); see also 47 C.F.R. §§ 1.2110(f)(4), 24.708(a) (1999) (listing rules for the installment program).

194. See *NextWave VII*, 200 F.3d at 58 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). It can be argued that the differences of opinion on the reading of the FCA succumb to the notion that the court must accept the FCC's interpretation of the statute as long as it reasonably advances the integrity and fairness of the auction process. See *United States v. Haggard Apparel Co.*, 526 U.S. 380, 392 (1999). Regulations ensure that the statutes are applied properly. See *id.* (stating that "[d]eference to an agency's expertise in construing a statutory command" should not be disregarded).

195. See *NextWave VII*, 200 F.3d at 53-54 ("[N]o court can grant an applicant an authorization which the Commission has refused." (quoting *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942))).

196. 11 U.S.C. § 362(b)(4) (Supp. IV 1998) (providing an automatic stay exemption for governmental units that enforce regulatory or police powers); see *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604 (1973) (stating that if the rights of the federal government are at issue in a contract, no rule may be applied, which would not be wholly in accord with that program); *In re Hoffman*, 65 B.R. 985, 991 (Bankr. D. R.I. 1986) (holding that "if the objective of the state law can reasonably be viewed as 'not so much one of priority of claims as one of defining the nature of the bankrupt's property to which the claims attach,'" it will withstand the Supremacy Clause).

197. See *NextWave VII*, 200 F.3d at 46.

ble to all C-Block licensees.¹⁹⁸

The bankruptcy court argued that the monetary aspects of the license allocation were separate and distinct from the regulations.¹⁹⁹ The court found that the enforcement of the agreement was the FCC creating its own rights as a creditor to the detriment of all other creditors, not the FCC regulating spectrum licensing.²⁰⁰ If Congress had intended to endow the Commission with such a privilege, the court maintained, it would have amended the Code or the FCA.²⁰¹ Therefore, the court reasoned, the FCC's enforcement power was not implicated and like any other government creditor, the agency should have complied strictly with the Bankruptcy Code.²⁰²

198. See *Restructuring Order*, *supra* note 92, at 16,513 (separate statement of Commissioner Susan Ness) (explaining that the FCC's primary responsibilities are writing fair rules, running fair auctions, and issuing licenses to winning bidders). In the same proceeding, Chairman Reed E. Hundt warned that bankruptcy litigation would impede Congress's intent to utilize the spectrum because of the inevitable cost in time and money. See *id.* at 16,507 (affirming and dissenting separate statement of Chairman Reed E. Hundt).

199. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 315-317 (Bankr. S.D.N.Y. 1999) (*NextWave V*) (holding that Congress conferred upon the FCC the dual roles of regulator and creditor).

200. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 270 (Bankr. S.D.N.Y. 1998) (*NextWave I*). The court argued strongly that Congress never conferred this right upon the Commission. See *id.* The court argued that cancellation removes the licenses from the estate, and consequently robs the other creditors from reclamation of their investments. See *id.* Nothing in the FCA or Bankruptcy Code granted any rights to the FCC as a creditor that would render it superior to or different from other creditors participating in the deal. See *NextWave V*, 235 B.R. at 316.

201. Cf. *NextWave V*, 235 B.R. at 316. Specific transactions in several government agencies are exempt from bankruptcy law. See *supra* note 74 and accompanying text. Since the initial C-Block bankruptcy filing, there has been legislation presented to Congress expressly exempting the Commission from the Bankruptcy Code. See Balanced Budget Act FY 2000, S. 1217, 106 Cong. § 618 (1999). Section 618 of the Appropriations bill would have amended § 309(j) of the FCA, exempting the FCC's regulation of spectrum licenses and the holders' obligations under the licenses from insolvency laws including bankruptcy. See *id.* However, the language was not included in the final version of the bill. See H.R.J Res. 82, 106 Cong. (1999); *Fate of NextWave's Spectrum Echoes in Hallways of Congress*, WIRELESS TODAY, Nov. 18, 1999, available in 1999 WL 6692264. In September 2000, a provision allowing the FCC to reclaim licenses from bankrupt wireless companies was pending in a Senate appropriations bill. See Jeffrey Silva, *Lawmakers Put Telecom Legislation on Hold for August Recess*, RCR RADIO COMM. REP., July 31, 2000, available in 2000 WL 9541941. This legislation is not the first of its kind. Examples include the "Health Education Assistance Loans, HUD mortgages, ship mortgages under the Merchant Marine Act, debts for taxes and customs duties, and licensure on educational institutions." Letter from Jon Jennings, Assistant Attorney General, U.S. Dept. of Justice, to the Honorable William E. Kennard, Chairman, FCC (Oct. 5, 1999) (on file with *Catholic University Law Review*).

202. See *NextWave V*, 235 B.R. at 316, 317. Because the district court found no regulatory provisions of the FCA affected, it deduced that federal bankruptcy law was necessar-

2. *The Bankruptcy Remedies Conflict with the FCA's Purposes*

The Federal Communications Act states that “[n]othing . . . in the use of competitive bidding, shall . . . diminish the authority of the [FCC] . . . to regulate or reclaim spectrum licenses.”²⁰³ The Commission claimed that the remedies that the bankruptcy court provided to NextWave violated this statutory language.²⁰⁴

Essentially, the bankruptcy court’s judgment was “at war with the basic policy underlying the [FCA]” because it emasculated the very system Congress chose to promote: an efficient and effective use of spectrum within a competitive market.²⁰⁵ The lower courts’ disregard for the winning bid and unwillingness to return the licenses for reauction prevented rapid development of services by companies that valued the spectrum the most.²⁰⁶

ily applicable, relying on examples of other federal lending programs subject to similar adjudication. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 316 (S.D.N.Y. 1999) (*NextWave VI*) (citing 11 U.S.C. § 106(a), which provides that the federal agencies are subject to fraudulent conveyance claims). The court also explains that the remedy in this case is mandated by law. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 305, 311 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*). Historically, the Supreme Court has admonished courts to refrain from electing its own remedies when the governing statute provides the answer. See, e.g., *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979).

203. 47 U.S.C. § 309(j)(6) (1994).

204. See *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 46 (2d Cir. 2000) (*NextWave VII*), cert. denied, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); *NextWave IV.B*, 235 B.R. at 307; *NextWave I*, 235 B.R. at 269, 270. By classifying the FCC as just an ordinary creditor with rights limited to those of a private lender, the *NextWave* court disregarded the Commission’s regulatory responsibilities and the objectives Congress enacted in the FCA. See *NextWave VII*, 200 F.3d at 55, 56. A remedy such as the one imposed by the bankruptcy court, which is completely at odds with the FCC licensing regulations—much less “wholly in accord” with them—is barred under federal common law. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 604 (1973) (asserting that if the rights of the federal government are at issue in a contract pertaining to a federal program, any rules applied to such contract must be “wholly in accord” with that program).

205. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 145-46 (1940) (holding that Court of Appeals for the District of Columbia Circuit’s finding that the FCC made legal errors in its denial of a radio license does not give the appeals court authority to then approve such license); *NextWave I*, 235 B.R. at 271; *NextWave IV.B.*, 235 B.R. at 307, 308; *NextWave V*, 235 B.R. at 317. The winning bids are the bases upon which the government allocates scarce spectrum among competing companies, and revocation of the licenses upon default of such bids are regulations that ensure the fairness and efficiency of the license scheme, as indicated by the FCA. See 47 U.S.C. § 309(j)(1), (3), (4), (6) (1994 & Supp. III 1997); *Second Report and Order*, *supra* note 8, at 2360, para. 70.

206. See *Cancellation Notice*, *supra* note 25 (quoting FCC Chairman William Kennard’s declaration that the spectrum for which NextWave is licensed “has laid fallow for too long”). Kennard warned that the public suffers a loss when companies are financially unable to utilize their allotted spectrum to its fullest capacity. See *Senate Hearing*, *supra*

Secondly, by virtue of the statute, the court had no authority to change an essential condition of the licenses.²⁰⁷ Congress conferred exclusive authority on the FCC, not the courts, to grant spectrum licenses based on regulations that would protect the public interest.²⁰⁸ By letting NextWave keep sixty-three licenses for seventy-five percent less than it bid for them, the bankruptcy court usurped the Commission's power and granted rights to NextWave to which the company is not entitled under the FCA.²⁰⁹ Similarly, by allowing NextWave to retain the licenses without adhering to the deadlines imposed on every other licensee, the court again granted license rights without statutory authority.²¹⁰

note 25 (statement of FCC Chairman William Kennard); Jeffrey Silva & Heather Forsgren Weaver, *FCC, DOJ: Pocket Licenses Must Come Back*, RCR RADIO COMM. REP., Oct. 26, 1998, available in 1998 WL 21947866.

207. See *NextWave VII*, 200 F.3d at 54, 56 (prohibiting the bankruptcy court from attacking or impairing the FCC's license allocation system); *In re Pacific Land Sales, Inc.*, 187 B.R. 302, 313 (B.A.P. 9th Cir. 1995). The Supreme Court has held that courts cannot grant an applicant a license that the FCC has refused. See *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946); *Scripps-Howard Radio, Inc., v. FCC*, 316 U.S. 4, 14 (1942). Because Congress has expressly granted the FCC exclusive jurisdiction over the airwaves, it remains that "the Commission, not the courts, . . . must be satisfied that the public interest will be served" by the grant of the license. See *WOKO*, 329 U.S. at 229.

208. See *NextWave VII*, 200 F.3d at 55 & n.11 (stating that the bankruptcy court has no power to adjudicate claims against the FCC as a regulator). The bankruptcy court had neither "technical competence nor legal authority" to reach the conclusion that the FCA's public interest goals would be promoted through the avoidance remedy. *National Broad. Co., v. United States*, 319 U.S. 190, 224 (1943). The determination of what policies constitute the public interest in relation to radio spectrum allocation is a task that Congress has given to the Commission. See, e.g., *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981).

209. See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 502 (1986) ("Congress has repeatedly expressed its legislative determination that the [bankruptcy] trustee is not to have *carte blanche* to ignore non bankruptcy law."). The Supreme Court has also held that a debtor in bankruptcy is not relieved of all pre-petition obligations under nonbankruptcy law simply because the debtor seeks refuge from the Bankruptcy Code. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 534 (1984). Even bankruptcy courts have operated under the canon that the Bankruptcy Code cannot change the "regulatory environment in which a debtor operates." *In re Draughton Training Inst., Inc.*, 119 B.R. 921, 924 (Bankr. W.D. La. 1990); see also *In re Capital West Investors*, 186 B.R. 497, 500-01 (Bankr. N.D. Cal. 1995) (reversing the bankruptcy court's order confirming a reorganization plan that removed certain financial requirements from the debtor's regulatory agreement with the Federal Housing and Urban Development Agency); *In re Nitech Paper Corp.*, 43 B.R. 492, 499 n.7 (Bankr. S.D.N.Y. 1984) ("The Supreme Court has indicated several situations where the bankruptcy code must bend in the face of contrary federal policy.").

210. See *In re FCC*, 217 F.3d 125, 128-29, 131-32 (2d Cir. 2000) (*NextWave IX*), petition for cert. filed, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447); *NextWave VII*, 200 F.3d at 55, 56 (noting that the NextWave bankruptcy court does not have the power to interfere with the FCC's implementation of congressional objectives); see also 11 U.S.C. § 1129(a)(3) (1994) (authorizing a court to confirm a plan of reorganization only if it is "not

Thirdly, waiving cancellation of NextWave's licenses unfairly discriminated against those C-Block licensees who played by the rules.²¹¹ The FCA specifically directs the FCC to allocate spectrum so as not to create unjust enrichment or additional rights for any licensee, regardless of any other statutory protections.²¹² Therefore, adhering to the conditions of the licenses allows for consistent implementation of the FCA's public policy goals.²¹³

3. Enforcement of the Bankruptcy Code Promotes Federal Policy

To provide equitable relief to NextWave's creditors and assistance for the company, the lower courts allowed NextWave to ignore the balance of the bid owed to the government.²¹⁴ The bankruptcy court explained that NextWave's debt represented a payment obligation to the FCC as a creditor, and because there was no express provision exempting the FCC as a creditor from bankruptcy proceedings, Congress intended such debt to be avoidable under the Bankruptcy Code just like any other financial obligation.²¹⁵ The district and bankruptcy courts rejected the argument that their remedies ignored the Communications Act, finding that the Commission's regulations governing spectrum licenses were not altered in any way.²¹⁶

by any means forbidden by law"). It is worth noting that when a debtor licensee attempts to limit the discretion of a regulatory body through bankruptcy proceedings, the debtor licensee could enhance its own property rights, which is contrary to the purpose of the Bankruptcy Code. See *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400, 404 (Bankr. N.D. Ohio 1983).

211. See *Cancellation Notice*, *supra* note 25 (quoting FCC Chairman William E. Kennard as stating that discretionary treatment toward NextWave would be unfair and undermine the auction process).

212. 47 U.S.C. § 309(j)(4)(E), (6)(D) (1994).

213. See *Senate Hearing*, *supra* note 25 (statement of FCC Chairman William Kennard).

214. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 319-20 (S.D.N.Y. 1999) (*NextWave VI*). The Bankruptcy Code promotes public policy through equitable distribution of the assets amongst all creditors, and through any relief that can encourage reorganization. See *In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996).

215. See *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 316-17 (Bankr. S.D.N.Y. 1999) (*NextWave V*); *In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 270-71 (Bankr. S.D.N.Y. 1998) (*NextWave I*).

216. See *NextWave VI*, 241 B.R. at 318. NextWave and the court maintain that the only FCC interest affected is the monetary loss the government will sustain as a creditor. See *id.* at 315, 320-21; see also *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 274 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*). The court distinguishes the Commission's supporting case law in *In re Yellow Cab Cooperative Ass'n*, 132 F.3d 591, 593-94 (10th Cir. 1997) (holding that municipal agency's regulatory power allowed modification of a bankrupt company's taxi cab license included as an asset in the estate) and *In re Gull Air, Inc.*, 890 F.2d 1255, 1260, 1262 (1st Cir. 1989) (denying bankruptcy transfer of FAA

The same court further held that any FCC action to enforce payment or reclamation of NextWave's licenses was categorically claim based and therefore stayed under the Bankruptcy Code to enable the company's recovery and protect its creditors.²¹⁷ Reorganization is strongly favored over dissolution because it is in the public interest to protect, among many other things, jobs and the economy.²¹⁸

4. *But Does the NextWave IX Ruling Harmonize the Competing Laws?*

The district court in *NextWave VI* acknowledged that "in construing conflicting statutes, the statutes must be read to harmonize and preserve the goals" of each.²¹⁹ When determining a remedy under two federal statutes, courts must give both equal credence to the congressional intent, for courts should avoid declaring which law is superior.²²⁰

Case law has held that "courts are bound by congressional judgments that general bankruptcy policy give way to more specific policy considerations."²²¹ The Second Circuit in *NextWave VII* echoed this view and asserted that the *NextWave* courts could not interfere with the congressional goals mandated by the FCA.²²² The reduction of NextWave's obligation and disregard for the payment conditions undermined an integral element of the auction, and thus abrogated the FCA's payment provi-

regulated airport slots because they were revoked from bankrupt licensee), by noting that the government in all of these cases is *not*, contrary to the FCC's position in the instant case, seeking to protect a pecuniary interest. *See id.*

217. *See generally NextWave VIII*, 244 B.R. at 266-68, 281-83.

218. *See, e.g., In re Continental Airlines*, 91 F.3d at 565.

219. *NextWave VI*, 241 B.R. at 319 (citing the same principle in *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *In re Betty Owen Schools, Inc.*, 195 B.R. 23, 33 (Bankr. S.D.N.Y. 1996) (reconciling bankruptcy law with the Department of Education's school loan program); *see also In re University Med. Ctr.*, 973 F.2d 1065, 1082-83 (3d Cir. 1992); *In re Capital West Investors*, 186 B.R. 497, 499 (N.D. Cal. 1995) ("When confronted with two different statutory schemes, the court must attempt to harmonize the goals and policies of each.").

220. *See Morton*, 417 U.S. at 551 (holding that when two statutes are capable of coexistence, the courts must regard each as applicable, unless Congress expressly intended to supplant one over the other); *see also West v. Keve*, 721 F.2d 91, 96 (3d Cir. 1983) ("Competing statutes should not, if at all possible, be interpreted so that the provisions of one will abrogate the provisions of another.").

221. *Johnson v. Edinboro State College*, 728 F.2d 163, 164 (3d Cir. 1984); *see also United States v. Sotelo*, 436 U.S. 268, 279 (1978) (holding that a bankruptcy court cannot discharge a debt that Congress intended to be nondischargeable under the Internal Revenue Code).

222. *In re NextWave Personal Communications, Inc.*, 200 F.3d 45, 55 (2d Cir. 1999) (*NextWave VII*) (referring to Justice Frankfurter's observation that the Communications Act represents Congress's desire to maintain the radio airwaves through administrative control), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980).

sions.²²³

The bankruptcy court refuted the FCC's claim and determined that in addition to promoting its own policy of providing a fresh start for bankrupt companies, allowing NextWave to keep the licenses facilitates a reorganization plan that meets all the objectives set forth in section 309(j) of the Communications Act.²²⁴ The bankruptcy court allowed an entrepreneurial company to stay in business, contribute to the economy, and utilize the spectrum faster than a future licensee who would be delayed by a reauction.²²⁵

The Commission, however, contended that regardless of the possibility that the remedy's effect would be in line with the FCA's goals, returning the licenses to the FCC would be the only equitable relief to reconcile the conflicting policies within the FCA and the Bankruptcy Code.²²⁶ The government argued that the bankruptcy court "failed to recognize that the potential benefits of allowing NextWave to reorganize pale in comparison with the negative ramifications that follow from permitting spectrum licensees to avoid critical provisions of their regulatory agreements with the FCC by declaring bankruptcy."²²⁷ The Second Circuit's opinion in *NextWave IX* harmonized congressional intent in both laws when it

223. Cf. *In re NextWave Personal Communications, Inc.*, 235 B.R. 305, 307 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*) (citing the FCC's claim that the bankruptcy court's remedy for NextWave must honor the principle of enforcing the winning bid).

224. See *id.* at 311. The bankruptcy court maintained that in keeping with the central canon of bankruptcy law, the remedy will allow NextWave to reorganize rather than liquidate. See *id.* at 312. The bankruptcy court reasoned that the faster NextWave gets on its feet, the quicker creditors, including the Commission, will be compensated. See *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 276 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*). The court further explained that NextWave's retention of the licenses and subsequent reentry into the marketplace will promote the FCA's goals by: (1) removing delays that are associated with the administrative and judicial oversight required for repossessing and reaucting licenses; (2) promoting economic opportunities for the public in the form of jobs, tax revenues, and new services; (3) functioning and succeeding as a competitive small business in the telecommunications market; and (4) promoting the "efficient and intensive use" of the spectrum, rather than allowing it to remain fallow and unused. *NextWave IV.B*, 235 B.R. at 311.

225. See *NextWave IV.B*, 235 B.R. at 311-12.

226. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 319 (S.D.N.Y. 1999) (*NextWave VI*); *In re NextWave Personal Communications, Inc.*, 235 B.R. 314, 316 (Bankr. S.D.N.Y. 1999) (*NextWave V*) (arguing that the payment conditions are the keystone of the FCC's auction program); see also *Senate Hearing, supra* note 25 (statement of FCC Chairman William Kennard) (explaining that strict adherence to the payment conditions will ensure that the licenses remain with companies that will promote the most effective use of the spectrum); *Cancellation Notice, supra* note 25 (noting that the C-Block licenses set aside by bankruptcy have remained fallow for too long and need to be reaucted for immediate use).

227. *NextWave VI*, 241 B.R. at 319.

reconciled the FCC's power under the FCA with the Bankruptcy Code's automatic stay exemption for the exercise of such power.²²⁸ Yet it is important to examine the impact of the Second Circuit's May 2000 ruling in light of the public policy conflicts espoused by both sides.

III. EXAMINING THE IMPACT OF THE SECOND CIRCUIT'S MANDAMUS

The Commission feared that NextWave's retention of the licenses would result in a financial burden for taxpayers, devaluation of a public resource, and an unnatural disruption of the wireless PCS market.²²⁹ Conversely, NextWave and the bankruptcy court believed that any ruling in favor of the FCC would result in destruction of NextWave's and other bankrupt licensees' rights under the bankruptcy law.²³⁰ The result in *NextWave IX* mirrored the Second Circuit's conclusions in the preceding appeal, and reiterated the proposition that regardless of the bankruptcy court's interpretation of the FCC's actions, the lower court was without jurisdiction to question whether or not such actions serve a regulatory purpose.²³¹

A. A Ruling for the FCC Avoids Destructive Precedent

The Commission's chief concern was that a ruling affirming the bankruptcy court's enforcement of the automatic stay would effectively undermine the integrity of the entire auction process.²³² The Commission argued that without FCC regulatory requirements in place, unsuitable auction participants might pledge billions of dollars for spectrum licenses with neither the ability nor the intention to pay for them.²³³ Under such

228. See *In re FCC*, 217 F.3d 125, 134-39, 141 (2d Cir. 2000) (*NextWave IX*), petition for cert. filed, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447).

229. See *FCC Restructuring Order*, *supra* note 92, at 16,447, para. 19 (announcing that the Commission will not allow bankruptcy licensees to retain their licenses without obligation to the full bid price because such action would be contrary to the purpose of awarding licenses to the highest bidders).

230. See *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 266, 268-70 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*) (explaining that the Bankruptcy Code's provisions are NextWave's right to cure defaults in order to avoid forfeiture and reorganize); *NextWave Statement*, *supra* note 25 ("The FCC has violated the legal rights of NextWave . . ."). The bankruptcy court further stipulated that "[i]f the statutory right to cure were not honored and the FCC were permitted to reclaim NextWave's licenses . . . the result would be economic catastrophe" for the company and its investors. *NextWave VIII*, 244 B.R. at 269.

231. *NextWave IX*, 217 F.3d at 135, 137.

232. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 319 (Bankr. S.D.N.Y. 1999) (*NextWave V*).

233. See *In re NextWave Personal Communications, Inc.*, 241 B.R. 311, 319 (S.D.N.Y.) (*NextWave VI*); see also *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 52

circumstances, the FCC's auction program could not reliably award licenses to parties that value them most highly²³⁴ and would disrupt the free market forces built into the current system.²³⁵

Presumably, auction participants could bid phantom amounts, in hopes that a bankruptcy court would subsequently allow them to defer payment until they were financially stable.²³⁶ The automatic stay and chapter 11 remedies could become an insurance policy for debtors and their underwriters.²³⁷ Such a result is highly unfair to those bidders who, with good intention, bid what they can afford and play by the rules.²³⁸ The Commission could not have been more forthcoming in providing the public with detailed guidelines to the auction program provisions.²³⁹ It would be naive to assume that NextWave and the other bankrupt C-Block licensees had any less knowledge of the potential risks involved than their counterparts who have successfully used their licenses.²⁴⁰

In structuring the auction program, Congress and the FCC intended to let the market dictate the value of the licenses and allow the bidder to

(2d Cir. 2000) (*NextWave VII*) (explaining that the FCC "gave considerable thought . . ." to deterring frivolous or insincere bidding when it promulgated regulations requiring full and timely payment of winning bids), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980).

234. See *NextWave VII*, 200 F.3d at 54; *Restructuring Order*, *supra* note 92, at 16,447, para. 19 (stating that allowing companies to keep their licenses without paying their full bid price would result in "the Commission picking winners and losers on an unsupportable basis, instead of the marketplace determining winners" based on how much they valued the licenses).

235. See *Restructuring Order*, *supra* note 92, at 16,510 (separate statement of FCC Commissioner Susan Ness) (concluding that the FCC's suspension of C-Block payments created marketplace uncertainty and impeded investment that was needed to support the building of PCS systems).

236. See *NextWave VI*, 241 B.R. at 320 (suggesting that such a plan is not good business). Between March 1997 and October 1999, 29 C-Block licensees filed for bankruptcy. See Department of Justice Letter from Jon Jennings, Acting Assistant Attorney General, United States Dep't of Justice, to the Honorable William E. Kennard, Chairman, FCC (Oct. 5, 1999) (on file with *Catholic University Law Review*).

237. See, e.g., *Kupetz v. Wolf*, 845 F.2d 842, 849 n.16 (9th Cir. 1988) (asserting that absent any limits on suing for fraudulent conveyance, "[c]redit could liberally be extended to such companies regardless of their assets or cash flow with the knowledge that the [transaction] could always be [challenged]" in court).

238. See *Restructuring Order*, *supra* note 92, at 16,447, para. 19; *Cancellation Notice*, *supra* note 25.

239. See *Restructuring Order*, *supra* note 92, at 16,508-10 (separate statement of Commissioner Susan Ness) (asserting that the auction rules were clear and fair).

240. See *In re NextWave Personal Communications, Inc.*, 200 F.3d 45, 61-62 (2d Cir. 1999) (*NextWave VII*), *cert. denied*, 69 U.S.L.W. 3250 (U.S. Oct. 10, 2000) (No. 99-1980); cf. *Spectrum Report*, *supra* note 8, at 9605 (highlighting the fact that the FCC's dissemination of auction information to the public has been a successful component of the program).

make the ultimate decision.²⁴¹ Instead, with the *NextWave* case, a bankruptcy court determined the price of the licenses, arguably without expertise in the PCS market.²⁴² Further, bidders who ultimately lost in the auction may have had bids higher than the price *NextWave* will be paying. The appeals court recognized these pitfalls when it reversed the fraudulent conveyance ruling.²⁴³ Thus, if the Second Circuit had allowed the bankruptcy court to stay the FCC's cancellation order, the Commission and Congress would inevitably be back to the arbitrary allocation system they sought to change in section 309(j) of the FCA.²⁴⁴ In addition, enforcement of the stay would allow *NextWave* to be unjustly enriched, which Congress expressly prohibits in the Act.²⁴⁵

B. Implications: The Communications Industry and the Public

Also of concern is the public trust element of the spectrum auction.²⁴⁶ Policy makers, along with the FCC, feared that taxpayers would bear the brunt of the litigation: picking up the outstanding multibillion dollar bill on the C-Block licenses and losing out on the promise of efficient, innovative, and cost effective services.²⁴⁷

241. See generally *Spectrum Report*, *supra* note 8, at 9634-36 (reporting that the Commission does not estimate the value of auctionable spectrum and that mandated competitive bidding that awards licenses to those who will pay the most for them satisfies the congressional objectives enacted in section 309(j) of the FCA).

242. *NextWave VII*, 200 F.3d at 54-55 (establishing that the bankruptcy court's reduction of *NextWave*'s bid obligation effectively awarded licenses to a company that the FCC determined was not a worthy licensee). Congress assigned the FCC as the expert in allocating spectrum, and together they decided that marketplace forces would indicate which licensees would best serve the PCS market. See *id.*; e.g., Heather Forsgren Weaver, *Congress Could Step in to Guide C-Block*, RCR RADIO COMM. REP., Sept. 21, 1998, at 3 (reporting on Rep. John Dingell's reaction to a ruling in *GW*'s C-Block bankruptcy case). Representative Dingell found it ironic that a bankruptcy judge in Dallas had a better sense of the auction policies than the FCC. *Id.*

243. See *NextWave VII*, 200 F.3d at 59-62.

244. See H.R. REP. 103-111, at 248 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 575 (suggesting to replace the lottery system of spectrum allocation with the competitive bidding auctions due to the arbitrary and ineffective results of the former).

245. 47 U.S.C. 309(j)(3)(C), (4)(E) (1994 & Supp. III 1997).

246. See generally H.R. REP. 103-111, at 249, *reprinted in* 1993 U.S.C.C.A.N. 378, 576; *Senate Hearing*, *supra* note 25 (statement of FCC Chairman William Kennard) (testifying before the Senate Budget Committee that the FCC's position in the C-Block bankruptcy litigation is motivated by strong public policy objectives).

247. See Jeffrey Silva and Heather Forsgren Weaver, *FCC, DOJ: Pocket Licenses Must Come Back*, RCR RADIO COMM. REP., Oct. 26, 1998, *available in* 1998 WL 21947866, at *3. FCC Chairman William Kennard stated that:

"Spectrum belongs to the American public. We should not allow valuable spectrum to be tied up for years in bankruptcy litigation If these auction winners remain able to use the Bankruptcy Code to avoid the amount they promised to

NextWave contends that the protection afforded by the Bankruptcy Code is crucial, not only to its own companies and creditors, but to the public interest at large.²⁴⁸ Allowing the FCC to evade bankruptcy law without express congressional authority can chill public and private financing for future telecommunications ventures.²⁴⁹ Similarly, allowing such behavior also revokes the safety net of bankruptcy law upon which all financial entities have the right to rely.²⁵⁰ Denying bankruptcy relief for NextWave sends a strong message to the telecommunications industry that entrepreneurial companies may be effectively precluded from entering the wireless marketplace.²⁵¹

Despite contentions, the *NextWave IX* ruling's most important result will be the restored integrity of congressional intent and FCC authority.²⁵² The bankruptcy court's failure to grasp the obvious regulatory role of enforcing the payment conditions completely ignored the purpose of awarding spectrum licenses by auction. By allowing the FCC to reclaim the licenses, the market forces upon which consumers, the government, and commercial providers rely will continue to be the drive behind a healthy and successful telecommunications industry.²⁵³

IV. CONCLUSION

Congress enacted both the Federal Communications Act and the

pay the American government and keep the licenses out of productive use, then consumers lose on both ends American taxpayers should not have to bear the risk when entrepreneurs try to back out of their promises to the government."

Id. (quoting FCC Chairman William Kennard).

248. See *NextWave Statement*, *supra* note 25 (declaring that by reclaiming the NextWave licenses, the FCC will severely impact and irreparably harm bankrupt C-Block licensees across the country, and will inevitably cause a delay of PCS service to the public).

249. See Shrier-Rape & Brookner, *supra* note 95, at 7.

250. See *id.* at 8 (illustrating that government instrumentalities are subject to the Code when dealing with private entities).

251. See H.R. Rep. 103-111, at 254-55, reprinted in 1993 U.S.C.C.A.N. 581-82; *In re NextWave Personal Communications, Inc.*, 244 B.R. 253, 270 (Bankr. S.D.N.Y. 2000) (*NextWave VIII*) (arguing that NextWave would have to be liquidated and sold if it cannot retain the licenses, therefore resulting in a \$420 million loss for its investors). NextWave also warned that stripping the company of its rights under bankruptcy law would set a destructive precedent for other areas of industry where the government acts as a creditor. See *NextWave Petitions Supreme Court for Review*, WASH. TELECOM NEWSWIRE, June 9, 2000, available in 2000 WL 6837355.

252. *In re FCC*, 217 F.3d 125, 129, 141 (2d Cir. 2000) (*NextWave IX*), petition for cert. filed, 69 U.S.L.W. 3235 (U.S. Sept. 21, 2000) (No. 00-447).

253. See *Senate Hearing*, *supra* note 25 (statement of FCC Chairman William Kennard) (listing the benefits to consumers and the industry in a market driven auction process).

Bankruptcy Code to satisfy economic policy goals that are inherent in our capitalist society. Ignoring these goals would produce unintended inequities and inefficiencies. So too would a ruling that denies the court or the FCC its proper authority under both areas of law. According to these principles, the Second Circuit in *NextWave* successfully reconciled the laws when it affirmed the Commission's right to enforce spectrum payment obligations and penalties by virtue of the agency's regulatory authority. A contrary ruling would allow *NextWave* to avoid the law governing the allocation of spectrum licenses and rendered useless the entire auction program. Such a consequence would have undeniably been contrary to the public interest.

