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## Can You Hear Me Now? Good. The Nextwave of Options for the FCC, in Light of FCC v. Nextwave Personal Communications, Inc.

Susan K. Slam

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## CAN YOU HEAR ME NOW? GOOD.<sup>TM1</sup> THE NEXTWAVE OF OPTIONS FOR THE FCC, IN LIGHT OF *FCC v. NEXTWAVE PERSONAL COMMUNICATIONS, INC.*<sup>2</sup>

### I. INTRODUCTION

The United States Supreme Court made a clear announcement in *FCC v. NextWave Personal Communications, Inc.* when it correctly held that the Bankruptcy Code prohibited the FCC from revoking licenses held by a debtor upon the debtor's failure to make timely payments to the FCC for purchase of the licenses.<sup>3</sup> The Bankruptcy Code methodically tries to balance the countervailing interests between debtors and creditors.<sup>4</sup> The Code encourages debtor companies that are

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1. FEDTM 76364630. "Can You Hear Me Now? Good." is an active trademark of Cellco Partnership, d/b/a Verizon Wireless. FEDTM 76364630.

2. *FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293 (2003) (affirming judgment declaring the spectrum license cancellations unlawful under bankruptcy provisions).

3. *Id.* The decision made it clear to government regulators not to make a payment default the sole trigger for license cancellation. H. Jason Gold & Valerie P. Morrison, *United States Supreme Court Holds FCC in Violation of the Bankruptcy Code*, available at <http://www.wrf.com/attorney/publications.asp?id=G432064236> (January 27, 2003).

4. The Bankruptcy Reform Act of 1978 (as amended and codified in 11 USC) is commonly known as the Bankruptcy Code. BLACK'S LAW DICTIONARY 142 (7th ed. 1999). Bankruptcy is defined as: "[t]he statutory procedure, usually triggered by insolvency, by which a person is relieved of most debts and undergoes a judicially supervised reorganization or liquidation for the benefit of that person's creditors." BLACK'S LAW DICTIONARY 141 (7th ed. 1999). There are different types of bankruptcy:

There are two general forms of bankruptcy: (1) liquidation and (2) rehabilitation. Chapter 7 of the Code is entitled 'Liquidation.' . . . [i]n a typical Chapter 7 liquidation case, the trustee collects the non-exempt property of the debtor, converts that property to cash, and distributes the cash to the creditors. . . . [c]hapters 11, 12, and 13 of the Bankruptcy Code contemplate debtor rehabilitation. In a rehabilitation case, creditors look to future earnings of the debtor, not to the property of the debtor at the time of the initiation of the proceeding, to satisfy their claims. The debtor generally retains its assets and makes payments to creditors, usually from postpetition earnings, pursuant to a court-approved plan.

BLACK'S LAW DICTIONARY 141 (7th ed. 1999), quoting David G. Epstein et al., Bankruptcy §1-5, at 8-9 (1993).

Chapter 11 is defined as "[t]he chapter of the Bankruptcy Code allowing an insolvent business, or one that is threatened with insolvency, to reorganize itself under court supervision while continuing its normal operations and restructuring its debt." BLACK'S LAW DICTIONARY 226

reorganizing to make a “fresh start,” while protecting creditors from significant losses.<sup>5</sup> When a governmental agency, such as the Federal Communications Commission (FCC), is functioning as both a creditor and regulator, a conflict arises between the agency’s regulatory power and its status as a creditor, thereby requiring it to abide by the Bankruptcy Code.<sup>6</sup>

If the FCC takes action against a company that has filed for Chapter 11 protection, under its regulatory authority and for a regulatory purpose, the Code yields to the regulatory agency.<sup>7</sup> However, when the FCC advances the government’s pecuniary interests, the Bankruptcy Code prevails, and the protections within the Code will be triggered to prevent the government from negatively affecting the bankrupt company.<sup>8</sup>

This Note examines the competing interests involved when a company has personal communications services (PCS) and spectrum licenses granted by the FCC and reorganizes under Chapter 11 of the Bankruptcy Code.<sup>9</sup> Part II provides a framework of the FCC’s distribution of spectrum and PCS licenses, the relevant provisions of the Bankruptcy Code, an analysis of the FCC’s actions as both a regulator and creditor, and an overview of leading cases that have been decided in this area.<sup>10</sup> Part III provides a statement of facts, including the procedural history and the Supreme Court’s decision in *FCC v. NextWave Personal Communications, Inc.*<sup>11</sup> Finally, Part IV analyzes the impact of the Supreme Court’s decision, and how it will affect future regulatory action in the bankruptcy arena, along with proposed solutions to the difficulties facing the FCC.<sup>12</sup>

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(7th ed. 1999).

5. Andrea Serlin, *NextWave v. FCC: Battle for the C-Block Licenses*, 50 CATH. U. L. REV. 219, 229 (2000) (reviewing NextWave’s position in trying to maintain C-Block licenses).

6. Nicholas J. Patterson, *Symposium: Management and Control of the Modern Business Corporation: Comment: The Nature and Scope of the FCC’s Regulatory Power in the Wake of the NextWave and GWI PCS Cases*, 69 U. CHI. L. REV. 1373, 1373-74 (2002) (reviewing the FCC’s jurisdiction in bankruptcy proceedings, finding that the FCC can regulate use of the electromagnetic spectrum by bankrupt licensees, but cannot enforce promissory notes against debtors in bankruptcy).

7. *Id.* See *infra* notes 27-40 and accompanying text, for a full explanation of Chapter 11 Bankruptcy and other provisions of the Bankruptcy Code.

8. See *infra* notes 27-40 and accompanying text.

9. See *infra* Parts II-IV.

10. See *infra* notes 13-59 and accompanying text.

11. See *infra* notes 60-107 and accompanying text.

12. See *infra* notes 108-199 and accompanying text.

## II. BACKGROUND

### *A. Federal Communications Act of 1934<sup>13</sup>: The Process of Securing PCS Licenses*

The Federal Communications Act (FCA) established the FCC in 1934.<sup>14</sup> In 1993, Congress amended the FCA to authorize the FCC to award spectrum licenses “through a system of competitive bidding.”<sup>15</sup>

13. The Federal Communications Act (FCA) governs national telecommunications policy. Nicole C. Daniel, *A Return to Written Consent: A Proposal to the FCC to Eliminate Slamming*, 49 FED. COMM. L.J. 227, 233 (1996) (recommending that the FCC reinstate its short-lived rule requiring written authorization from the consumer before any change in the long-distance carrier could be implemented). The FCC maintains regulatory power over interstate and foreign commerce in communications by wire and radio. *Id.* The FCA requires the FCC to consider “the public interest, convenience and necessity” when establishing rules. *Id.* (quoting 47 U.S.C. § 251(h)(3)(not in current version), 302(a)(repealed 1936), 303, and 309(a) (1995)). The FCC has two general sets of functions. *Id.* First, it must establish and enforce fair rules of competition in communications. *Id.* Second, it must “work in the public interest to protect consumers in noncompetitive telecommunications markets and to guarantee public benefits from communications that a market system simply will not provide.” *Id.* (quoting Reform of Fed. Communications Commission: Hearings Before the Subcomm. on Telecommunications and Finance of the Comm. on Commerce H.R., 104th Cong. 15 (1996) (statement of Reed E. Hundt)).

14. Federal Communications Act of 1934, 47 U.S.C. § 151 (1996). See Federal Communications Commission, *About the FCC* (last reviewed/updated June 3, 2003), at <http://www.fcc.gov/aboutus.html>. The FCC is an independent United States government agency, directly responsible to Congress. *Id.* It is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. *Id.* The FCC’s jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions. *Id.*

15. Federal Communications Act of 1934, 47 U.S.C. § 309(j)(1) (1993). See Federal Communications Commission, *Glossary of Telecommunications Terms* (last reviewed/updated July 31, 2002), at <http://www.fcc.gov/glossary.html>. The FCC defines ‘spectrum’ as, “the range of electromagnetic radio frequencies used in the transmission of sound, data, and television.” *Id.*

Congress directed the FCC to “promot[e] economic opportunity and competition” and “avoid[] excessive concentration of licenses” by “disseminating licenses among a wide variety of applications, including small businesses [and] rural telephone companies.” Federal Communications Act of 1934, 47 U.S.C. § 309(j)(3)(B). To achieve this goal, Congress directed the FCC to “consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments... or other schedules or methods...” Federal Communications Act of 1934, 47 U.S.C. § 309(j)(4)(A). The Wireless Telecommunications Bureau regulates the use of radio spectrum to fulfill the communications needs of businesses, local and state governments, public safety service providers, aircraft and ship operators, and individuals. Federal Communications Commission, *About the FCC*, at <http://www.fcc.gov/aboutus.html>. Congress directed the FCC to issue licenses in an auction system designed to promote the “efficient, fair, and intensive use of the spectrum.” Serlin, *supra* note 5, at 219. The licenses grant the licensee the right to use the spectrum in accordance with the conditions accompanying the license. *Id.* at 225.

The Telecommunications Act of 1996 was the first major overhaul of telecommunications law in almost 62 years, with the goal of allowing anyone to enter any communications business. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); Federal Communications Commission, *Telecommunications Act of 1996* (last reviewed/updated November

Pursuant to Congress's mandate, the FCC created a competitive bidding auction system and designated the C-Block<sup>16</sup> for small businesses providing PCS, a new form of wireless technology.<sup>17</sup> The FCC had four objectives in implementing the auctioning of the PCS licenses, which focus on developing the technology and promoting opportunities for small business.<sup>18</sup>

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13, 2001), at <http://www.fcc.gov/telecom.html>.

16. In 1993, Congress authorized competitive bidding to auction "blocks" of the electromagnetic spectrum used for PCS. Federal Communications Act of 1934, 47 U.S.C. § 309(j) (1993). The PCS spectrum was divided into six blocks, consisting of different available bandwidths (MHz). Federal Communications Commission, *FCC Broadband PCS Band Plan* (last reviewed/updated on September 23, 2003), at <http://wireless.fcc.gov/auctions/05>. To further Congress's purpose of promoting economic opportunity and competition, the FCC restricted participation in C and F-Block auctions to small businesses and other designated entities with total assets and revenues below certain levels, and allowed the successful bidders to pay in installments over the term of the license. *NextWave Pers. Communications, Inc.*, 537 U.S. at 296. The FCC structured the action under the assumption that the primary impediment to participation by small businesses and minority or woman-owned firms was their lack of access to private capital markets. Thomas W. Hazlett & Babette E.L. Boliek, *Use of Designated Entity Preferences in Assigning Wireless Licenses*, 51 FED. COMM. L.J. 639, 641 (1999) (identifying the delays in license allocation that are directly associated with the FCC preference programs for small, woman, and minority-owned businesses; estimating the consumer costs associated with those delays). Implementing the directives of § 309(j)(1), the FCC reserved the C and F-Blocks of the PCS spectrum for small businesses, entrepreneurs, and other "designated entities." *Id.* at 641-42.

17. Federal Communications Commission, *Glossary of Telecommunications Terms* (last reviewed/updated July 31, 2002), at <http://www.fcc.gov/glossary.html>. The FCC defines PCS as:

Any of several types of wireless, voice and/or data communications systems, typically incorporating digital technology. PCS licenses are most often used to provide services similar to advanced cellular mobile or paging services. However, PCS can also be used to provide other wireless communications services, including services that allow people to place and receive communications while away from their home or office, as well as wireless communications to homes, office buildings and other fixed locations.

*Id.*

PCS generally encompasses a wide range of radio-based communications services that free individuals from the constraints of the wireline public switched telephone network. Thomas A. Monheim, *Personal Communications Services: The Wireless Future of Telecommunications*, 44 FED. COMM. L.J. 335, 338 (1992) (defining PCS and providing partial listing of then current PCS experiments).

The FCC categorized designated entities by average revenues over the three years preceding the filing for auction eligibility. Hazlett, *supra* note 16, at 641; *see generally* Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 F.C.C.R. 175, 75 Rad. Reg. 2d (P & F) 1211 (1994). The categories included very small business, for firms with average revenues of \$15 million; small business for those with revenues not in excess of \$40 million; and entrepreneur, for those with revenues in excess of \$40 million, and not in excess of \$125 million. *Id.* Entrepreneurs were to have no more than \$500 million in gross assets. *Id.*

18. Serlin, *supra* note 5, at 227. Section 309(j) of the FCA provided that the Commission shall include safeguards to protect the public interest and the following four objectives:

(A) development and rapid deployment of new technologies . . . for the benefit of the public . . . without administrative or judicial delays; (B) promoting economic opportunity

To enable small businesses to effectively compete for PCS licenses, Congress directed the FCC to auction specific blocks of the spectrum to qualified small businesses and to offer flexible payment plans.<sup>19</sup> An inherent problem became apparent, however, as each auction covered the same or similar geographical areas, and the bidders at the C-Block auction were mainly new to the market and dramatically misjudged the licenses values.<sup>20</sup> The FCC implemented Restructuring Orders to allow C-Block licensees to choose one of three options to ease the financial burden.<sup>21</sup>

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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 U.S.C. 309(j)(3)(A)-(D).

19. Serlin, *supra* note 5, at 235. The C-Block auctions resulted in bids that aggregated \$10.2 billion in May and July of 1996. *Id.* The FCC required a ten percent cash down payment of the bid, and the remaining ninety percent was deferred in installments spanning ten years. *Id.* at 235-36. The C-Block auction began on December 18, 1995 and ended on May 6, 1996. Federal Communications Commission, *Auction 5: Broadband PCS C Block* (last reviewed/updated on September 23, 2003), at <http://wireless.fcc.gov/auctions/05>. There were a total of 184 rounds of bidding. *Id.* A total of 225 bidders were qualified for the auction, and 89 small business bidders won 493 licenses. *Id.*

20. Serlin, *supra* note 5, at 235-36. After the C-Block auctions, the FCC announced additional auctions in the D, E, and F Blocks, which covered many of the same geographical areas as the C-Block licenses already auctioned. *Id.* at 236. The final bids on these later blocks were significantly lower, and the decrease was not attributed to a decrease in the value of the PCS market, but to the extremely high bids in the C-Block auction. *Id.* This inflated bidding was attributed to the inexperience of the C-Block bidders, as they were mainly new to the market. *Id.* at 265 n.94. The FCC suspended C-Block licensees' installment payment deadlines because several companies sought to modify their payments. *Id.* at 237. Many of the high bidders in the C-Block auctions were not able to obtain financing because the investment banking community believed that the cost of the C-Block licenses was "grossly excessive" compared to their market value, considering the lower winning bids of the D, E, and F Block auctions. *Id.* at 265 n.95.

21. Serlin, *supra* note 5, at 237. 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 licenses; and (3) prepayment. Installment Payment Financing for Personal Communications Services (PCS) Licenses, 62 Fed. Reg. 55354 (Oct. 24, 1997) (to be codified at 47 C.F.R. pt. 1 and 24). The C-Block licensees also had the option to resume payments under their current note. *Id.* at 55350. The disaggregation option allowed any C-Block licensee to break up a portion of its spectrum from each of its licenses and surrender it to the FCC for reauction. *Id.* The only requirements were that the licensee had to disaggregate 15 MHz of spectrum it held across all Basic Trading Areas (BTAs) in a Major Trading Area (MTA). *Id.* The FCC required this to prevent selective surrendering for which the licensee believed it paid too much for, or otherwise discarding spectrum in markets more difficult to serve. *Id.* The FCC also provided that to avoid unjust enrichment, licensees were prohibited from bidding in the subsequent reauction for spectrum the incumbent licensee had disaggregated. *Id.* The amnesty option permitted any C-Block licensee to surrender all of its licenses in exchange for relief from its outstanding debt and waiver of any applicable default payment. *Id.* at 55351. The FCC adopted the amnesty option to speed use of the C-Block spectrum to provide service to the American public. *Id.*

The process to obtain a PCS license begins with the FCC announcing an auction in an official public notice.<sup>22</sup> The FCC may require an upfront payment from those choosing to participate in an auction in order to ensure that only serious bidders participate.<sup>23</sup> If a participant has a winning bid, it is not automatically granted a license.<sup>24</sup> The winning bid only grants the exclusive right to apply for the license.<sup>25</sup> After submitting necessary information, the FCC evaluates the winning bidder's application and either grants or denies the license application.<sup>26</sup>

### B. The Bankruptcy Code<sup>27</sup>

The Bankruptcy Code is structured to permit a debtor "to carry on and rebuild his life" by making a "fresh start," and protects creditors from significant losses by an insolvent debtor.<sup>28</sup> Determining what

The FCC acknowledged that it would not return the down payments made by licensees electing the amnesty option, to discourage speculation and ensure that all bidders would participate in the reauction without undue advantage. *Id.* Prepayment allowed any C-Block licensee to prepay selective licenses subject to certain restrictions. *Id.* at 55352.

22. Serlin, *supra* note 5, at 228. The notice specifies the geographic spectrum and the guidelines for the application. *Id.* The notice also includes the following information: the licenses to be auctioned, along with the time, place, and method of competitive bidding to be used, the bid submission and withdrawal procedures, filing timelines for forms, fees, and payments. *Id.* at 265 n.49. Bidders must submit an application and certification forms which identify the licenses for which the applicant seeks to bid, the applicant's name, certification that applicant is qualified under Section 308(b) of the FCA, and a certification of meeting any financial requirements. *Id.*

23. *Id.* at 228. The FCC is authorized to provide upfront and/or down payments under Section 309(j)(4). *Id.* at 265 n.50.

24. *Id.* at 228. The winning bidder must submit a long-form application and a non-refundable down payment, which is a certain percentage of its total bid. *Id.* at 228, 265 n.52.

25. *Id.* at 228. The highest bidders are announced in a public notice, and parties opposed to a granting of an application can provide specific allegations as to why it would be inconsistent with public interest. *Id.* at 228-29.

26. *Id.* at 229. If the FCC grants an application, it awards the license on full payment of the winning bid. *Id.*

27. See BLACK'S LAW DICTIONARY, *supra* note 4 and accompanying text.

28. Serlin, *supra* note 5, at 229. The Code is a detailed and complicated set of regulations, with the public policy of giving debtors a second chance at success. Miriam Marton, *The Battle of Authority Between the FCC and the Bankruptcy Courts*, 18 BANKR. DEV. J. 81, 96 (2001) (discussing the case history of FCC v. NextWave Personal Communications, Inc., emphasizing the need of the Supreme Court to make a determinative decision as to which prevailed). Chapter 11 is a rehabilitative clause, where "creditors look to future earnings of the debtor, not to the property of the debtor at the time of the initiation of the bankruptcy proceeding, to satisfy their claims." *Id.* (quoting David G. Epstein et al., Bankruptcy §1-5, at 10 (1992)). The policy prevents liquidation of the debtor's assets, and permits successful rehabilitation. Serlin, *supra* note 5, at 265 n.58. Bankruptcy law seeks to accomplish three goals: (1) to distribute equitably the debtor's assets among creditors; (2) relieve the honest debtor from the weight of oppressive indebtedness, to permit the debtor a fresh start; and (3) expeditious and economic administrative of cases under the Bankruptcy Code. Warner v. DMG Color, Inc., 20 P.3d 868, 871-72 (Utah 2000).

property is included in the bankruptcy estate is critical, and 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.”<sup>29</sup> The Code protects both debtors and creditors.<sup>30</sup>

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29. 11 U.S.C. § 541 (2000). Property includes, among other things: bank accounts, checks, insurance owned by debtor, land sale contracts, leased property, accounts receivable, assets of a corporation in which debtor is a shareholder, cars, community property, crops, escrow funds, stock exchange seats, licenses and permits, livestock, marital property, or obligations such as alimony, and various personal property. Serlin, *supra* note 5, at 265 n.61. The companies that obtain licenses from the FCC have property rights in their licenses. William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 FED. COMM. L.J. 1, 6 (1997).

Licensees’ property rights in their licenses are often disputed in the bankruptcy context. *Id.* at 21. The licenses obtained from the FCC are generally among the more valuable assets of a licensee, and questions arise as to whether bankruptcy courts can assert dominion over the licenses as it would over other bankruptcy estate assets. *Id.* at 22. Some bankruptcy courts have treated an FCC license as “property of the estate” under Section 541 of the Bankruptcy Code, however others have taken the contrary view. *Id.* See, e.g., *In re Fugazy Express, Inc.*, 124 B.R. 426, 430 (Bankr. S.D.N.Y. 1991); *In re D.H. Overmyer Telecasting Co.*, 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983) (holding that FCC license is not property of debtor’s estate).

A bankruptcy court’s jurisdiction over a debtor’s licenses rests on 28 U.S.C. § 1334(e), where a bankruptcy court has exclusive jurisdiction over all property of the debtor. Rafael Pardo, *Bankruptcy Court Jurisdiction and Agency Action: Resolving the NextWave of Conflict*, 76 N.Y.U. L. REV. 945, 956 (2001) (criticizing decisions of the United States Court of Appeals for the Second Circuit, which held that bankruptcy court lacks jurisdiction to determine if the FCC is stayed from revoking a debtor’s licenses). The only way a bankruptcy court has jurisdiction over the licenses is if the PCS licenses are considered property of the estate, as defined by 11 U.S.C. § 541(a)(1). *Id.* at 956-57. Within the bankruptcy context, the degree of property interest a debtor holds in PCS licenses is sufficient to trigger a bankruptcy court’s exclusive jurisdiction over licenses as property of the estate. *Id.* at 957.

30. Serlin, *supra* note 5, at 230. The debtor’s property interest is protected by staying any action against the estate, suspending debts owed to creditors, and either modifying payments or granting total or partial avoidance of debts. *Id.* Creditors are protected, even if the estate is not large enough to cover all debts fully, by fairly distributing the debtor’s property to satisfy the creditors’ claims. *Id.* The automatic stay provision is one of the basic debtor protections within the Code. *Id.* Section 362(a) stays debt collection efforts, foreclosures, and actions to possess or control property of the estate. 11 U.S.C. § 362(a). This helps to preserve maximum value of the assets for the benefit of both the debtor and its creditors. Serlin, *supra* note 5, at 231. The stay is applied to all parties involved in the proceedings, to give the debtor a break from his creditors, and to design a reorganization plan that will successfully pull the debtor out of bankruptcy. Marton, *supra* note 28, at 96. The automatic stay puts all creditors on equal footing, so there is no disparity because of the relative power of each creditor. *Id.* There are exceptions to the automatic stay provision, such as for regulatory powers of governmental agencies, but they are to be read narrowly in conjunction with Congress’s intent to provide broad relief with the stay. *Id.* at 96-97.



## 1. Section 525 (a)<sup>31</sup> Protection Against Discriminatory Treatment

Section 525 (a) of the Code was enacted to codify and expand the Supreme Court's 1971 decision in *Perez v. Campbell*.<sup>32</sup> Section 525 (a) prevents any governmental unit, as defined in the Code, from revoking, suspending, denying or refusing to renew, or discriminating in any way with respect to, a government license, permit, employment or "other similar grant" to a debtor or former debtor or its affiliates "solely because" the debtor is or was in bankruptcy, was insolvent before it was adjudged a bankrupt, or did not pay a debt dischargeable in the bankruptcy case.<sup>33</sup> The section furthers the "fresh start" policy underlying the Code.<sup>34</sup>

31. 11 U.S.C. § 525 (a) in relevant part provides:

a governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . or other similar grant to, . . . discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is . . . a bankrupt or a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

32. The legislative history reflects that § 525(a) was designed to codify the Supreme Court's decision in *Perez v. Campbell*, 402 U.S. 637 (1971). See S. Rep. No. 95-989 at 81 (1978); H.R. Rep. No. 95-595 at 165 (1977). *Perez* involved an Arizona statute that called for suspending the driver's license of any motorist who failed to pay an automobile tort judgment, even one that had been discharged in bankruptcy. *Perez*, 402 U.S. at 638-39. The Court held that application of the statute in that context unconstitutionally treaded on federal bankruptcy laws. *Id.* at 652.

33. 11 U.S.C. § 525(a). A governmental unit is defined as:

United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. § 101(27) (2003); see 11 U.S.C. § 525(a).

34. *NextWave Pers. Communications, Inc.*, 537 U.S. at 307 n.4 (stating that it would undermine the debtor's "fresh start" "if there [was a] revocation of a license solely because of a bankrupt's failure to pay dischargeable debts").

## 2. Section 362 (a) Automatic Stay<sup>35</sup>

The automatic stay provision is one of the most important debtor protections; however, governmental agencies acting within regulatory context are exempt from the provision.<sup>36</sup> The courts have used two tests, the “pecuniary purpose”<sup>37</sup> test and the “public policy”<sup>38</sup> test, to determine if a regulatory agency qualifies for the exception from the automatic stay.<sup>39</sup>

In a bankruptcy proceeding, a debtor can seek to avoid the full or

35. 11 U.S.C. § 362(a) in relevant part provides:

a petition filed . . . or an application filed . . . operates as a stay, applicable to all entities, of . . . (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case.

11 U.S.C. §362(a). The automatic stay was designed to prevent certain creditors from gaining preference for their claims against the debtor, to forestall development of debtor’s assets due to legal costs in defending proceedings against interest, and to avoid interference with orderly liquidation or rehabilitation of the debtor. *Borman v. Raymark Industries, Inc.*, 946 F.2d 1031, 36 (3d Cir. 1991).

36. 11 U.S.C. 362(b)(4); Serlin, *supra* note 5, at 232. The stay is automatic and immediate, with no judicial action required. Pardo, *supra* note 29, at 947. Section 362(b)(4) indicates that the stay does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit’s police or regulatory power. 11 U.S.C. § 362 Legislative Statements. This section is intended to be given a narrow construction to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate. 11 U.S.C. 362 Legislative Statements. The exemption for the automatic stay in cases of government regulatory action is a result of the “countervailing policy favoring state control of natural resources.” Serlin, *supra* note 5, at 232. The action of the government must involve regulatory enforcement, and must not be used to advanced the government’s pecuniary interests. *Id.* Government regulatory actions unaffected by the stay include: fraud prevention, environmental protection, consumer protection, and actions to protect public health and safety. Pardo, *supra* note 29, at 950. The legislative history has indicated that the exceptions should not be applied to except agency actions whose aim is to “protect a pecuniary interest in property of the debtor or property of the estate.” *Id.*

37. Pardo, *supra* note 29, at 950. The “pecuniary purpose” test asks if the government’s action “relates primarily to the protection of the government’s pecuniary interest in the debtor’s property and not to matters of public policy.” *Id.* (quoting *Eddleman v. U.S. Dep’t of Labor*, 923 F.2d 782, 791 (10th Cir. 1991) (holding that Department of Labor’s enforcement proceedings are except from stay under either test)). Under the “pecuniary purpose” test, a regulatory agency will not be excepted if is primarily seeks to protect a pecuniary interest. *Id.*

38. *Id.* The “public policy” test asks if the government’s action against the debtor seeks to effectuate public policy or to adjudicate private rights. *Id.* (quoting *Eddleman*, 923 F.2d at 791). If the government is attempting to advance private rights it will not be excepted from the stay. *Id.*

39. *Id.* at 950-51. The courts appreciate that the regulatory power exception reflects Congress’s desire to ensure that the Bankruptcy Code will not interfere with local, state, or federal governments implementing their respective regulatory schemes, however, the courts have interpreted both tests that the exception should not be read to give an agency free rein over a debtor’s assets simply because the agency claims to act within its regulatory authority. *Id.*

partial payment of a debt by trying to prove that the obligation resulted from a fraudulent conveyance.<sup>40</sup>

### C. Regulator or Creditor?

The FCC plays two roles in dealing with parties licensed to use the electromagnetic spectrum of the United States.<sup>41</sup> The FCC was created to be a regulator with control of the spectrum.<sup>42</sup> Congress enabled the FCC to become a creditor, by authorizing the FCC to conduct competitive auctions for electromagnetic licenses.<sup>43</sup> “When a licensee goes bankrupt, tension arises if the FCC tries to use its position as a regulator to give it an advantage as a creditor.”<sup>44</sup>

Only the circuit courts of appeals have jurisdiction over the FCC with regard to its regulatory capacity, while the Code gives the district courts original jurisdiction of proceedings under Title 11 and all related matters.<sup>45</sup> A jurisdictional dispute arises when a debtor in a bankruptcy proceeding alleges that a government regulatory agency violated the automatic stay provision.<sup>46</sup>

40. Serlin, *supra* note 5, at 231. 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. *Id.* at 265 n.19. See 11 U.S.C. §§ 544, 548(a)(2)(A) (2000). The debtor must prove that he incurred the obligation when his remaining assets were unreasonably small compared to the transaction, and the transaction did not provide him a reasonably equivalent value. Serlin, *supra* note 5, at 231. Bankruptcy courts faced with a fraudulent conveyance claim must ultimately determine the value of the asset in controversy. *Id.*

41. Patterson, *supra* note 6, at 1373.

42. *Id.* As a regulator, the FCC allocates licenses for use of the spectrum and oversees licensees' use of these licenses in order to prevent interference. *Id.* See also 47 U.S.C. § 307(a)(1) (1994).

43. See *Id.* See also 47 U.S.C. § 309(j) (1994 & Supp. 1998) (authorizing the FCC to sell electromagnetic licenses for PCS to private companies by auction and specifying the design of such bidding and the governmental objectives auctions should seek to promote).

44. Patterson, *supra* note 6, at 1374.

45. Marton, *supra* note 28, at 84. A bankruptcy court's jurisdiction over a debtor's assets rests on 28 U.S.C. § 1334(e); 28 U.S.C. § 1334(e) (1994) (providing “the district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate”). District courts have “original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b).

46. Pardo, *supra* note 29, at 960-61. The courts of appeals have exclusive jurisdiction over any challenge to the validity of a final order of the FCC. See 28 U.S.C. § 2342 (1994 & Supp. IV 1998) (providing in pertinent part, “[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47”); 47 U.S.C. § 402(a) (1994 & Supp. IV 1998) (providing, in pertinent part, “[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28”). The district courts have exclusive jurisdiction

### D. Other Cases

#### 1. *In re Personal Communications Network, Inc.*<sup>47</sup>

The facts of *In re Personal Communications Network, Inc.*, are very similar to those in *NextWave*.<sup>48</sup> The court deferred to the decision of the United States Court of Appeals for the Second Circuit, and found that the bankruptcy court was “without power to review the propriety of the FCC’s conclusion that the . . . [l]icenses were revoked automatically upon [d]ebtor’s failure to meet conditions imposed by the FCC for retention of the [l]icenses.”<sup>49</sup> The court concluded that since the FCC determined that the licenses automatically cancelled, then the licenses were not property of the estate under Section 541.<sup>50</sup>

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over all property of the debtor as of the commencement of such case, and of property of the estate. 28 U.S.C. § 1334(e); Marton, *supra* note 28, at 84.

47. 249 B.R. 233 (Bankr. E.D.N.Y. 2000) (granting motion by the United States to determine that debtor’s PCS licenses were not a part of debtor’s estate). The Eastern District court of New York held it had no jurisdiction to review the FCC’s decisions. *Id.* at 237.

48. *In re Pers. Communications Network, Inc.*, 249 B.R. at 235-37. PCN submitted bids for six C-Block licenses, and was subsequently awarded the six licenses in 1996. *Id.* at 235. PCN completed its down payments in September 1996, and issued promissory notes for the balance due. *Id.* In March 1997, the FCC suspended the C-Block installment payments because of problems C-Block licensees were having in meeting their payment obligations. *Id.* PCN opted to give up its rights to use half of the spectrum covered by the six licenses to reduce their payment obligation in half. *Id.* Each license contained the following language in relevant part: “authorization conditioned upon the full and timely payment of all monies due . . . failure to comply with the condition will result in automatic cancellation of this authorization.” *Id.* at 236. This is the same condition set on NextWave’s authorization. *NextWave Pers. Communications, Inc.*, 537 U.S. at 297.

49. *See id.* *See also In re Pers. Communications Network, Inc.*, 249 B.R. at 237; *In re FCC*, 217 F.3d 125, 129 (2d Cir. 2000) (granting writ of mandamus to the bankruptcy court, concerning a bankruptcy court order prohibiting the FCC from re-auctioning spectrum licenses previously held by debtor, finding the bankruptcy court’s ruling violated the court’s mandate, and that the FCC’s licensing decisions were subject to the exclusive jurisdiction of the federal courts of appeals and outside the limited jurisdiction of the bankruptcy court. The court found that the FCC’s decision to re-auction debtor’s PCS licenses was in fact regulatory and directed the bankruptcy court to vacate its earlier order). The court found that the federal courts of appeals have exclusive jurisdiction over the FCC’s licensing decisions and are outside the limited jurisdiction of the bankruptcy court. *In re Pers. Communications Network, Inc.*, 249 B.R. at 236-37.

50. *In re Pers. Communications Network, Inc.*, 249 B.R. at 237. The court rejected the debtor’s argument that the automatic cancellation of the licenses violated due process rights. *Id.*

## 2. In re GWI PCS 1, Inc.<sup>51</sup>

The facts of *In re GWI PCS 1 Inc.* were nearly identical to those in *NextWave* with the exception that the court in *GWI* determined that the company had begun implementing its reorganization plan.<sup>52</sup> An analysis of the requirements of equitable mootness<sup>53</sup> demonstrate that “the court stretched its reasoning to show compliance with substantial consummation.”<sup>54</sup> The court ultimately conceded that the FCC’s jurisdiction trumped the bankruptcy court.<sup>55</sup> However, the court

51. 230 F.3d 788 (5th Cir. 2000) (affirming debtors’ bankruptcy reorganization plan allowing for the avoidance of \$894,000,000 of debtors’ obligation to FCC and providing for the subsidiary debtors retention of licenses obtained at FCC auction on finding the obligation was a constructive fraudulent transfer and the FCC’s contentions were equitably moot).

52. *In re GWI PCS 1, Inc.*, 230 F.3d at 802. The court determined that although it “might agree with the Second Circuit and reverse the bankruptcy court’s avoidance judgment,” it was precluded from doing so by “equitable mootness.” *Id.* at 805. Reorganization within bankruptcy is defined as “a financial restructuring of a corporation, especially in the repayment of debts, under a plan created by a trustee and approved by a court.” BLACK’S LAW DICTIONARY 1300 (7th ed. 1999). The Chapter 11 reorganization provisions enable a business debtor to achieve a complex and comprehensive financial restructuring through the workings of a plan of reorganization that provides for distribution on, and discharge of, all of the debtor’s pre-bankruptcy debts. Ralph Brubaker, *Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations*, 1997 U. ILL. L. REV. 959, 961 (1997).

53. The mootness doctrine is defined as “[t]he principle that American courts will not decide moot cases – that is, cases in which there is no longer any actual controversy.” BLACK’S LAW DICTIONARY 1025 (7th ed. 1999).

54. Marton, *supra* note 28, at 101. Equitable mootness is a recognition by the appellate courts that there is a point beyond which they cannot order fundamental changes in reorganization actions. *In re GWI PCS 1, Inc.*, 230 F.3d at 800. The courts consider three elements when deciding if equitable mootness applies: (1) if a stay has been obtained; (2) if the plan has been substantially consummated; and (3) if the relief requested would affect either the rights of parties not before the court or the success of the plan. *Id.* A stay had been issued in this case which was lifted, and the FCC made no further actions to reinstate the stay. *Id.* Without a stay in place, the reorganization plan became effective. *Id.* at 801. Substantial consummation is defined as:

(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

11 U.S.C. § 1101(2); *In re GWI PCS 1, Inc.*, 230 F.3d at 801.

The court found that although the company had a “Business Alternative” and a “Litigation Alternative,” that a “number of transactions [were] completed in furtherance of the Business Alternative.” *Id.* at 802. The final element was satisfied because the court was concerned with the possible effect on third parties of reversing the implementation of the reorganization plan. *Id.* at 803.

55. *In re GWI PCS 1, Inc.*, 230 F.3d at 804. “Although the bankruptcy court possibly *erred* in permitting avoidance and enjoining the FCC from revoking the subsidiary debtors’ licenses for failing to remit the full bid price, . . . the FCC’s challenge on this point and request that the avoidance judgment, in its entirety, and the enjoinder order, be reversed are barred by equitable mootness.” *Id.*

distinguished this case from the Second Circuit's decision in *NextWave* as the company in the instant case had already "substantially consummated" a reorganization plan, while *NextWave* had not.<sup>56</sup>

### 3. U.S. v. Kansas Personal Communications Services, Ltd.<sup>57</sup>

The Kansas federal district court dealt with a debtor similarly situated to *NextWave* and agreed with the *NextWave* decision by the District Court of Appeals for the Second Circuit, finding that the cancellation of the licenses was automatic upon default in payment.<sup>58</sup> The district court determined that the FCC held the position of a regulatory agency in this case, not a creditor.<sup>59</sup>

## III. STATEMENT OF THE CASE

### A. *Statement of the Facts*

At C-Block auctions in May and July, 1996, NextWave Personal Communications, Inc., and NextWave Power Partners, Inc. (jointly referred to as NextWave) bid \$4.74 billion in total, winning 63 C-Block licenses.<sup>60</sup> Consistent with the statutory mandate, the FCC enacted regulations authorizing payment on outstanding balances owed to the FCC over a period of ten years.<sup>61</sup> NextWave made a down payment on

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56. *Id.*

57. 256 B.R. 807 (D. Kan. 2000) (holding "[i]t is not the role of a court to second guess the FCC's regulatory scheme and hold that the statutory objectives are not furthered by requiring timely and full installment payments. Such a policy decision lies in the discretion of the FCC . . .") (citation omitted).

58. U.S. v. Kansas Pers. Communications Services, Ltd., 256 B.R. at 812. The court looked to similar cases to determine that the filing of a bankruptcy petition did not preserve the licensee's limited property interest in a license under the automatic stay provision. *Id.* at 812. The First Circuit upheld an FAA regulation providing that an airline's right to use airport departure slots "shall be recalled by the FAA" upon failure of the airline to use the slots for a two month period. *In re Gull Air, Inc.*, 890 F.2d 1255, 1260 (1st Cir. 1989). The court concluded that there was no need for affirmative action by the FAA, and held the automatic stay inapplicable. *Id.* at 1263.

59. *Kansas Pers. Communications Services*, 256 B.R. at 814.

60. NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 134 (D.C. Cir. 2001) *aff'd*, 537 U.S. 293 (2003) (concluding that the FCC had violated 11 U.S.C.S. § 525(a), which prohibits governmental entities from revoking debtors' licenses solely for failure to pay dischargeable debts, and the FCC was bound by the usual rules governing the treatment of such obligations in bankruptcy). In 1995, a group of former telecommunications executives founded NextWave Personal Communications Inc. and NextWave Power Partners Inc. for the purpose of bidding on PCS licenses and operating a personal communications service. *Id.* The founders hoped the company would become a "carrier's carrier," selling wireless services and airtime wholesale. *Id.*

61. NextWave Pers. Communications, Inc. v. FCC, 235 B.R. 263, 266 (Bankr. S.D.N.Y.

the purchase price, signed promissory notes for the balance, and executed security agreements.<sup>62</sup>

“On June 26, 1996, the FCC announced the date for commencement of the D, E and F Block auctions, which were held on August 26, 1996 and concluded in January 1997.”<sup>63</sup> The value of the winning bids on the D, E and F Block auctions were a fraction of those in the C-Block auction.<sup>64</sup> The disparity between the C-Blocks and the D, E and F Blocks which covered geographical areas covered by the C-Blocks caused several successful C-Block bidders, including NextWave, to experience difficulty obtaining financing.<sup>65</sup>

Approval for NextWave’s 63 C-Block licenses came through on

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1998) (ruling court had no jurisdiction over the unfair conduct claim as the claim was based on defendant’s conduct acting in its regulatory capacity and required the court to attach legal consequences to conduct within defendant’s regulatory capacity under 28 U.S.C.S. § 1334, over which the court had no jurisdiction; also finding the court had jurisdiction over the fraudulent conveyance claim, which pertained to certain transfers, as it arose solely out of defendant’s status as a creditor, implicated no conduct by defendant, did not require the court to adjudicate or attach any consequence to any act or omission of defendant in its regulatory capacity, and defendant was not given authority to dictate its own rights as a creditor). The regulations required a 10 percent down payment, and the remaining 90 percent paid over ten years, with interest only for the first six years and principal and interest for the remaining four years. *Id.* Below-market interest rates were provided to enable start up companies to obtain financing through capital markets or private placement. *Id.*

62. *Id.* The company made the 10 percent required down payment totaling \$474 million. *Id.* The security agreements gave the FCC a first “lien on and continuing security interest in all of the Debtor’s rights and interest in [each] License.” *NextWave Pers. Communications, Inc.*, 254 F.3d at 134. The licenses were conditional on “the full and timely payment of all monies due pursuant to . . . the [FCC’s] installment plan as set forth in the Note and Security Agreement executed by the licensee.” *Id.* Failure to comply with the condition would result in automatic cancellation of the license. *Id.*

63. *NextWave Pers. Communications, Inc.*, 235 B.R. at 266. These blocks covered geographical areas across the country, including areas covered by the 63 C-block licenses for which NextWave was awaiting FCC approval. *Id.* at 266-67.

64. *Id.* at 267. Factors in the value of PCS licenses are: the population or number of people served by the license (“Pops”); the carrying capacity of the wireless spectrum covered by the license, expressed in number of megahertz (“MHZ”). *Id.* The price paid for a license can be quantified in terms of dollars per MHZ per Pops, or \$/MHZ-Pops. *Id.* NextWave bid an average of \$1.43/MHZ-Pops for the 63 C-Block licenses for which it was high bidder. *Id.* However, the winning bids for the D, E and F Block auctions reflected an average value of \$.35/MHZ-Pops for D and E Block and \$.245/MHZ-Pops for F Block licenses. *Id.*

65. *NextWave Pers. Communications, Inc.*, 235 B.R. at 266.. The lower bids in the D, E, and F Block auctions significantly drove down the value of the C-Block licenses to thirteen percent of NextWave’s bid price. Serlin, *supra* note 5, at 238. NextWave anticipated it would require \$700 million in public financing to implement its business plan. *NextWave Pers. Communications, Inc. v. FCC*, 235 B.R. 277, 286 (Bankr. S.D.N.Y. 1998) (finding that the licenses did not constitute a “reasonably equivalent value” for debtor’s \$474 million cash down payment and promissory notes totaling \$4.27 billion). NextWave was not able to obtain public financing to build out the PCS infrastructure. *Id.*

January 3, 1997.<sup>66</sup> The FCC suspended installment payment obligations for C-Block licensees, and issued two “Restructuring Orders,” offering a variety of revised financing options.<sup>67</sup> The FCC gave licensees until June 8, 1998 to elect a restructuring option, until July 31, 1998 to resume installment payments, and October 29, 1998 as the last date it would accept late installment payments.<sup>68</sup> NextWave attempted to obtain stays of the election deadline from the FCC, but the FCC denied the stays.<sup>69</sup>

### B. Procedural History

NextWave filed for Chapter 11 bankruptcy protection in New York on June 8, 1998.<sup>70</sup> NextWave then commenced suit in the United States Bankruptcy Court, alleging that its \$4.74 billion indebtedness on the C-Block licenses was avoidable as a “fraudulent conveyance” under the Bankruptcy Code, 11 U.S.C. Section 544.<sup>71</sup> The court initially addressed

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66. NextWave Pers. Communications, Inc. v. FCC, 235 B.R. 263, 266 (Bankr. S.D.N.Y. 1998).

67. *Id.* at 267. The FCC issued the first “Restructuring Order” on October 16, 1997, which provided distressed C-Block licensees with four distinct, mutually exclusive options regarding financial relief for C-Block licensees. *Id.* On receipt of numerous petitions for reconsideration, oppositions, replies and ex parte filings, the FCC issued a “Reconsideration Order,” in which the FCC slightly modified the initial order to allow licensees somewhat more flexibility in making their choices available under the Restructuring Order. *Id.* None of the restructuring options allowed licensees to keep any of their licenses for less than the full bid price. *NextWave Pers. Communications, Inc.*, 254 F.3d at 135. The FCC said the options balanced the goals of introducing new spectrum services rapidly and promoting small business participation in PCS auctions against the need to maintain auction integrity and treat unsuccessful bidders fairly. *Id.*

68. *NextWave Pers. Communications, Inc.*, 254 F.3d at 135.

69. *Id.* On May 8, 1998 NextWave petitioned the FCC for further reconsideration of the Restructuring Orders, and on May 29, 1998 NextWave filed a petition for review of the Restructuring Orders with the District of Columbia Circuit Court. *NextWave Pers. Communications, Inc. v. FCC*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998). NextWave asked both the FCC and the Circuit Court for a stay of the June 8, 1998 deadline for its election of one of the four alternatives provided in the Restructuring Orders. *Id.* Both the FCC and the Circuit Court denied NextWave’s requests for the stay of the June 8, 1998 deadline. *Id.*

70. *NextWave Pers. Communications, Inc.*, 235 B.R. at 267. NextWave suspended payments to all creditors, including the FCC, pending confirmation of a reorganization plan. *FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 297 (2003). It did not seek permission to make installment payments under the “necessity of payment” doctrine, because the automatic stay provision of the Bankruptcy Code generally prevented even government creditors’ from enforcing payment obligations or seizing assets of the estate, therefore it had no reason to believe it would be required to make the October 1998 installment payment while in bankruptcy. *NextWave Pers. Communications, Inc.*, 254 F.3d at 136.

71. *NextWave Pers. Communications, Inc.*, 235 B.R. at 265. NextWave’s theory was that by the time the FCC actually conveyed the licenses, their value had declined from approximately \$4.74 billion to less than \$1 billion. *Id.* at 269.



the issue of subject matter jurisdiction over the case.<sup>72</sup> It determined that it had subject matter jurisdiction over the case and held that NextWave's winning bid exceeded the fair market value of its licenses at the time they were conveyed.<sup>73</sup> The court ruled that the company could keep its C-Block licenses for the reduced price of \$1.02 billion.<sup>74</sup>

The U.S. District Court for the Southern District of New York affirmed the Bankruptcy Court's decision.<sup>75</sup> The U.S. Court of Appeals for the Second Circuit reversed on the grounds that the Bankruptcy Court could not change the conditions attached to NextWave's licenses.<sup>76</sup> Following the Second Circuit's decision, NextWave prepared a plan of reorganization in which it would pay a single lump-sum to satisfy the entire remaining \$4.3 Billion obligation for purchase of the C block licenses, including interest and late fees.<sup>77</sup> The FCC objected to NextWave's reorganization plan, and announced that NextWave's licenses were available for auction under the automatic cancellation provisions.<sup>78</sup>

NextWave sought emergency relief in the Bankruptcy Court, which

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72. *Id.* at 267-68. The court noted that Congress in 47 U.S.C. § 402 had vested in the Circuit Courts of Appeals exclusive jurisdiction to enjoin, aside, annul or suspend orders of the FCC. *Id.* The court recognized that this exclusive grant of jurisdiction related to adjudicating the consequences of the conduct of the FCC acting within the scope of its Congressional mandate. *Id.* at 268. The court further noted that Congress has granted the district and bankruptcy courts exclusive jurisdiction to administer the Bankruptcy Code and Rules and to resolve claims, adversary proceedings and contested matters arising under the Code. *Id.* Under 28 U.S.C. § 1334 (a) and (b), Congress conferred jurisdiction in bankruptcy cases and proceedings to district courts. *Id.* Congress further authorized district courts to refer jurisdiction over bankruptcy cases to the bankruptcy judges in the district under 11 U.S.C. § 157. *Id.*

73. *NextWave Pers. Communications, Inc.*, 235 B.R. at 304.

74. *NextWave Pers. Communications, Inc. v. FCC*, 235 B.R. 305, 307 (Bankr. S.D.N.Y. 1998) (holding that the appropriate remedy, upon determination that licenses which debtor received represented less than "reasonably equivalent value" for its \$4.7 billion bid, was entry of order avoiding debtor's entire obligation to the FCC, with reinstatement of obligation only to extent of value actually given).

75. *NextWave Pers. Communications, Inc. v. FCC*, 241 B.R. 311, 321 (Bankr. S.D.N.Y. 1999).

76. *FCC v. NextWave Pers. Communications, Inc.*, 200 F.3d 43, 59 (2d Cir. 1999) (holding that the bankruptcy court had no jurisdiction to interfere with the FCC's system for allocation of licenses and should have deferred to the FCC's interpretation of its regulations when determining the point at which plaintiff debtor's obligations were incurred for 11 U.S.C. § 544 purposes). The Second Circuit held that in granting licenses by auction, the FCC was acting as a creditor and a regulator. *Id.* The Second Circuit also held that since, under FCC regulations NextWave's obligation attached at the close of the auction, there had been no fraudulent conveyance by the FCC acting in its capacity as creditor. *Id.*

77. *FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 298 (2003).

78. *Id.* The FCC objected to the plan, asserting NextWave's licenses had been automatically canceled when the company missed its first payment deadline in October 1998. *Id.*

declared the FCC's cancellation of the licenses "null and void" as a violation of various provisions of the Bankruptcy Code.<sup>79</sup> The FCC petitioned for a writ of mandamus,<sup>80</sup> and the Second Circuit granted mandamus and reversed the Bankruptcy Court's decision.<sup>81</sup> NextWave filed a petition with the FCC seeking reconsideration of the license cancellation.<sup>82</sup> The FCC addressed the challenge to the automatic cancellation and rejected NextWave's arguments that the cancellation was arbitrary and capricious.<sup>83</sup>

NextWave appealed to the United States Court of Appeals for the District of Columbia Circuit from the FCC's decision on two basic grounds.<sup>84</sup> NextWave asserted the cancellation was arbitrary and capricious and also that the license cancellation was unlawful under the anti-discrimination provision, the automatic stay provision, and Section 1123, which allows a debtor to cure its defaults.<sup>85</sup> The District of

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79. *In re NextWave Pers. Communications, Inc.*, 244 B.R. 253, 257 (Bankr. S.D.N.Y. 2000) (finding FCC "automatic" cancellation of PCS licenses in violation of the automatic stay specified in 11 U.S.C.S. § 362(a), mandating that the assets of a debtor's estate remain intact for adjudication by the bankruptcy court, and a "governmental" exception to the automatic stay in 11 U.S.C.S. § 362(b)(4) was found inapplicable because the FCC acted as creditor, not in any regulatory capacity).

80. *In re FCC*, 217 F.3d 125, 128 (2d Cir. 2000). A writ of mandamus is defined as a "writ issued by a superior court to compel a lower court or government officer to perform mandatory or purely ministerial duties correctly." BLACK'S LAW DICTIONARY 973 (7th ed. 1999). The FCC petitioned for mandamus on the ground that the United States Bankruptcy Court for the Southern District of New York violated the Court of Appeals' mandate expressed in *FCC v. NextWave Pers. Communications, Inc.* *In re FCC*, 217 F.3d at 129. The Court of Appeals' mandate held it was beyond the bankruptcy court's jurisdiction to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject. *FCC*, 200 F.3d at 54.

81. *In re FCC*, 217 F.3d at 141. The Second Circuit held that "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals" under 47 U.S.C. § 402. *Id.* at 139. The decision to re-auction the licenses was regulatory, and proclaiming it to be arbitrary was outside the jurisdiction of the Bankruptcy Court. *Id.* at 141

82. *NextWave Pers. Communications, Inc. v. FCC*, 254 F.3d 130, 139 (D.C. Cir. 2001) *aff'd*, 537 U.S. 293 (2003). The FCC denied the petition, noting that the public notice of re-auction was not an order or action of the FCC canceling NextWave's licenses, rather pursuant to FCC rules, the licenses canceled automatically after NextWave filed to make its first installment payment. *Id.*

83. *Id.* The FCC ruled that NextWave's arguments were barred by estoppel and waiver, and were summarily rejected by the Second Circuit and thus precluded under the doctrine of res judicata. *Id.*

84. *Id.* at 139-140. NextWave appealed pursuant to 47 U.S.C. § 402(b), asserting that the cancellation was arbitrary and capricious, and contrary to law, violating the Administrative Procedure Act, 5 U.S.C. § 706, and the Bankruptcy Code. *NextWave Pers. Communications, Inc.*, 537 U.S. at 299.

85. *NextWave Pers. Communications Inc.*, 254 F.3d at 139. 11 U.S.C. § 525 (a), the anti-discrimination provision, in relevant part provides:

a governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . or other similar grant to, . . . discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is . . . a bankrupt or a debtor under the Bankruptcy

Columbia Circuit agreed, holding the FCC's cancellation of NextWave's licenses violated 11 U.S.C. Section 525.<sup>86</sup> The FCC appealed the District of Columbia Circuit's judgment and the United States Supreme Court granted a writ of certiorari.<sup>87</sup> It did so to decide if Section 525 of the Bankruptcy Code prohibited the FCC from revoking licenses held by a debtor in bankruptcy upon the debtor's failure to make timely payments owed to the FCC for purchase of the licenses.<sup>88</sup>

### C. The United States Supreme Court's Decision

#### 1. The Majority Opinion

The Court, in an eight-to-one decision, affirmed the District of Columbia Circuit's ruling and rejected all of the arguments in support of the FCC's contention that Section 525 did not apply to its cancellation of the licenses.<sup>89</sup> The majority opinion, written by Justice Scalia, held that Section 525 prohibits the FCC from revoking licenses held by a bankruptcy debtor upon the debtor's failure to make timely payments to

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Act... solely because such bankrupt or debtor... has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a).

11 U.S.C. § 362(a), the automatic stay provision, in relevant part provides:

a petition filed . . . or application filed . . . operates as a stay, applicable to all entities, of (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case.

11 U.S.C. § 362(a).

86. *NextWave Pers. Communications, Inc.*, 254 F.3d at 156. The FCC never denied that if NextWave had made its payments, the company would have retained its licenses. *Id.* at 149. The court held that all federal agencies must obey all federal laws, not just the laws the agency administers, therefore the FCC violated the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy. *Id.* at 133.

87. *FCC v. NextWave Pers. Communications, Inc.*, 537 U.S. 293, 299 (2003).

88. *Id.* at 295. The FCC did not deny that the proximate cause for its cancellation of the licenses was NextWave's failure to make the payments that were due. *Id.* at 301. The FCC argued that § 525 does not apply because the FCC had a "valid regulatory motive" for the cancellation. *Id.* The FCC also argued that NextWave's obligations to the FCC were not debts dischargeable in bankruptcy. *Id.* at 302. The FCC argued that "regulatory conditions like the full and timely payment condition are not properly classified as 'debts' under the Bankruptcy Code." *Id.* The FCC further argued that the obligations were not "dischargeable" in bankruptcy because it was beyond the jurisdictional authority of the bankruptcy courts to alter or modify regulatory obligations. *Id.* at 303. The FCC's final argument was an interpretation of § 525 that the FCC violated the automatic stay provision would be in conflict with the auction provision of 47 U.S.C. § 309(j). *Id.* at 304.

89. *NextWave Pers. Communications, Inc.*, 537 U.S. at 304-08.

the FCC for purchase of the licenses.<sup>90</sup>

The Court rejected the petitioner's argument that the FCC did not revoke the respondents' licenses "solely because" of nonpayment under Section 525(a).<sup>91</sup> The fact that the FCC had a "valid regulatory motive" was irrelevant.<sup>92</sup> The Court was unwilling to provide a regulatory exception to Section 525, as its express terms curtail the authority of regulators.<sup>93</sup> The Court considered, and rejected, the FCC's argument that the money owed for the licenses was not a "debt" as recognized by the Bankruptcy Code that was dischargeable in bankruptcy.<sup>94</sup>

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90. *Id.* at 293. Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, Ginsburg, and Stevens joined the majority decision delivered by Justice Scalia. *Id.* at 294. NextWave argued that its payment obligations were dischargeable debts, pointing to language of the Code. John P. Hennigan, Jr., *May the FCC Cancel a Spectrum License for Nonpayment of Fees, Despite the Licensee's Bankruptcy?* 1 PREVIEW U.S. SUP. CT. CAS. 31 (2002) (previewing FCC v. NextWave case). NextWave also emphasized that an obligation to pay is a "debt" regardless of whether it is enforceable through conventional collection or incurred in a regulatory context. *Id.*

91. *NextWave Pers. Communications, Inc.*, 537 U.S. at 301. The FCC contended that NextWave's payment obligations were not "debts," but rather regulatory conditions of the licenses. Hennigan, *supra* note 90, at 31. If the obligations were regulatory conditions, they would be beyond the power of any bankruptcy court to alter so long as the debtor retains the license. *Id.*

92. *Id.* at 301. Reading Section 525 to include an exception for the governmental unit's motive in effecting the cancellation would deprive Section 525 of all force. *Id.* An exception for cancellations that have a "valid regulatory purpose" would consume the rule. *Id.* "Section 525 means nothing more or less than that the failure to pay a dischargeable debt must alone be the proximate cause of the cancellation – the act or event that triggers the agency's decision to cancel, whatever the agency's ultimate motive in pulling the trigger may be." *Id.* at 301-02.

93. Hennigan, *supra* note 90, at 301-02. The Court reasoned that Section 525 would have little value if it did not apply to licensing authorities, stating:

Some may think (and the opponents of § 525 undoubtedly thought) that there ought to be an exception for cancellations that have a valid regulatory purpose. Besides the fact that such an exception would consume the rule, it flies in the face of the fact that, where Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly, rather than by a device so subtle as denominating a motive a cause. There are, for example, regulatory exemptions from the Bankruptcy Code's automatic stay provisions. 11 U.S.C. § 362(b)(4). And even § 525(a) itself contains explicit exemptions for certain Agriculture Department programs, see n.2, *supra*. These latter exceptions would be entirely superfluous if we were to read § 525 as the Commission proposes – which means, of course, that such a reading must be rejected. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35-26 (1992).

*Id.* at 302.

94. Hennigan, *supra* note 90, at 302-03. The Court rejected the petitioner's contention that regulatory conditions, including full and timely payment condition are not properly classified as debts. *Id.* at 302. The Court rejected the view that the "financial nature of a condition" on a license "does not convert that condition into a debt." *Id.* Under the Bankruptcy Code, "debt" means "liability on a claim," 11 U.S.C. § 101(12), and "claim," includes any "right to payment," § 101(5)(A). *Id.* The Court previously held that "claim" has "the broadest available definition." *NextWave Pers. Communications, Inc.*, 537 U.S. at 302. The Court has also held that the plain meaning of a "right to payment" means an enforceable obligation, regardless of the objectives. *Id.* at 303. "[A] debt is a debt, even when the obligation to pay it is also a regulatory condition." *Id.*

The Court held that the bankruptcy courts did not need power to alter or modify regulatory obligations to discharge the debt in bankruptcy.<sup>95</sup> Lastly, the Court rejected the petitioner's contention that the Court's interpretation of Section 525 created conflict with the Communications Act.<sup>96</sup> The Court recognized the FCC's contention of a conflict as a preference of the FCC for selling licenses on credit and cancelling licenses rather than asserting security interests upon default.<sup>97</sup> Reasoning that there was "no inherent conflict between Section 525 and the Communications Act," the Court could regard each statute as effective.<sup>98</sup>

## 2. The Concurring Opinion

The concurring opinion, written by Justice Stevens, agreed with Parts I and II of the majority opinion, which included the background facts and holding,<sup>99</sup> but had its own response to the contentions of the dissent.<sup>100</sup> Justice Stevens initially asserted Section 525(a) was "merely intended to protect the debtor from discriminatory license terminations," as Justice Breyer argued in the dissent.<sup>101</sup> Justice Stevens significantly weighed the fact that the first words of the section describe three exceptions for statutes.<sup>102</sup> Justice Stevens agreed with Justice Breyer's view that the literal text of the statute does not always determine congressional intent; however, he reasoned that in this case it produces the correct answer.<sup>103</sup>

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95. *Id.* at 303. A pre-confirmation debt is dischargeable unless it falls within an express exception to discharge. *Id.*

96. *NextWave Pers. Communications, Inc.*, 537 U.S. at 304. The petitioner's contention that this interpretation would obstruct the functioning of the auction provisions of the FCA, 47 U.S.C. § 309(j), was found to be invalid, since there is nothing in the provisions which demands that cancellation be a sanction for failure to make payments. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 304. Part III, in which Justice Stevens did not join, was the majority's response to the contentions of the dissent. *Id.* at 304-308.

100. *NextWave Pers. Communications, Inc.*, 537 U.S. at 308-10 (Stevens, J., concurring).

101. *Id.* at 308.

102. *Id.* The three exceptions in § 525(a) are the Perishable Agriculture Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled, "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943. 11 U.S.C. § 525(a). The Perishable Agriculture Commodities Act, 1930 provided in relevant part, "whenever an applicant has paid the prescribed fee the Secretary . . . shall issue to such applicant a license . . . the license of any licensee shall terminate upon said licensee . . . being discharged as a bankrupt . . ." 7 U.S.C. § 499d(a).

103. *NextWave Pers. Communications, Inc.*, 537 U.S. at 310.

### 3. The Dissent

Justice Breyer interpreted the meaning of the statute, considered the statute's purpose, and relied on more than the literal meaning of the words.<sup>104</sup> Justice Breyer found the statute's purpose was to "forbid discrimination against those who are, or were, in bankruptcy" and to prohibit governmental action that would undercut the "fresh start" that bankruptcy provides, but not to prevent government creditors from collecting where these concerns are not present.<sup>105</sup> Justice Breyer encouraged interpretation of the relevant phrase, "solely because" of nonpayment of "a debt that is dischargeable," as requiring a certain relationship between the dischargeability of the debt and the decision to revoke the license.<sup>106</sup> Breyer urged that such an interpretation would avoid preventing government debt collection efforts, and it would further the statute's basic purpose.<sup>107</sup>

## IV. ANALYSIS

### A. *The NextWave Decision*

The Supreme Court correctly decided that, regardless of the FCC's alleged regulatory motive, cancellations of the licenses violated the Bankruptcy Code.<sup>108</sup> If the FCC had the ability to avoid the constraints

104. *Id.*, at 311 (Breyer, J., dissenting). Justice Breyer recognized that the law seeks to regulate human activities in particular ways, and the law is also tied to life. *Id.* However, "a failure to understand how a statutory rule is so tied can undermine the very human activity the law seeks to benefit." *Id.* Justice Breyer noted that the FCC held a perfected security interest in the licenses, and considered why it would be the intent of Congress to permit a private creditor to assert its security interest in a bankruptcy case without violating Section 525, and not provide the same rights to the Government. *Id.* at 312.

105. *Id.* at 315. Justice Breyer supported his proposed purpose of the statute through the statute's title, its language, and its history. *Id.* at 313.

106. *Id.* at 316. Breyer concludes this interpretation as consistent with the statute's language, accounting for the factual content and its intended significance. *Id.* Breyer also recognizes that this interpretation is consistent with lower courts efforts to interpret the statute. *Id.* at 317.

107. *Id.* "[T]he majority's interpretation means that private creditors. . . can enforce security interests in the goods they sell . . . but governments cannot enforce security interests in items that they sell." *Id.* at 319.

108. *Id.* at 301-02. As stated in *United States v. Whiting Pools, Inc.*, reorganization allows the business to "continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners." 462 U.S. 198, 203 (1983), citing H.R. Rep. No. 95-595, at 220 (1977), U.S. Code Cong. & Admin. News 1978, at 5787. The Supreme Court noted that "Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap.'" *Whiting Pools*, 462 U.S. at 203. Excluding assets such as the PCS licenses, "the reorganization effort would have small chance of success" as the licenses are "essential to running the business."

of the Code by merely characterizing its payment requirements as “regulatory conditions,” regulators would have free rein to eviscerate the Bankruptcy Code.<sup>109</sup> The FCC is not exempt from the applicable provisions of the Bankruptcy Code, and if the Court found otherwise, other agencies would have followed with similar behavior.<sup>110</sup> The Court’s decision makes it clear that regulations and actions of federal agencies must comply with “any law, and not merely those laws that the agency itself is charged with administering.”<sup>111</sup>

However, the Court’s decision could have a negative impact in the strategic use of bankruptcy.<sup>112</sup> Licensees can take more risk, effectively buying one of two options. A licensee could either use the licenses to obtain the financing to bring itself out of bankruptcy, or it could sell the licenses at a higher price.<sup>113</sup> After the Court’s decision, analysts predicted that NextWave would exercise its call option and sell its licenses “for a nice profit on its nearly \$5 billion investment.”<sup>114</sup>

The FCC argued that the licenses should not be included as property in the estate of the debtor who entered Chapter 11 bankruptcy. It believed that such licenses should be immediately revocable upon a

*Id.*, citing 6 J. Moore & L. King, *Collier on Bankruptcy* ¶ 3.05, p. 431 (14th ed. 1978).

109. 537 U.S. at 302-3. If an agency was permitted to cancel a license for failure to meet a “regulatory” payment condition, there would be virtually no situation where the license of a debtor could not be cancelled. *Id.*

110. *Id.* The Code leaves much agency authority unaffected, but Congress has enacted a number of restrictions on agency conduct that are essential to the protection of estate property and the successful implementation of plans of reorganization. *Id.*

111. *NextWave Pers. Communications, Inc.*, 537 U.S. at 300; Jacqueline B. Stuart, *Supreme Court Rules Bankruptcy Code Prohibits FCC from Canceling Licenses*, BANKRUPTCY BULLETIN, Weil, Gotshal & Manges LLP, Vol. 10 No. 2, February 2003. Regulatory agencies are subject to the Bankruptcy Code provisions prohibiting debt collection no less than non-governmental creditors, and they cannot avoid such Code provisions by alleging reliance on their regulatory functions. *Id.* The decision clarifies the scope of Section 525 and also provides certainty to debtors whose affairs interact with the licensing functions of regulatory agencies. *Id.*

112. *See generally The Supreme Court, 2002 Term: Leading Cases*, 117 HARV. L. REV. 390, 395-98 (November 2003) (finding that the Court’s decision allows companies to utilize bankruptcy strategically). If a licensee did not file Chapter 11, the licenses would automatically cancel upon default. *Id.* at 395.

113. *Id.* If the company was only speculating when it originally bid on the licenses, it can capture any appreciation in value without developing the license. *Id.* Analysts following NextWave stated that the company “really wasn’t in a position to build out the networks.” *Id.* at 396 (quoting Gautam Naik & Bryan Gruley, *NextWave’s Tactics at Wireless Auction Are Under Fire*, WALL ST. J., May 6, 1996, at B4).

114. *Id.* at 396-97 (quoting Dan Meyer, *What’s Next for NextWave?*, RCR WIRELESS NEWS, Feb. 3, 2003, at 1). Indeed, in August 2003, NextWave announced that it sold about twenty percent of its licenses to Cingular Wireless for \$1.4 billion. Christopher Stern, *Cingular Agrees to Buy NextWave Wireless Licenses*, WASH. POST, Aug. 6, 2003, at E1.

licensee's failure to meet the conditions for holding the license.<sup>115</sup>

### 1. FCC's Action Frustrated Congressional Intent

In anticipating the Supreme Court's decision, the FCC changed its diversity auction financing policies, discontinuing the use of installment payments in January 1998.<sup>116</sup> The purpose behind Section 525 of the Bankruptcy Code is to prevent governmental units from frustrating congressional intent to provide debtors with a fresh start.<sup>117</sup> Publicly, the FCC articulated that it was bound by the same bankruptcy rules as all other creditors since it chose to create a standard debt obligation as a part of the installment payment scheme. Creditors of NextWave relied on these representations, and the FCC frustrated Congress's intent when it changed its position.<sup>118</sup>

When Congress grants special bankruptcy status to a particular government agency or program it does so explicitly. The FCC's position went against everything Congress hoped to promote.<sup>119</sup>

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115. Deborah L. Schrier-Rape & Jason S. Brookner, *The FCC as Creditor: Attempts to Legislate Out of the Bankruptcy Court*, AM. BANKR. INST., <http://abiworld.org/legis/reform/drspeech.html> (June 16, 1999). The FCC argued that if the licenses were subject to being restructured in the same manner as other obligations, the licenses would be unnecessarily tied up in bankruptcy and their deployment delayed. *Id.*

116. Competitive Bidding Proceeding, 63 Fed. Reg. 2315, 2318-19 (FCC Jan. 15, 1998); Harvard Law Review, *supra* note 112, at 398. The FCC's motive for ending installment payments was in response to the anticipated result in NextWave. *Id.* If the FCC did not change its policy, it would enable a company to buy licenses on installment, pay a down payment, and lock the licenses in bankruptcy. *Id.* at 397.

117. 11 U.S.C. § 525.

118. Brief of Amici Curiae Creditors of NextWave Pers. Communications, Inc. at 2, FCC v. NextWave, 537 U.S. 293 (2003) (Nos. 01-653, 01-657). The FCC frustrated Congress's intent because the very risk Congress wanted investors to take on small businesses within the telecommunications industry would be severely punished by the FCC stepping in front of all the other creditors and claiming the licenses automatically canceled. *Id.* at 3. The licenses were the bulk of the value of NextWave. *Id.* The FCC changed its position when the value of the licenses was increasing. *Id.* at 2. The FCC's position would have caused small business financing for the licenses to disappear, for no rational creditor would invest in a company like NextWave if the FCC were authorized in the event of bankruptcy to revoke the essential licenses on which the company's business plan depends. *Id.* at 4-5.

119. *Id.* at 5. Congress has created special regulatory exceptions to the automatic stay provision with explicit requirements, which the FCC did not meet. *Id.* Congress has squarely rejected legislative proposals to confer special bankruptcy status on the FCC. *Id.* In a letter dated May 12, 2000, members of the House Judiciary Committee explained that:

[e]very member of the [Commercial and Administrative Law] Subcommittee present at the hearing expressed his concern or disagreement with the FCC's position that it is exempt from the automatic stay provision – a position contrary to congressional intent when it enacted section 362 (b) in 1997 . . . [The FCC's proposals] conflict with one of the Bankruptcy Code's fundamental tenets that all similarly situated creditors be treated



Congress enacted Section 309(j) of the Communications Act with the understanding that federal agencies are governed by the Bankruptcy Code.<sup>120</sup>

Section 525 of the Bankruptcy Code reflects Congress's judgment that a debtor's licenses are often indispensable to its ability to reorganize.<sup>121</sup> The FCC's refusal to comply with Section 525 threatened to defeat the claims of all other creditors, and derailed the reorganization that would have paid the FCC and NextWave's other creditors in full.<sup>122</sup>

### B. FCC Alternatives in Light of NextWave

The decision in *NextWave* requires the FCC to conduct itself as any other creditor in a bankruptcy proceeding, while still distributing licenses pursuant to Congress's mandate.<sup>123</sup> The FCC can proceed by changing its method of distributing licenses, urging Congress to change its position regarding small businesses, or allocating licenses in a different manner, as to allow small businesses to target markets that will not be in direct competition with the industry giants.<sup>124</sup>

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equally absent significant public policy reasons warranting some form of preferred treatment (e.g., police and regulatory enforcement officials, spousal and child support claimants, victims of fraud). These proposals, however, would endow the FCC with more protection than virtually any other creditor, including the Internal Revenue Service, has under the current bankruptcy law . . . If enacted, this proposed legislation could potentially destroy a debtor's prospect for economic rehabilitation and deprive creditors of a major source of repayment.

*See* 145 Cong. Rec. S14,104 (daily ed. Nov. 5, 1999) (Johnson Amendment No. 2523 to Bankruptcy Reform Act of 1999, S. 625).

120. Brief of Amici Curiae Creditors of NextWave Pers. Communications, Inc. at 9, *FCC v. NextWave*, 537 U.S. 293 (2003) (Nos. 01-653, 01-657). There is no conflict between Section 309(j) of the Communications Act and Section 525(a) of the Bankruptcy Code. *Id.* If there was a conflict, it would be resolved by a principle governing the development of federal statutory law, which finds a very strong presumption that a federal agency is not exempt from pre-existing background federal statutes, except where the law expressly provides. *Id.*

121. *See* 11 U.S.C. § 525(a); Brief of Amici Curiae Creditors of NextWave Pers. Communications, Inc. at 16, *FCC v. NextWave*, 537 U.S. 293 (2003) (Nos. 01-653, 01-657). Preserving the debtor's ability to retain its licenses advances the Code's goals of rehabilitating debtors, maximizing the value of the estate for creditors, and ensuring that all creditors are treated fairly. *See infra* notes 27-40, and accompanying text.

122. Brief of Amici Curiae Creditors of NextWave Pers. Communications, Inc. at 16-18, *FCC v. NextWave*, 537 U.S. 293 (2003) (Nos. 01-653, 01-657).

123. *NextWave Pers. Communications, Inc.*, 537 U.S. at 304. In drafting rules for future license auctions, the FCC is likely to be less generous in proving credit terms to financially constrained buyers. H. Jason Gold & Valerie P. Morrison, *United States Supreme Court Holds FCC in Violation of the Bankruptcy Code*, available at <http://www.wrf.com/attorney/publications.asp?id=G432064236> (January 27, 2003). Other agencies would be wise to review their license cancellation regulations for compliance with the Court's new mandate. *Id.*

124. *See infra*, notes 125-199 and accompanying text.

## 1. Auctions and the Competitive Bidding Process

The FCC believes that competitive bidding is the appropriate way to distribute PCS licenses, as it maximizes spectrum investment and activity.<sup>125</sup> Auctions were intended to correct problems associated with lotteries and comparative hearings, the previous methods implemented by the FCC to assign licenses.<sup>126</sup> However, due to the competing interests that the FCC is trying to meet, the current system of license distribution is not necessarily the most efficient option.<sup>127</sup> The primary advantage to using an auction system to distribute licenses is its tendency to assign the spectrum to those best able to use it.<sup>128</sup> Auctions do not remedy the inherent deficiencies in administrative allocation of the spectrum.<sup>129</sup> Furthermore, the outcome in recent auctions with

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125. William Kummer, *Spectrum Bids, Bets, and Budgets: Seeking an Optimal Allocation and Assignment Process for Domestic Commercial Electromagnetic Spectrum Products, Services, and Technology*, 48 FED. COMM. L.J. 511, 527-28 (1996) (analyzing the allocation and assignment of electromagnetic spectrum licenses for commercial use through competitive bidding). Public revenue is maximized as the fair market value of the electromagnetic spectrum less auction administrative expenses goes to the U.S. Treasury, and taxes rise due to increased economic activity. *Id.* at 527. Speed of development increases because high licensing costs induce successful bidders to launch services as soon as possible to recover large initial investment. *Id.* Universal service increases as low prices of rural licenses reduce development costs and attract investors unable or unwilling to make capital requirements necessary to develop major metropolitan licenses. *Id.* High levels of spectrum efficiency and use are achieved as high spectrum costs foster large investments in technology to expand capacity. *Id.* at 527-28.

126. Hazlett, *supra* note 16, at 642. It was argued that auctions would reduce rent-seeking, speed licenses to the marketplace, capture license rents for the Federal Treasury rather than "squander" them on lucky or politically connected applicants, and enhance performance because the auction winners would be most likely to implement services most efficiently. *Id.*

127. See Rob Frieden, *Balancing Equity and Efficiency Issues in the Management of Shared Global Radiocommunication Resources*, 24 U. PA. J. INT'L ECON. L. 289, 311-14 (2003) (examining the merits of maintaining, revamping, or abandoning the current administrative processes for managing international spectrum and satellite orbital slots). Globally, governments have authorized competitive bidding, for select portions of radio spectrum. *Id.* at 312. Congress desires the FCC to promote small businesses, but at the same time the licenses need to be distributed in an efficient manner. Hazlett, *supra* note 16, at 640. The A and B Block auctions took 98 days to complete the 112 rounds of bidding. *Id.* at 647. Furthermore, the winning bidders were mostly previous filers with the FCC, so the review of the winning bidders' final applications was expedited. *Id.* However, the C Block auction was designated for small businesses, and the FCC had special ownership rules and criteria required for applicants. *Id.* at 648. This increased the administrative analysis and competitor scrutiny. *Id.* GWI, the third highest bidder in the C-Block auction was not granted its licenses until nine months after the auction was closed. *Id.*

128. Peter Cramton, *Spectrum Auctions*, in HANDBOOK OF TELECOMMUNICATIONS ECONOMICS 605-640, 608 (Martin E. Cave et al. eds., 2002). Companies that most highly value the spectrum are likely to bid higher to win the licenses. *Id.* Well-designed auctions are more likely to be highly efficient, with competition for the licenses not being wasteful, as it leads to auction revenues. *Id.*

129. Frieden, *supra* note 127, at 317. Opponents to auctioning of spectrum argue that the notions of public interest in the distribution of the spectrum is a vague, ill-defined concept. *Id.* The

companies like NextWave demonstrates that overbidding can lead to bankruptcies and confusion over who retains title to the spectrum.<sup>130</sup>

The competitive bidding or auction-style process is not an efficient means to distribute PCS licenses.<sup>131</sup> Each license covers a specified area, and in order to create a contiguous service area, the companies have to hedge their bids and hope that they get enough licenses to be able to provide full coverage in one area.<sup>132</sup> The FCC views competitive bidding as a market-based approach to fulfilling the mandate of FCA Section 309 that telecommunications licenses be awarded to serve the “public interest, convenience, and necessity.”<sup>133</sup>

However, the FCC recognized that a licensee’s failure to make full and timely payment indicated that the agency had not identified the best applicant.<sup>134</sup> The financial difficulties leading to default may disable the licensee from exploiting the spectrum in the public interest.<sup>135</sup> The FCC feared that tolerance for default could invite speculative bidding and undermine the integrity of the auction process.<sup>136</sup> In light of the Supreme Court’s decision, the FCC needs to rethink its distribution of licenses.<sup>137</sup>

## 2. Alternatives to Auctions

Other possible means of distributing licenses include an administrative process or lotteries, both of which have been used and rejected in the United States.<sup>138</sup> An administrative process requires those

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FCC has established “many protectionist, anti-competitive, anti-innovative, inflexible, output-limiting regulatory regimes” under the public interest scheme. *Id.* (quoting Lawrence J. White, “Propertyizing” the Electromagnetic Spectrum: Why It’s Important, and How to Begin, 9 MEDIA L. & POL’Y 19 (2000)).

130. *Id.* at 317-318.

131. Cramton, *supra* note 128.

132. *Id.*

133. Hennigan, *supra* note 90, at 31.

134. *Id.* The FCC suspended the use of installment payments as a means of financing small business participation in the auction program in January 1998. Competitive Bidding Proceeding, 63 Fed. Reg. at 2326-2327. The FCC changed the down payment requirement to 20 percent of the high bid amount as well. *Id.* at 2326. The FCC believed that a substantial down payment was required to ensure that licensees have the financial capability necessary to deploy and operate their systems, and to protect against default. *Id.*

135. Hennigan, *supra* note 90, at 31. This is the reason why the promotion of small business in the telecommunication industry is no longer a wise decision.

136. *Id.*

137. H. Jason Gold & Valerie P. Morrison, *United States Supreme Court Holds FCC in Violation of the Bankruptcy Code*, available at <http://www.wrf.com/attorney/publications.asp?id=G432064236> (January 27, 2003).

138. Cramton, *supra* note 128, at 607.

interested in the spectrum to inform the licensing agency how they intend to use it, and the agency awards spectrum to those with the most attractive proposals.<sup>139</sup> After the FCC rejected this type of allocation, the agency switched to lotteries, where the FCC would randomly select license winners from among those that apply.<sup>140</sup> The inefficiencies in both processes led the FCC to abandon them in favor of auctions.<sup>141</sup>

### 3. Should Congress Continue to Promote Designated Entities?

The FCC hoped to meet its mandate of assigning licenses to a wide variety of applicants by structuring auctions under the assumption that the primary obstacle for small business and minority-or-women-owned firms was their lack of access to private capital markets.<sup>142</sup> The FCC established a program of benefits for these so called designated bidders, with the potential bidder required to meet certain criteria based on size and ownership status to be eligible for the benefits package.<sup>143</sup> This program caused delays in deployment of the licenses, used government funds to subsidize the entities, and hurt consumers.<sup>144</sup>

#### a. Promoting Small Businesses Does Not Benefit Consumers

Promoting small and diverse owners is a desirable goal in some sectors that require licenses, such as those which contain editorial content; however, the same arguments do not translate to mobile wireless communications.<sup>145</sup> Small businesses in the PCS industry did not benefit from the FCC's separate designated C and F Block

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139. *Id.* Allocating the spectrum in this manner is very slow and wasteful, taking the FCC an average of two years to award thirty cellular licenses. *Id.* Competitors spent large amounts of money to influence the regulators' decisions, and when final decisions were made, it was difficult to see why one proposal won out over another. *Id.*

140. *Id.* Here, because the licenses are so valuable, there is a strong incentive for a large number of applicants. *Id.* The FCC received over four hundred thousand applications for its cellular lotteries, wasting resources in creating and processing the applications. *Id.* at 607-08. The winners were not always those best suited to provide the services, and it took years for the licenses to be transferred through private markets to those capable of building out a service. *Id.* at 608.

141. *Id.* at 607-08.

142. Hazlett, *supra* note 16, at 641. The benefits available to these designated entities included preferential financing programs and bidding credits. *Id.*

143. *Id.*

144. *See generally*, Hazlett, *supra* note 16, at 650-56.

145. Cramton, *supra* note 128, at 634. Special treatment to designated entities are premised on the idea that small is good; however, within the wireless communications industry there are significant economies of scale. *Id.* Larger competitors are able to better bargain with equipment suppliers and have the ability to market in a more efficient manner. *Id.*

auctions.<sup>146</sup> The FCC created a system which ultimately set up these small businesses for failure.<sup>147</sup> It decided that an auction system was the most effective means to implement Section 309(j) of the FCA.<sup>148</sup> The FCC divided broadband PCS spectrum into six auction blocks, and designated the third and the sixth blocks for small businesses.<sup>149</sup> However, it was inappropriate for the FCC to conduct the “designated entity” auction and create a situation whereby the designated entities were encouraged to bid money they did not have.<sup>150</sup>

A study commissioned by Verizon Wireless found that the FCC’s actions regarding NextWave’s licenses delayed implementation of new wireless services and impeded wireless investment that would have increased the United States’ gross domestic product by between \$19 billion and \$52 billion.<sup>151</sup>

The FCC’s actions locked the licenses in court proceedings, and prevented any company from using them until the dispute was resolved.<sup>152</sup> If NextWave could have used the licenses, it might have been able to implement its business plan, increasing competition in the

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146. *Id.*

147. *See id.*

148. *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348, P71 (1994). “Since a bidder’s ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services . . . and the efficient and intensive use of the spectrum.” *Id.* However, this is inherently flawed reasoning, as small businesses may have an innovative concept, but if they have to obtain the licenses through an auction, which could irrationally raise the price of the license, the small businesses are then locked into a higher payment to the FCC. This would cause the small businesses to have to use capital obtained to build out the market to satisfy installment payments on over priced licenses.

149. Hennigan, *supra* note 90, at 31. Because the licenses covered largely the same geographical areas and spectrum allocated, this was not an appropriate method to distribute licenses. The FCC’s scheme does not make sense on how it would effectively implement Congressional intent. Valuation of the available spectrum in each auction is a difficult task. Leslie Taylor, *Telecommunications Reports*, available at [http://www.lta.com/res\\_articles/ontherecord.htm](http://www.lta.com/res_articles/ontherecord.htm). In the six different broadband PCS auctions, there was a huge variation in the amounts per megahertz paid for the licenses. *Id.* Bidders need to consider the value of combining licenses in different markets, if they plan on bidding in different markets. *Id.*

150. Taylor, *supra* note 149. This system created a situation where the designated entities were more likely inexperienced in the telecommunications industry and had no way to accurately gauge if they would be able to get the money in the future. *Id.*

151. Jeremy Feiler, *Study: Industry Hurt by Airwaves Auction Inaction*, available at <http://www.bizjournals.com/philadelphia/stories/2002/09/02/newscolumn1.html>. The FCC refused to cancel the results of the auction in which it re-auctioned NextWave’s seized licenses. *Id.* This has caused financial troubles for bidders in the second auction, as the have not received any benefit from the licenses which were locked in the court proceedings, but still had to recognize the debt incurred as a ‘contingent liability.’ This treatment hurt the bidders’ credit rating. *Id.*

152. *Agencies Can’t Renege on Business Contracts*, DETROIT NEWS, Jan. 29, 2003, at 10A.

industry and ultimately benefiting customers.<sup>153</sup> Now, with the large national wireless providers firmly entrenched in the industry, NextWave will be forced to sell some of its airwave space to other companies.<sup>154</sup>

b. Large Companies Have the Means and Ability to Improve the Industry

In the telecommunications industry, the size of the company does matter.<sup>155</sup> Consumers in the marketplace have shifted demand toward nationwide wireless services.<sup>156</sup> Companies within the industry need to be large enough and produce sufficient cash flow to absorb the costs of expanding networks and services that quickly become obsolete.<sup>157</sup> One of the biggest barriers to entry into the industry is its capital-intensive nature.<sup>158</sup> All of these factors lead to a situation where it is unrealistic for Congress to think that small businesses will be able to enter the industry.<sup>159</sup>

The effect of the congressional mandate to encourage small businesses to enter the industry has a detrimental effect far beyond the FCC not being able to automatically cancel licenses upon default.<sup>160</sup> Many established telecommunication equipment suppliers provided equipment to these smaller companies on credit in the hopes of benefiting as the new companies grew.<sup>161</sup> However, the unprecedented economic expansion in the late 1990s abruptly reversed, causing equipment providers who went out on a limb for these small businesses to now face financial difficulty.<sup>162</sup>

The ripple effect extends seemingly without limit: the small business such as NextWave petitions for bankruptcy protection, largely to avoid the installment payment due to the FCC; the larger equipment supplier, or other creditor that has extended equipment or capital is now forced to the end of the line, waiting for any meager percentage of

153. *Id.*

154. *See supra* note 125, and accompanying text.

155. *See Cramton, supra* note 128, at 634.

156. *Id.* Providing nationwide services requires billion dollar deals, and what consumers ultimately need is a variety of strong national competitors. *Id.* Small regional players cannot compete on this level. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See generally* Brief of Amici Curiae Creditors of NextWave Pers. Communications, Inc. at 1-6, FCC v. NextWave, 537 U.S. 293 (Nos. 01-653, 01-657).

161. *Id.*

162. *Id.*

payment for the debts owed to it.<sup>163</sup> These companies are now facing bankruptcy, or other serious financial troubles.<sup>164</sup>

### C. Proposed Solutions to the Problems Facing the FCC

#### 1. Congress Needs to Abandon Favors to Designated Entities

The auction system is the most efficient allocation of the spectrum. However, Congress needs to abandon its policy of setting aside auctions for designated entities.<sup>165</sup> To prevent over-consolidation of spectrum, the FCC can use spectrum caps to guarantee new entry where it is desirable.<sup>166</sup> The events of the C Block auction demonstrate that using special incentives to encourage participation of designated entities can

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163. *Id.*

164. *Id.* The Creditors Committee was the official representative of the thousands of businesses and investors who extended hundreds of millions of dollars in services, goods, and financing to NextWave to enable NextWave to acquire its licenses, build out its network, and fund its operations. *Id.* at 1. The group included corporate investors such as Sony, QUALCOMM, and Hughes Network Systems; hundreds of small businesses which provided supplies and services toward the build-out of the network; and large investment funds which manage money for banks, pension funds, and insurance companies. *Id.* The Creditors Committee wanted to ensure that the FCC was subject to the same rules the Bankruptcy Code applies to all other creditors. *Id.* This was especially critical as NextWave's reorganization plan proposed to pay in full not only the FCC's claim, but also each of the claims of the Creditor Committee's constituents. *Id.* at 2. Various lenders financed NextWave after commencement of the Chapter 11 proceedings, to allow NextWave to continue operations; in conjunction with this financing, they took liens on the proceeds of NextWave's licenses to secure repayment of its loans. *Id.* The lenders obtained the bankruptcy court's prior approval of these liens upon notice to the FCC. *Id.* The FCC never objected to the liens on the ground that the licenses had canceled (or could be canceled) for non-payment. *Id.* The lenders relied on the FCC's repeated acknowledgement that NextWave's licenses would not cancel while NextWave attempted to reorganize. *Id.*

165. These entities do not have the means to successfully implement a nationwide full service system, which consumers now demand. Cramton, *supra* note 128, at 634. Furthermore, there are more effective means of encouraging bids by small businesses. *Rural Carriers Urge End of Set-Asides for Designated Entities*, COMMUNICATIONS DAILY, August 2, 2004. Bidding credits for these designated entities, used in open license auctions, would give these small businesses more opportunity. *Id.*

166. Cramton, *supra* note 128, at 633. A spectrum cap is a direct method of limiting the concentration of spectrum for a particular type of service in a particular area. *Id.* Spectrum caps can promote competition by limiting a firm to a specific quantity of spectrum it can hold in any market. *Id.* The FCC utilizes this method, and so far it has played a critical role in ensuring that there are many competitors for mobile wireless service in each market. *Id.* Consumers benefit from this increased competition. *Id.* However, spectrum caps are not able to take into account the specifics of each situation. *Id.* The ultimate policy on spectrum caps would be a middle ground, with binding caps imposed on initial auctions, but once it is believed that vigorous competition has been established the caps should give way. *Id.* Mergers in the industry should be reviewed on a case by case basis. *Id.*

be very troublesome.<sup>167</sup>

If Congress does not abandon its mandate to promote small businesses within the telecommunication industry, then the FCC should restructure its auction system.<sup>168</sup> Under the auction system used in the PCS A through F Block auctions, small and large companies were able to bid on licenses covering much of the same geographic locations.<sup>169</sup> This was inefficient and troublesome in many respects. First, small businesses do not have a great likelihood of survival in the telecommunications industry.<sup>170</sup> Second, this also hurts the larger, established businesses, because they are blocked from obtaining more licenses to provide service for their customers.<sup>171</sup>

## 2. The FCC Should Support Consolidation Within the Industry

The current industry is dominated by “The Big Six”; however, industry consolidation is likely to change the dynamics of the industry.<sup>172</sup> Industry observers argue consolidation will benefit consumers, with proponents predicting better rates and service packages in the long term, while opponents recognize that in the interim the industry will be in flux.<sup>173</sup> Cingular Wireless announced in February 2004 that it would acquire AT & T Wireless and become the largest wireless carrier in the United States.<sup>174</sup>

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167. *Id.* at 634. The FCC’s overly attractive installment payments encouraged speculative bidding, leading all major bidders to default and declare bankruptcy. *Id.* Favors to designated entities greatly complicate the auction process. *Id.* at 635. The rules and administration of determining designated status often becomes a central issue in establishing the auction procedures. *Id.* The worst outcome is having the licenses tied up in litigation; until the litigation is resolved, the building of communication services cannot begin. *Id.*

168. *Id.* at 633-35.

169. *See supra* notes 19-26, 64-65 and accompanying text.

170. *See generally* Patterson, *supra* note 6. NextWave is just one of the many small businesses that had to result to bankruptcy to help find a resolution to its problems.

171. *Id.*

172. Denise Pappalardo & Jim Duffy, *Consolidation Might Be New Wireless Plan*, available at <http://www.nwfusion.com/news/2004/0119attcin.html> (January 19, 2004). The “Big Six” are Verizon Wireless, Cingular Wireless, AT & T Wireless, Sprint PCS, Nextel, and T-Mobile. *Id.*

173. *Id.* Once the deals are complete, network, customer service, and billing integration will follow. *Id.*

174. Cingular Wireless, *Cingular to Acquire AT & T Wireless, Create Nation’s Premier Carrier*, available at [http://www.cingular.com/about/latest\\_news/04\\_02\\_17](http://www.cingular.com/about/latest_news/04_02_17) (February 17, 2004). The combined company would have 46 million customers, and one of the most advanced digital networks in the United States, with spectrum in 49 states and coverage in 97 of the top 100 markets. *Id.* Stan Sigman, president and CEO of Cingular Wireless states that the acquisition will benefit consumers, through the combined strengths of the companies enabling it to create customer benefits and growth prospects for “better coverage, improved reliability, enhanced call quality, and a wide array of new and innovative services for consumers.” *Id.*



### 3. The FCC Should Encourage Designated Entities to Specialize in the Industry

If small businesses are to survive in the telecommunications industry, they need to specialize within the industry in order to set themselves apart from the large industry leaders.<sup>175</sup>

One option for the smaller firms is to focus on smaller geographic or rural areas. The limited amount of PCS services offered in rural areas continues to be an ongoing problem faced by the FCC.<sup>176</sup> The FCC recognizes that on the national scale, the deployment of wireless mobile service has been successful—resulting in increased competition and services overall—but is still trying to resolve the issue of providing telecommunications services in sparsely populated, expansive rural areas.<sup>177</sup> The FCC could focus small businesses' licenses in rural and localized areas to solve both problems.<sup>178</sup>

Geographic size can be a disadvantage, particularly if a company's customers are too spread out.<sup>179</sup> Dominating a local market will increase profitability through economies of scale.<sup>180</sup> Nextel's performance is

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175. Darren Sextro, *Consolidation, Speculation, Specialization*, available at [http://www.wirelessreview.com/ar/wireless\\_consolidation\\_speculation\\_specialization/](http://www.wirelessreview.com/ar/wireless_consolidation_speculation_specialization/) (March 1, 1999).

176. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 68 Fed. Reg. 64,050 (proposed November 12, 2003). The FCC continues to examine ways to promote the rapid and efficient deployment of quality spectrum-based services in rural areas. *Id.* The FCC's primary mission is the promotion of "communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide and world-wide wire and radio communications service." *Id.*

177. *Id.* The FCC recognizes that there is a need to service rural areas, not only to enable Americans who travel, reside or conduct business throughout the country to communicate effectively, but also for the benefit of the general public interest. *Id.*

178. See generally Darren Sextro, *Consolidation, Speculation, Specialization*, available at [http://www.wirelessreview.com/ar/wireless\\_consolidation\\_speculation\\_specialization/](http://www.wirelessreview.com/ar/wireless_consolidation_speculation_specialization/) (March 1, 1999); Bruce Meyerson, *Keeping Up With the Big Wireless Boys*, available at <http://www.madison.com/archives/read.php?ref=tct:2004:02:24:335685:BUSINESS> (February 24, 2004).

179. Bruce Meyerson, *Keeping Up With the Big Wireless Boys*, available at <http://www.madison.com/archives/read.php?ref=tct:2004:02:24:335685:BUSINESS> (February 24, 2004). There are advantages to the large companies, such as being able to spread the monumental operating costs from the wireless business across a far larger customer base. *Id.*

180. *Id.* For example, Nextel only has 12.9 million subscribers, whose monthly bills are among the highest in the wireless industry, averaging \$69 per month in 2003. *Id.* The company's churn rate, the measure of how many customers close their accounts, averaged 1.6 percent per month in 2003. *Id.* Verizon Wireless has 37.5 million customers, with an average monthly bill of \$49 per month, and a churn rate of 1.8 percent. *Id.* Cingular's customers' average monthly bill was \$51, with a churn rate of 2.7 percent. *Id.* AT & T Wireless's customers' monthly bill averaged \$60,

largely due to focusing on high-usage business customers, who are willing to pay more for special features, like the company's pioneered walkie-talkie service.<sup>181</sup>

Airadigm Communications, Inc., is an example of a small business that operates PCS systems in Wisconsin and Iowa in mostly rural areas and many on tribal lands.<sup>182</sup> Airadigm temporarily ceased making its debt payments to the FCC and its other creditors while it was in bankruptcy.<sup>183</sup> Airadigm has borne great cost to provide service to less populated rural areas that have been underserved.<sup>184</sup>

The large companies are currently focusing on developing their networks and providing expanded services in the larger cities where the demand is already established.<sup>185</sup> Small businesses should choose to target local areas, and develop some sort of meaningful PCS network in these areas.<sup>186</sup> Smaller businesses could focus their resources and

and a 2.6 percent churn. *Id.*

181. *Id.* Sprint PCS is taking a similar approach to Nextel, by differentiating itself with handsets and advanced non-voice services, like picture messaging and wireless Web access. *Id.*

182. Brief of Amici Curiae Airadigm Communications, Inc., at 1, FCC v. NextWave, 537 U.S. 293 (Nos. 01-653, 01-657). Airadigm provides service to more than 30,000 subscribers, and even after filing bankruptcy has continued to serve the public and fulfill the statutory goal of deploying "new technologies, products, and services for the benefit of the public, including those residing in rural areas." *Id.* (quoting 47 U.S.C. § 309(j)(3)(A)).

183. *Id.* Airadigm concentrated on providing service where it was needed most, underserved markets. *Id.* at 2. The first cell sites activated were on the Oneida reservation, where no service had previously been provided. *Id.*

184. *Id.* Airadigm concentrated initial efforts on a landline replacement business model, which brought competition to wireless and traditional landline operators. *Id.* The company's ambitious business plan required heavy investment in network equipment and when subscriber revenue fell short of predictions, Airadigm ran into financial difficulties. *Id.* at 2-3. The company filed a Chapter 11 petition, and soon secured additional debtor-in-possession financing and working capital loans. *Id.* at 3. The company refocused its business model, and turnaround seemed complete in October 2000, when Airadigm's plan of reorganization was confirmed. *Id.* January 2000 marked the FCC's announcement that NextWave's licenses had automatically cancelled and would be reauctioned. *Id.* This was very bad for Airadigm, as the FCC informed the company that they would take the same position on its licenses. *Id.* The FCC actively participated in Airadigm's bankruptcy, but had never claimed that the quarterly interest payments should be among various current obligations. *Id.*

185. U.S. Department of Transportation, Intelligent Transportation Systems, *Wireless Telecommunications Carrier Industry Overview*, (March 2001), at [http://www.its.dot.gov/511/PDF/Wireless\\_Telecom.pdf](http://www.its.dot.gov/511/PDF/Wireless_Telecom.pdf). Six wireless carriers offer their services nationwide, available to over 190 million people. *Id.*

186. See generally Darren Sextro, *Consolidation, Speculation, Specialization*, available at [http://www.wirelessreview.com/ar/wireless\\_consolidation\\_speculation\\_specialization/](http://www.wirelessreview.com/ar/wireless_consolidation_speculation_specialization/) (March 1, 1999); Bruce Meyerson, *Keeping Up With the Big Wireless Boys*, available at <http://www.madison.com/archives/read.php?ref=tct:2004:02:24:335685:BUSINESS> (February 24, 2004).

provide needed services in rural areas.<sup>187</sup> They could then negotiate with the larger companies some sort of borrowed airtime or coverage, for the consumers who subscribe to the large companies services, but are found in the rural areas.<sup>188</sup> This would provide additional revenue for the smaller companies to continue to develop and expand their networks.<sup>189</sup> Furthermore, the smaller companies would also have the option of selling their pre-built networks to the larger companies once they were fully established.<sup>190</sup>

Another option for the small businesses and designated entities is to specialize in providing targeted services.<sup>191</sup> Small businesses can succeed by adopting a different sales practice, focusing on the specific needs of a vertical market.<sup>192</sup>

#### 4. The FCC Should Redesign the Allocation of PCS Licenses

The greatest room for improvement in the auction process lies not within the auction design, but in the allocation process.<sup>193</sup> Determining proper allocation of the spectrum involves complex political, engineering, and economic factors.<sup>194</sup> Economic gains would come from better allocations of spectrum.<sup>195</sup> The FCC would benefit from redefining the allocation of the spectrum, and could encourage small businesses and designated entities through the allocation of the

187. U.S. Department of Transportation, Intelligent Transportation Systems, *Wireless Telecommunications Carrier Industry Overview*, (March 2001), at [http://www.its.dot.gov/511/PDF/Wireless\\_Telecom.pdf](http://www.its.dot.gov/511/PDF/Wireless_Telecom.pdf). The carriers which provide service in rural areas can become key roaming partners to many of the larger national and regional carriers. *Id.*

188. Cramton, *supra* note 128, at 605-40.

189. *Id.*

190. *Id.* NextWave is now in the process of creating its reorganization plan, which must be filed by mid-October with the Bankruptcy Court. Chris Nolter, *All Eyes on NextWave's Exit*, DAILY DEAL, September 6, 2004. NextWave has sold some of its spectrum to other wireless companies, such as Verizon Wireless and MetroPCS, Inc. *Id.* The money received from these sales will enable NextWave to propose a plan that not only pays creditors in full, but also provide value to equity holders. *Id.*

191. Darren Sextro, *Consolidation, Speculation, Specialization*, available at [http://www.wirelessreview.com/ar/wireless\\_consolidation\\_speculation\\_specialization](http://www.wirelessreview.com/ar/wireless_consolidation_speculation_specialization) (March 1, 1999).

192. *Id.* Vertical markets, such as utilities, transportation, and agriculture have not been sought after for public wireless networks. *Id.*

193. Cramton, *supra* note 128, at 637. The allocation of the spectrum defines the license, which is comprised of the frequency band, the geographic area, the time period, and the restrictions on use. *Id.* at 631. The focus has been on the assigning of the licenses; however, the allocation step is more important. *Id.*

194. *Id.*

195. *Id.*

spectrum.<sup>196</sup>

The FCC could address the issues facing people in rural areas, which are not being serviced by the larger companies in the industry if it redefined the allocation process of the licenses.<sup>197</sup> The feasibility of a small start-up company surviving in the large cities is slim to none.<sup>198</sup> Forcing the smaller businesses to focus on the rural, non-serviced areas enables them to create a niche in the marketplace.<sup>199</sup>

## V. CONCLUSION

Congress should reconsider its policy objective of requiring the FCC to promote small businesses and other designated entities when it distributes PCS licenses. The policies underlying the Bankruptcy Code and its “fresh start” offered to restructuring companies overshadow the FCC’s authority within bankruptcy proceedings. This is necessary to maintain equilibrium among creditors. Consumers are interested in nationwide wireless service, which can realistically only be offered by the large national carriers which are firmly established in the industry.

Auctioning the PCS licenses seems to be the most appropriate way to distribute the licenses.<sup>200</sup> Most of the problems stemming from the auctioning system resulted from Congress’s mandate to promote small businesses and other designated entities.<sup>201</sup> The auction system allows bidders who most highly value the licenses to obtain them, which maximizes revenues for the government. By eliminating separate auctions for small businesses, the most capable companies would obtain the licenses, which would result in the most efficient use of limited resources.<sup>202</sup>

Promoting small businesses and other designated entities does not

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196. *Id.*

197. See generally Darren Sextro, *Consolidation, Speculation, Specialization*, available at [http://www.wirelessreview.com/ar/wireless\\_consolidation\\_speculation\\_specialization/](http://www.wirelessreview.com/ar/wireless_consolidation_speculation_specialization/) (March 1, 1999); Bruce Meyerson, *Keeping Up With the Big Wireless Boys*, available at <http://www.madison.com/archives/read.php?ref=tct:2004:02:24:335685:BUSINESS> (February 24, 2004).

198. *Id.*

199. A market niche is a focused, tangible portion of a market. Susan Ward, *Niche Market*, available at <http://sbinfocanada.about.com/library/glossary/bldef-nichemark.htm>. By definition, a business that focuses on a niche market is addressing a need for a product or service that is not being addressed by mainstream providers. *Id.* The advantage of a niche market is being alone there; other small businesses may not be aware of the particular market, and large businesses will not want to bother with it. *Id.*

200. See generally, Cramton, *supra* note 128.

201. *Id.*

202. *Id.*

benefit consumers.<sup>203</sup> Only large telecommunications companies have the ability to improve the industry and offer the services that consumers demand.<sup>204</sup> If Congress wants to ensure that competition will flourish in the industry, spectrum caps can be used to prevent over-consolidation.<sup>205</sup>

If Congress determines that promoting small businesses is still a desirable goal for the industry, then the FCC needs to restructure its auction system.<sup>206</sup> The FCC could create a system where the small businesses focus on providing services in rural areas, which are being ignored and under-serviced currently.<sup>207</sup> Furthermore, the small businesses could partner up with the larger national providers and provide the key roaming service for the national carriers in these rural areas.<sup>208</sup>

*Susan K. Slam*

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203. See generally, Cramton, *supra* note 128; Hazlett, *supra* note 16.

204. See generally, Cramton, *supra* note 128.

205. *Id.*

206. See Brief of Amici Curiae Airadigm Communications, Inc. at 1, FCC v. NextWave, 537 U.S. 293 (Nos. 01-653, 01-657).

207. See generally, Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, 68 Fed. Reg. at 64,050 (Nov. 12, 2003)(to be codified at 47 C.F.R. pt. 22, 24, 90).

208. See, U.S. Department of Transportation, Intelligent Transportation Systems, *Wireless Telecommunications Carrier Industry Overview* (March 2001), at [http://www.its.dot.gov/511/PDF/Wireless\\_Telecom.pdf](http://www.its.dot.gov/511/PDF/Wireless_Telecom.pdf). See generally, Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, 68 Fed. Reg. at 64,050 (Nov. 12, 2003)(to be codified at 47 C.F.R. pt. 22, 24, 90).