No. 01-653

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC. AND NEXTWAVE POWER PARTNERS INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI (VOLUME I)

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1402 and 00-1403

NEXTWAVE PERSONAL COMMUNICATIONS INC.
AND NEXTWAVE POWER PARTNERS INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, RESPONDENTS

BELLSOUTH CORPORATION, ET AL., INTERVENORS

[Argued: March 15, 2001
Decided: June 22, 2001]

On Petition for Review and Notice of Appeal of Orders of the Federal Communications Commission.

Before: SENTELLE, TATEL and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

This case concerns the extent to which the Bankruptcy Code limits a federal agency—here, the Federal Communications Commission—acting to implement the provisions of its own statute. Seeking to comply with its statutory duty to ensure small business participation

in auctions of broadband PCS licenses, the Commission allowed winning bidders to pay for their licenses in installments. As part of this scheme, the Commission took and perfected security interests in the licenses, and provided for license cancellation should a bidder fail to make timely payments. When appellants, winning bidders on several licenses, declared bankruptcy and ceased making payments, the Commission canceled their licenses. Applying the fundamental principle that federal agencies must obey all federal laws, not just those they administer, we conclude that the Commission violated the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy. The Commission, having chosen to create standard debt obligations as part of its licensing scheme, is bound by the usual rules governing the treatment of such obligations in bankruptcy.

I

In 1993, Congress amended the Communications Act of 1934 to authorize the Federal Communications Commission to award spectrum licenses "through a system of competitive bidding." 47 U.S.C. § 309(j)(1). In "identifying classes of licenses and permits to be issued by competitive bidding," and in "designing the methodologies" for such bidding, Congress directed the Commission to promote several objectives, including "the development and rapid deployment of new technologies, products and services," the "recovery for the public of a portion of the value of the public spectrum resource made available for commercial use," and the "efficient and intensive use of the electromagnetic spectrum." *Id.* § 309(j)(3). Congress also directed the Commission to

"promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by . . . disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies." *Id.* § 309(j)(3)(B). To further this last goal, Congress directed the Commission to "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments . . . or other schedules or methods." *Id.* § 309(j)(4)(A).

Acting pursuant to this statute, the Commission adopted rules to auction licenses for "broadband PCS" —"personal communications services in the 2 GHz band." *In re Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 5532 ¶ 1 (1994). The Commission expected broadband PCS to "provide new mobile communications capabilities" through "a new generation of communications devices" including "small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multichannel cordless phones, and advanced paging devices with two-way data capabilities." *Id.* ¶ 3. The Commission "determined that the use of competitive bidding to award broadband PCS licenses, as compared with other licensing methods, would speed the development and deployment of new services to the public and would encourage efficient use of the spectrum," as required by statute, since "auctions would generally award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public." *Id.* ¶ 5. The Commission expected the PCS license auction to "constitute the largest auction of public assets in American

history," recovering "billions of dollars for the United States Treasury," and thus fulfilling another statutory mandate. *Id.* ¶ 1.

As directed by Congress, the Commission adopted a variety of measures to promote small business ownership of PCS licenses, including setting aside two blocks of licenses, the "C" and "F" Blocks, for bidding by entities with annual gross revenues and total assets below specified amounts. *Id.* ¶ 12. Especially relevant to this case, the Commission allowed "most successful bidders within the [C and F Blocks] to pay for their licenses in installments." *Id.* ¶ 16. Observing that "the primary impediment to participation [in license auctions] by designated [small business] entities is lack of access to capital," *id.* ¶ 10, the Commission concluded that "installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum." *Id.* ¶ 135. "By allowing payment in installments," the Commission stated, "the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction." *Id.* ¶ 136. The Commission also announced that "[t]imely payment of all installments will be a condition of the license[] grant and failure to make such timely payment will be grounds for revocation of the license." *Id.* ¶ 138.

In 1995, a group of former telecommunications executives founded NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave"), appellants in this case, for the purpose of bidding on PCS licenses and operating a personal communications service. NextWave's founders hoped

the company would become a "carrier's carrier," selling wireless services and airtime wholesale. Appellants' Opening Br. at 5. At C Block auctions in May and July, 1996, NextWave bid $4.74 billion in total, winning sixty-three licenses. The company made a $474 million down payment. Several months later, the Commission granted NextWave its licenses, took a security interest in each, and filed UCC financing statements to perfect its claims. The security agreements gave the Commission "a first lien on and continuing security interest in all of the Debtor's rights and interest in [each] License." *Security Agreement between NextWave and FCC* ¶ 1 (January 3, 1997). The licenses included the following language: "This authorization is conditioned upon the full and timely payment of all monies due pursuant to . . . the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization." FCC, *Radio Station Authorization for Broadband PCS* 2 (issued to NextWave January 3, 1997).

After the Commission awarded the C Block licenses, several successful bidders, including NextWave, experienced difficulty obtaining financing, having agreed to pay on average almost three times what winning bidders in the prior A and B Block auctions had paid, and several times what winning bidders in subsequent D, E, and F block auctions paid. In response, the Commission suspended installment payment obligations for C Block licensees, and then issued two *Restructuring Orders*, offering a variety of revised financing options that allowed C Block licensees to surrender some or all of their licenses for full or partial for-

giveness of their outstanding debt. *See In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. Licensees, Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16436 ¶¶ 6, 32-69 (1997); *In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. Licensees, Order on Recons. of the Second Report and Order*, 13 FCC Rcd 8345 ¶¶ 11-15 (1998); *see also In re Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. Licensees, Second Order on Recons. of the Second Report and Order*, 14 FCC Rcd 6571 (1999). None of the restructuring options allowed licensees to keep any of their licenses for less than the full bid price. *See In re Amendment of the Comm'n's Rules, Order on Recons.*, 13 FCC Rcd 8345 ¶ 8. According to the Commission, these 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. *See In re Amendment of the Comm'n's Rules*, 12 FCC Rcd 16436 ¶¶ 1-5; *see also U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000) (upholding restructuring scheme). The Commission gave licensees until June 8, 1998 to elect a restructuring option, and until July 31, 1998 to resume installment payments. *Public Notice, Wireless Telecommunications Bureau Announces June 8, 1998 Election Date*, 13 FCC Rcd 7413 (1998). It set October 29, 1998 as the last date it would accept late installment payments. *Id.*

On June 8, 1998, after failing to obtain stays of the election deadline from the Commission and this court,

NextWave filed for Chapter 11 bankruptcy protection in New York. *See NextWave Pers. Communications, Inc. v. FCC* (*In re NextWave Pers. Communications, Inc.*), 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998) ("*NextWave I*"). Because the Bankruptcy Code is central to this case, we pause to summarize certain relevant provisions. Section 362, the "automatic stay" provision, provides that petitions filed under Chapter 11 "operate[] as a stay, applicable to all entities" of a variety of acts to collect on or enforce debts. 11 U.S.C. § 362(a). Subsection 362(a)(3) stays "any act to obtain possession of property of [an] estate . . . or to exercise control over property of the estate," *id.* § 362(a)(3), but subsection 362(b)(4) provides an exception to 362(a)(3) for "governmental unit[s]" acting to "enforce" their "regulatory power." *Id.* § 362(b)(4). Subsections 362(a)(4) and (5) stay "any act to create, perfect, or enforce any lien against property of the estate" or of the debtor. *Id.* § 362(a)(4), (5). The regulatory power exception does not apply to these subsections. *See id.* § 362(b)(4). In general, an automatic stay lasts only until a bankruptcy case is closed or dismissed, or until the bankruptcy court grants or denies a discharge. *See id.* § 362(c)(2). Other provisions of the Code, however, offer more permanent relief. Section 525 prohibits "governmental unit[s]" from "revok[ing]" a bankrupt's or debtor's license "solely because such bankrupt or debtor . . . has not paid a debt that is dischargeable . . . under this title." *Id.* § 525(a). Finally, under section 1123, 11 U.S.C. § 1123, bankrupts (subject to court approval) have the power to "cure" their defaults —that is, to "tak[e] care of the triggering event and return[] to pre-default conditions." *Di Pierro v. Taddeo* (*In re Taddeo*), 685 F.2d 24, 26-27 (2d Cir. 1982).

After declaring bankruptcy, and in line with the "normal deferment of the payment of preorganization claims until their disposition can be made part of a plan of reorganization," *In re Penn Cent. Transp. Co.*, 467 F.2d 100, 102 n.1 (3d Cir. 1972), NextWave made no further payments on its licenses. Nor did it seek permission to make installment payments under the "necessity of payment" doctrine, which some courts have invoked to authorize payment of prepetition claims "if such payment [is] essential to the continued operation of the debtor." *In re Just For Feet, Inc.*, 242 B.R. 821, 825 (Bankr. D. Del. 1999). NextWave sought no such authorization, it explains, because "the Code's automatic stay provision generally prevents even government creditors from enforcing payment obligations or seizing assets of the estate," and thus it had "no reason to believe it would be required to make the October 1998 installment payment while in bankruptcy." Appellants' Opening Br. at 10 & n.8.

Instead, NextWave alleged in the bankruptcy court that its $4.74 billion license fee obligation was avoidable under section 544 of the Bankruptcy Code as a "fraudulent conveyance" since the company had not received reasonably equivalent value in exchange for incurring the obligation: by the time the Commission actually conveyed the licenses to NextWave, the company claimed, their value had declined to less than $1 billion. *NextWave I*, 235 B.R. at 269; *see also NextWave Pers. Communications, Inc. v. FCC* (*In re NextWave Pers. Communications*), 235 B.R. 277, 290 (Bankr. S.D.N.Y. 1999) ("*NextWave III*"). Ruling on this claim, the bankruptcy court began by addressing its jurisdiction. It acknowledged that under 47 U.S.C. § 402, it lacked jurisdiction to "enjoin[], review[], assess[] damages for

or otherwise adjudicat[e] the consequences of the conduct of [a] Federal agency acting within the scope of its Congressional mandate." *NextWave I*, 235 B.R. at 268. It nevertheless asserted jurisdiction over the case because, in its view, NextWave's claim against the Commission did not involve "any regulatory conduct on the part of the FCC," but rather concerned solely the debtor-creditor relationship between the FCC and NextWave. *Id.* at 269; *see also NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications)*, 235 B.R. 305, 314 (Bankr. S.D.N.Y. 1999) ("*NextWave IV*"). Nothing in the Communications Act, the court said, suggests that a bankruptcy court lacks jurisdiction to implement the provisions of the Code "which affect [the Commission] *as a creditor*." *NextWave I*, 235 B.R. at 269-70. Turning to the merits, the court found that NextWave's winning bid exceeded the fair market value of its licenses at the time they were conveyed, *NextWave III*, 235 B.R. at 304, and avoided $3.72 billion of NextWave's $4.74 billion license fee obligation, ruling in effect that the company could keep its licenses for the reduced price of $1.02 billion. *See NextWave IV*, 235 B.R. 305, *aff'd NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.)*, 241 B.R. 311, 321 (S.D.N.Y. 1999); *see also In re NextWave Pers. Communications, Inc.*, 235 B.R. 314, 316 (Bankr. S.D.N.Y. 1999) ("*NextWave V*").

The Second Circuit reversed, making four key points. First, it emphasized that the Commission's action, contrary to the bankruptcy court's finding, *was* regulatory: the Commission explicitly "made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining a spectrum license," and this

condition had a purpose "related directly to the FCC's implementation of the spectrum auctions." *FCC v. NextWave Pers. Communications, Inc. (In re NextWave Personal Communications)*, 200 F.3d 43, 52 (2d Cir. 1999) (quoting 47 C.F.R. § 24.708). The Second Circuit explained the Commission's regulatory purpose as follows:

> [The FCC] decided that it would be 'critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.' . . . [Since] 'designated entities' such as NextWave . . . were allowed to pay in installments[,] [i]t was important for the functioning of the auction . . . that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the 'detailed credit checks' and other forms of due diligence that otherwise would be necessary to ensure . . . that the licenses would be awarded to the appropriate entities.

Id. at 52-53 (quoting *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348 ¶¶ 197, 194, 198 (1994)).

Second, the court held that the bankruptcy court had interfered with this regulatory purpose by avoiding a substantial portion of NextWave's bid price, thus allowing the company to keep the licenses for a reduced price. *Id.* at 55. This, the Second Circuit held, the

bankruptcy court had no jurisdiction to do: "Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* . . . 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses." *In re NextWave*, 200 F.3d at 54.

Third, the Second Circuit found that besides interfering with the Commission's licensing function through a collateral proceeding, the bankruptcy court had in effect attempted to exercise that function itself—again exceeding its jurisdiction:

> By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy . . . court[] impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them. In so doing [it] exercised the FCC's radio-licensing function. . . . [E]ven if the bankruptcy . . . court[] [was] right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the [Federal Communication Act's] goals, [it was] utterly without the power to order that NextWave be allowed to retain them for that reason or on that basis.

Id. at 55 (internal citations omitted).

Finally, notwithstanding its conclusion that the bankruptcy court lacked jurisdiction to change the conditions under which NextWave could retain its licenses, the Second Circuit acknowledged that the bankruptcy

court might well have jurisdiction over NextWave's underlying debts themselves: "To the extent that the financial transactions between [the FCC and NextWave] do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors." *Id.* Pointing out that NextWave "remain[ed] a debtor in bankruptcy," and that "[i]f the Licenses [were] returned to the FCC, the bankruptcy court [might] resolve resulting financial claims that the FCC has against NextWave," *id.* at 56, the Second Circuit reviewed the merits of the bankruptcy court's avoidance decision and concluded that NextWave should not be allowed to avoid $3.72 billion of its debt under the Bankruptcy Code. *Id.* at 46, 62.

Immediately following the Second Circuit reversal, NextWave prepared a new plan of reorganization that provided for a single lump sum payment to satisfy its entire $4.3 billion outstanding obligation to the Commission, including interest and late fees. The Commission objected to the plan, alleging that NextWave's licenses had automatically canceled when the company missed its first payment deadline in October 1998. *See In re Pub. Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, Order on Reconsideration*, FCC 00-335 ¶ 7 (Sept. 6, 2000). Simultaneously, the Commission issued a public notice announcing reauction of NextWave's licenses. The notice stated that the licenses were "available for auction under the automatic cancellation provisions" of the Commission's regulations. *Public Notice, Auction of C and F Block Broadband PCS Licenses*, DA 00-49, 15 FCC Rcd 693 (2000).

The dispute then returned to the bankruptcy court, which declared the Commission's cancellation of NextWave's licenses "null and void" as a violation of various provisions of the Bankruptcy Code, including the automatic stay provisions of section 362(a). *In re NextWave Pers. Communications, Inc.*, 244 B.R. 253, 257-58, 267-68 (Bankr. S.D.N.Y. 2000)("*NextWave VI*"). In reaching this conclusion, the bankruptcy court acknowledged that under the Second Circuit's ruling, it lacked jurisdiction to interfere with the Commission's regulatory acts. *Id.* at 260-61. It also acknowledged that it was bound by the Second Circuit's decision that "a regulatory purpose was implicit in the 'full payment requirement' in the FCC regulations." *Id.* at 270. As the bankruptcy court saw it, however, the "regulatory objective" behind the full payment requirement had been "fulfilled in the debtors' modified Plan . . . to pay the entire $4.3 billion outstanding . . . in a lump sum upon confirmation." *Id.* The cancellation of NextWave's licenses, in contrast, was a response to the company's failure to make a *timely* payment, and this requirement, the court reasoned, was "purely economic," having to do with "the time value of money." *Id.* "[T]he economic consequence of delay," it stated, "will be fully cured by payment in full of all applicable interest, penalties and late fees. . . ." *Id.* Further explaining its view that the timely payment requirement lacked a regulatory purpose, the bankruptcy court discussed at length its reasons for believing that canceling licenses for failure to make a timely payment "conflict[ed] with the spirit and the letter of the agency's governing statute"—namely, section 309(j) of the Communications Act. *Id.* at 281; *see also id.* at 282-83, 271. Concluding that the Commission "has not and cannot articulate any regulatory interest entailed in the

'timely payment' requirement," *id.* at 270, the court ruled that the Second Circuit's prior decision did not preclude it from declaring the cancellation void. *Id.* at 283.

Again, the Second Circuit reversed. *In re FCC*, 217 F.3d 125 (2d Cir. 2000). Granting a mandamus petition filed by the Commission, the court held that "[t]here can be little doubt that if full payment is a regulatory condition, so too is timeliness." *Id.* at 136. In the court's view, "the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time." *Id.* at 135. The conclusion that the Commission's decision "was in fact regulatory," the court went on, was "reinforced" by the fact that the bankruptcy court, in deciding that the license cancellation lacked a regulatory purpose, had explained at length that the cancellation and re-auction were contrary to the purposes of section 309(j) of the Communications Act. *Id.* at 136. But according to the Second Circuit, these discussions, rather than explaining why the re-auction decision was not regulatory, explained why, under the Communications Act, it was arbitrary, and such a determination, the Second Circuit pointed out, was "outside the jurisdiction of the bankruptcy court." *Id.* "[A] regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid." *Id.* at 137.

As a consequence, the Second Circuit concluded that the bankruptcy court had both violated the appellate

court's earlier mandate and exceeded the bankruptcy court's own jurisdiction. *Id.* "The bankruptcy court," the Second Circuit stated, "construes our mandate to mean no more than that the bankruptcy court may not abrogate the full-payment requirement on the basis of a fraudulent conveyance holding." *Id.* at 139. But this understanding "under-reads our previous opinion." *Id.* That opinion "clearly instruct[ed] the bankruptcy court to refrain from interfering with the licensing decisions of the FCC," *id.*, and as the Second Circuit saw it, this is exactly what the bankruptcy court did in declaring the license cancellation null and void. In addition, because "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals" under 47 U.S.C. § 402, *In re FCC*, 217 F.3d at 139, the Second Circuit found that the bankruptcy court's license cancellation holding exceeded that court's jurisdiction. *Id.* at 141. The court also noted that "NextWave remains free to pursue its challenge to the FCC's regulatory acts" in another forum, pointing out that the company had already filed "protective notices of appeal" in this court. *Id.* at 140-41.

After losing in the Second Circuit, NextWave filed a petition with the Commission, requesting reconsideration of the license cancellation. Denying the petition, the Commission noted first that the public notice of reauction "was not an order or action of the Commission . . . canceling NextWave's licenses." *Order on Reconsideration*, FCC 00-335 ¶ 10. Rather, "[p]ursuant to [Commission] rules, the licenses canceled automatically" after NextWave failed to make its first installment payment. *Id.* The Commission thus concluded that NextWave's petition was "late" and its challenge to the reauction notice "procedurally defec-

tive." *Id.* "Nevertheless, because of the importance of the issues raised in NextWave's petition," *id.*, the Commission went on to address the company's challenge to the automatic cancellation. The Commission rejected NextWave's arguments that the cancellation was arbitrary and capricious and barred by estoppel and waiver, *id.* ¶¶ 11-33, and found that the company's Bankruptcy Code arguments, having been "summarily rejected by the Second Circuit," were "precluded under the doctrine of res judicata." *Id.* ¶ 26.

NextWave now challenges the Commission's decision on two basic grounds. First, it claims that the license cancellation is "patently unlawful," Appellants' Opening Br. at 16, under the provisions of the Bankruptcy Code described earlier: the anti-discrimination provision (section 525), the automatic stay provision (section 362), and the provision of the Code allowing debtors to "cure" their defaults (section 1123). Second, citing our decision in *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 631 (D.C. Cir. 2000), where we held that an agency may not "sanction a company for its failure to comply with regulatory requirements" without first providing "fair notice" of those requirements, NextWave argues that even if the license cancellation is not barred by the Bankruptcy Code, it is invalid because the Commission failed to provide adequate notice that the timely payment regulations apply to Chapter 11 debtors. The Commission, supported by Intervenors (the Cellular Telecommunications Industry Association and several telecommunications companies) defends its decision.

II

We begin with three threshold issues. Does our jurisdiction in this case arise from 47 U.S.C. § 402(a) or 402(b)? Was NextWave's challenge to its license cancellation timely? And are NextWave's Bankruptcy Code arguments barred by res judicata? We consider each question in turn.

Jurisdiction

NextWave has filed both a petition for review under section 402(a) and a notice of appeal under section 402(b) of the Communications Act. Section 402(a) provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought" in a court of appeals. *See* 47 U.S.C. § 402(a) (cross-referencing 28 U.S.C. § 2342(1)). Section 402(b), in contrast, provides:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia . . . [b]y the holder of any construction permit or station license which has been modified or revoked by the Commission.

Id. § 402(b). Acknowledging that we have previously found these two provisions mutually exclusive, *see Friedman v. FCC*, 263 F.2d 493, 494 (D.C. Cir. 1959), NextWave asks us to "dismiss the filing that relies on the incorrect jurisdictional provision." Appellants' Opening Br. at 1.

In *Mobile Communications Corp. of America v. FCC*, we decided that the term "station license" in section 402(b) encompasses PCS licenses. *See* 77 F.3d 1399, 1403 (D.C. Cir. 1996); *see also* 47 U.S.C. § 153(42) (defining "station license" as "that instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio"); *id.* § 153(33) (defining "communication by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds"). Given this, we think section 402(b)'s plain language, permitting appeal by "the holder of any . . . station license which has been . . . revoked by the Commission," covers this case. *Cf. Cook, Inc. v. United States*, 394 F.2d 84, 86 n.4 (7th Cir. 1968) ("'The language of [subsection 402(b)], when considered in relation to that of subsection (a) . . . would make clear that judicial review of all cases involving the exercise of the Commission's radio-licensing power is limited to [the United States Court of Appeals for the District of Columbia Circuit].'") (quoting S. REP. NO. 82-44, at 11 (1951)); *In re FCC*, 217 F.3d at 140-41. Even if the Commission did not formally "revoke" NextWave's licenses, that is certainly the effect of the license cancellation: the licenses once assigned to NextWave are now being re-auctioned to other bidders. *Cf. In re FCC*, 217 F.3d at 140 n.10. We therefore dismiss the section 402(a) petition and proceed with the section 402(b) appeal.

Timeliness

Section 402(c) of the Communications Act requires appeals under section 402(b) to be filed "within thirty days from the date upon which public notice is given of

the decision or order complained of." 47 U.S.C. § 402(c). The "decision" NextWave seeks to challenge is the Commission's cancellation of its licenses, but the formal Commission action it actually appeals is the public notice of re-auction, which itself cancels no licenses, but rather announces in passing that the company's licenses canceled automatically at an earlier date. *Order on Reconsideration*, FCC 00-355 ¶ 10.

The Commission acknowledges that "in some instances, it may be proper for a party to challenge the Commission's public notices that establish or deny rights." *Id.* Joined by Intervenors, however, it argues that NextWave's challenge to the license cancellation policy is untimely. Intervenors claim that NextWave should have challenged the policy when its licenses were issued, since the licenses themselves stated explicitly that they were conditioned on timely payment, and as we have held, "[a]cceptance of a license constitutes accession to all [license] conditions." *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984). Alternatively, both Intervenors and the Commission suggest that NextWave should have challenged the automatic cancellation rule during the *Restructuring Order* proceedings because during those proceedings, the Commission considered objections to its original installment payment plan (including some objections based on the Bankruptcy Code), revised the plan, and ultimately reaffirmed the timely payment requirement. Intervenors' Br. at 3; *see also, e.g.*, *Order on Recons. of the Second Report and Order*, 13 FCC Rcd 8345 ¶ 24. Having failed to challenge the automatic cancellation rule at one of these earlier dates, they argue, NextWave cannot do so now because orders denying reconsideration do not re-open matters that should

have been challenged previously. *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 279-80, 285-86, 107 S. Ct. 2360, 96 L.Ed.2d 222 (1987).

As NextWave points out, however, we have held that "a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule . . . even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits" but failed to do so. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999). Thus even if NextWave could have challenged the automatic cancellation policy at an earlier date—either when its licenses issued or during the *Restructuring Order* proceedings—the company remained free to do so "within thirty days from the date upon which public notice [was] given" that the policy had been applied to it. 47 U.S.C. § 402(c).

According to NextWave, the thirty-day period was triggered by the public notice of re-auction because, prior to the re-auction notice, "the FCC had done *nothing whatsoever* to announce the cancellation of NextWave's licenses." Appellants' Reply Br. at 6. Because it filed a precautionary appeal with this court 30 days after the notice of re-auction, NextWave claims, its appeal was timely. Disagreeing, Intervenors argue that NextWave already had notice in October 1998 that its licenses would cancel automatically if and when it failed to make an installment payment. Thus, they argue, no further Commission statement was required to trigger the period for seeking judicial review.

Intervenors' argument assumes that notice of a future event's automatic effect (here, the explicit warning that the licenses would cancel for failure to make a

timely payment) is by itself sufficient notice to mean that the occurrence of the future event (failing to make a timely payment) will trigger the period for seeking judicial review under section 402(c). To resolve the timeliness issue in this case, however, we need not decide whether that assumption is correct, for we think it was unclear prior to the notice of re-auction that the automatic cancellation policy would apply to licensees who had filed for bankruptcy. To begin with, the Bankruptcy Code gave NextWave reason to doubt that the automatic cancellation would actually occur when the company missed its first payment in October 1998: the automatic stay triggered by a Chapter 11 filing generally blocks most efforts by creditors to exercise control over or repossess property of a debtor. *See* 11 U.S.C. § 362(a); *cf. NextWave VI,* 244 B.R. at 266-68 (finding that the automatic stay applied to NextWave's license fee obligations). Neither the Commission nor Intervenors point to any instance prior to the re-auction notice in which the Commission actually announced that NextWave's licenses had canceled despite the stay. Moreover, the Commission's own conduct suggests that it was at best unsure whether the automatic stay blocked cancellation of the company's licenses. After the bankruptcy court's fraudulent conveyance holding, and several months after NextWave missed the October payment deadline, the Commission moved the bankruptcy court to lift the stay "so that the . . . automatic cancellation provisions may take effect." *Mot. to Lift Automatic Stay* at 2, *NextWave V*, 235 B.R. 314 (No. 98 B 21529). And in the bankruptcy court, Commission counsel suggested that the automatic stay blocked cancellation of NextWave's licenses, stating for example that although "[t]he regulations provide that upon failure to make the payments the license is

automatically canceled[,] . . . [t]hat hasn't [happened] in this case due to the automatic stay." *See* Hearing Tr. at 30, *In re NextWave Pers. Communications, Inc.*, No. 98 B 21529 (Bankr. S.D.N.Y. Nov. 12, 1998); *NextWave VI*, 244 B.R. at 277 (noting that transcript erroneously attributes this quotation to the Court).

These circumstances suggest that the Commission believed NextWave's licenses had not canceled prior to the notice of re-auction. At the very least, they created doubt about the matter, and as we have held, "when an agency leaves room for genuine and reasonable doubt as to the applicability of its orders or regulations, the statutory period for filing a petition for review is tolled until that doubt is eliminated." *Recreation Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 569 (D.C. Cir. 1981). Because the "genuine and reasonable doubt" about the status of NextWave's licenses continued until the Commission issued the notice of re-auction, we conclude that NextWave's petition is timely.

Res Judicata

This brings us to the final and most difficult threshold issue: whether NextWave's Bankruptcy Code arguments are barred by res judicata. "The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983). According to the Commission, because NextWave litigated and lost its Bankruptcy Code arguments in the Second Circuit mandamus proceedings, it may not relitigate them here. Asserting a right to make these arguments here, NextWave argues that the Second Circuit's decision was jurisdictional—a decision about "*where* NextWave's bankruptcy challenges

should be decided, not *how* they should be resolved." Appellants' Opening Br. at 26 (emphasis added). As a result, the company argues, res judicata does not bar it from presenting its Bankruptcy Code arguments in this court.

The doctrine of res judicata "usually is parsed into claim preclusion and issue preclusion." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 946. Because the Commission raises arguments based on both theories, and because the two theories differ in subtle but significant respects, we consider each separately. "Under the claim preclusion aspect of res judicata, a final judgment on the merits in a prior suit involving the same parties or their privies bars subsequent suits based on the same cause of action." *Id.* at 946-47. Claim preclusion prevents parties from relitigating issues they raised or could have raised in a prior action on the same claim. *See Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980). "[D]ismissals for lack of jurisdiction," however, "are not decisions on the merits and therefore have no [claim preclusive] effect on subsequent attempts to bring suit in a court of competent jurisdiction." *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999); *see also* Fed. R. Civ. P. 41(b) ("a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction . . . operates as an adjudication upon the merits").

No one disputes that the Second Circuit thought the bankruptcy court lacked authority to declare the notice of reauction invalid. *In re FCC*, 217 F.3d at 141. The question dividing the parties is why the Second Circuit thought this. According to NextWave, the Second

Circuit reversed the bankruptcy court because under section 402 of the Communications Act, "the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals." *Id.* at 129. In other words, the company claims, the Second Circuit held that any arguments directly or collaterally challenging the Commission's regulatory actions—including arguments based on the Bankruptcy Code—must be brought in a court of appeals. *Cf. In re NextWave*, 200 F.3d at 55. The Commission has a different view of the Second Circuit's decision. It argues that the Second Circuit decided not that the bankruptcy *court* lacked jurisdiction to determine whether the license cancellation violated the Bankruptcy Code, but rather that "the [Bankruptcy *Code*] provisions on which NextWave relies do not reach regulatory actions such as those at issue here." Appellee's Br. at 15. In other words, the Commission claims that the Second Circuit reviewed the bankruptcy court's Bankruptcy Code conclusions on the merits and found that because the Commission's actions were regulatory, the automatic stay, right to cure, and antidiscrimination provisions of the Code did not reach those actions.

We agree with NextWave's interpretation of the Second Circuit's decision. As we read that decision, the court principally held that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked jurisdiction to apply the Code to these acts. With one exception (which we shall explain later), we do not understand the Second Circuit to have decided as a substantive matter that nothing in the Bankruptcy

Code prevents the Commission from canceling NextWave's licenses.

To begin with, and most obviously, the Second Circuit repeatedly stated that it was making a "jurisdictional" decision based on section 402. Here are just three examples: "We recognized that pursuant to . . . 47 U.S.C. § 402, review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts," *In re FCC*, 217 F.3d at 131 (describing initial opinion); "'[b]ecause jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* . . . 47 U.S.C. § 402, *the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses*,'" *id.* at 137 (quoting initial opinion); "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals," *id.* at 139 (citing cases discussing section 402). Reinforcing the jurisdictional nature of its opinion, the Second Circuit also disavowed any intent to rule on the merits of NextWave's challenges to the Commission's acts, stating explicitly that NextWave was "free to pursue its challenge to the FCC's regulatory acts" in an appropriate forum, *id.* at 140, and that the court was making "no comment on the prospects" of such an appeal. *Id.* at 129*; see also id.* at 138 n.8 ("we have no occasion to opine on whether the Public Notice is valid or whether the Licenses automatically canceled at some prior date"); *id.* at 139 ("Even if the bankruptcy court is right on the merits of its arguments against revocation

—we have no occasion to express an opinion—it is without power to act on its determination.").

According to the Commission, these repeated references to the bankruptcy court's lack of jurisdiction mean only that the bankruptcy court lacked jurisdiction to decide whether the Commission had applied the auction requirements of section 309(j) of the Communications Act arbitrarily and capriciously, not that it lacked jurisdiction to review the Commission's actions for compliance with the Bankruptcy Code. Likewise, the Commission suggests, the Second Circuit's references to the prospects of NextWave's appeal refer only to an appeal based on section 309(j). In support of this interpretation, the Commission points to language in the Second Circuit's opinion suggesting that the bankruptcy court lacked jurisdiction to question the Commission's regulatory judgments under section 309(j). *See, e.g.*, *id.* at 131-32 ("'[E]ven if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the [Federal Communication Act's] goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis.'") (quoting initial opinion); *see also id.* at 136-37.

The Second Circuit, however, had good reason to address section 309(j) directly: the bankruptcy court devoted several paragraphs to evaluating the Commission's conduct in light of that section. *See NextWave VI*, 244 B.R. at 271, 281-83. Moreover, it is perfectly consistent to hold that section 402 prohibits the bankruptcy court from reviewing Commission action both under section 309(j) *and* under the Bankruptcy Code.

True, as the Commission points out, other circuits have recognized the jurisdiction of bankruptcy courts to determine whether provisions of the Code such as the automatic stay apply to agency actions. *See, e.g.*, *Word v. Commerce Oil Co. (In re Commerce Oil Co.)*, 847 F.2d 291 (6th Cir. 1988); *Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.)*, 128 F.3d 1294 (9th Cir. 1997). But that is irrelevant to the question we face here: how did the *Second Circuit* view the bankruptcy court's jurisdiction? Regardless of how other circuits—or even we—might interpret section 402, we think the Second Circuit construed the provision to confer "exclusive jurisdiction" on courts of appeals to review even Bankruptcy Code challenges to the Commission's regulatory acts. Many of the court's references to section 402 are not clearly restricted to bankruptcy court power under section 309(j). *See, e.g.*, *In re FCC*, 217 F.3d at 139 ("Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals."). And at least once in its opinion, the Second Circuit expressly stated that "[t]he bankruptcy court *lacked jurisdiction* to declare the Public Notice [of reauction] null and void *on [the] ground[s] that the Public Notice violated the automatic stay*, [or] *that the right to cure obviates any default*"—that is, on Bankruptcy Code grounds. *Id.* at 139 (emphasis added).

The Second Circuit's reasoning in granting mandamus further illustrates the jurisdictional nature of its opinion. The court overturned the bankruptcy court's decision on two "independently sufficient" grounds, each discussed in a separate section of the opinion. *See id.* at 141. One ground was that the bankruptcy court lacked "statutory jurisdiction" to nullify the Commission's license cancellation. *Id.* Entitled "Jurisdiction,"

this section of the opinion consists entirely of a discussion of sections 402(a) and (b) of the Communications Act—it never mentions the Bankruptcy Code. *Id.* at 139-41. If, as the Commission maintains, the Second Circuit thought the bankruptcy court lacked authority to invalidate the license cancellation principally because the Code does not reach the Commission's regulatory acts (and if, as the Commission also maintains, the Second Circuit's discussion of "jurisdiction" merely refers to the peripheral issue of the bankruptcy court's jurisdiction to review Commission actions under section 309(j) of the Communications Act) it is difficult to explain why the court failed to discuss the Bankruptcy Code in this section of its opinion, given that the reasons discussed here provide an "independently sufficient" basis for mandamus.

The Second Circuit's other reason for granting mandamus was that the bankruptcy court violated the appellate court's earlier mandate. But as the Second Circuit made clear, its initial opinion too was jurisdictional:

> Our extraordinary mandamus power has two purposes: to achieve compliance with the terms and spirit of our mandates, and to constrain inferior courts to proper exercises of their jurisdiction. In this case, the two uses of mandamus overlap and reinforce one another. This Court's previous opinion reversed a decision of the bankruptcy court on the ground that that court lacked jurisdiction. The bankruptcy court again seeks to control the FCC's allocation of licenses, notwithstanding this Court's express holding that 'the bankruptcy and district courts lack[] jurisdiction to decide the question of

> whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.' Thus a writ of mandamus protecting this Court's mandate also confines the inferior court to the lawful exercise of its jurisdiction.

Id. at 137 (quoting *In re NextWave*, 200 F.3d at 54).

To be sure, in the "mandate" section of its opinion, the Second Circuit appeared to decide on the merits that at least some parts of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, do not apply to the facts of this case. *See In re FCC*, 217 F.3d at 138 ("Undoubtedly, the [Commission] is a governmental unit that is seeking 'to enforce' its 'regulatory power' [under subsection 362(b)(4)]."); *id* at 138 n.8 ("[W]e hold that the FCC's regulatory decisions fall within [subsection] 362(b)(4)."). But leaving aside for the moment the effect of this discussion under the doctrine of issue preclusion, this portion of the Second Circuit's opinion does not change our view that the court's decision was primarily jurisdictional, for the court expressly couched its discussion of the automatic stay in jurisdictional terms: the court prefaced its discussion by noting that "[t]he bankruptcy court *founds its jurisdiction* [to interfere with the FCC's enforcement of its payment schedule] chiefly on the automatic stay provision of [section 362]. . . ." *Id.* at 138 (emphasis added). We need not decide whether this jurisdictional interpretation of section 362 is correct—the Supreme Court has declined to express an opinion on the issue, *see Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 41 n.11, 112 S. Ct. 459, 116 L.Ed.2d 358 (1991)—because the Commission's res judicata argument requires only that we determine what the

Second Circuit meant, and here we think it clear that the court treated section 362 as though it provided a potential basis for bankruptcy court jurisdiction.

In addition to this direct evidence of the jurisdictional nature of the Second Circuit opinion, the Commission's alternate view of the opinion—that the court decided as a substantive matter that nothing in the Bankruptcy Code prevents the Commission from canceling NextWave's licenses—is implausible. Not only does this interpretation fail to account fully for the opinion's jurisdictional language, *see supra* at 26a-27a, but the Second Circuit never actually states that the Bankruptcy Code as such does not reach the Commission's regulatory acts: the entire opinion concerns the power and jurisdiction of the bankruptcy court. Perhaps most telling, the Second Circuit does not discuss any provision of the Bankruptcy Code besides section 362, despite the fact that the bankruptcy court discussed section 525 and made a ruling based on sections 1123 and 1124. As NextWave argues, "[t]he exclusively jurisdictional character of the Second Circuit's ruling provides a *complete* explanation for its . . . silence respecting NextWave's principal bankruptcy arguments." Appellants' Reply Br. at 4.

Faced with the Second Circuit's silence about sections 525 and 1123, the Commission suggests that even though the court failed to mention these provisions, it necessarily decided that they do not bar the license cancellation because "mandamus relief is warranted only where the petitioner has demonstrated that its right to such relief is clear and indisputable," and "the Second Circuit would not have granted our request for extraordinary relief if it had thought that the bank-

ruptcy court's decision was sustainable on the basis of [section] 525" or 1123. Appellee's Br. at 21 n.13 (internal quotation omitted); *id.* at 24 n.15. The assumption that the Second Circuit "necessarily" resolved these arguments, however, is valid only if the Commission's view of the case is correct—that is, if the Second Circuit meant to decide as a substantive matter that the Bankruptcy Code did not reach the Commission's actions. If instead the Second Circuit principally decided, as much of the opinion's language suggests, *see supra* at 24a-27a, that the bankruptcy court lacked jurisdiction to hear these arguments, that conclusion would also have provided a basis for mandamus, without requiring the court to consider or decide anything about sections 525 and 1123 at all.

The Commission offers a second, equally unpersuasive explanation for the Second Circuit's silence regarding sections 525 and 1123. The bankruptcy court's analysis of those provisions, the Commission says, "hinges on its characterization of the FCC as an ordinary creditor," Appellee's Br. at 24, and by rejecting decisively this characterization, the Second Circuit in effect decided that these parts of the Code do not apply. Apart from the fact that it seems odd that the Second Circuit would have decided that sections 525 and 1123 do not apply without ever mentioning them, this argument fails because, like the previous argument, it assumes the correctness of the Commission's reading of the Second Circuit's opinion. But the alternate reading of the opinion—that the bankruptcy court lacked jurisdiction to hear challenges to the Commission's regulatory actions based on the Bankruptcy Code or otherwise—also relies upon the notion that the Commission is not an ordinary creditor but a regulator

in this situation. The fact that the Second Circuit decided that the Commission was not acting as an ordinary creditor when it canceled the licenses thus does not indicate that the court implicitly decided that sections 525 and 1123 are inapplicable to this case.

Having thus concluded that the Second Circuit's opinion was jurisdictional and that claim preclusion does not bar NextWave from re-litigating its Bankruptcy Code arguments in this court, we turn to the Commission's second major res judicata argument: that each of NextWave's Bankruptcy Code arguments is barred by issue preclusion. "Under the issue preclusion aspect of res judicata, a final judgment on the merits in a prior suit precludes subsequent relitigation of issues actually litigated and determined in the prior suit, regardless of whether the subsequent suit is based on the same cause of action." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 947. Issue preclusion is most often invoked where "a subsequent action is brought on a different claim," *id.* at 947 n.3, and as a result claim preclusion does not apply. Issue preclusion, however, may also apply to subsequent actions brought on the same claim: if a judgment "does not preclude relitigation of all or part of the claim on which the action was brought"—if, for example, as here, the judgment was jurisdictional—it may still preclude relitigation of any *issues* "actually litigated and determined" in the first action. *Id.* For issue preclusion to apply, however, "the issue must have been actually and necessarily determined by a court of competent jurisdiction in the first trial." *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (internal quotation and emphasis omitted). If the "basis" of a prior decision is "unclear, and it is thus uncertain whether the issue was actually and necessar-

ily decided in [the prior] litigation, then relitigation of the issue is not precluded." *Id.*

It may appear that the only issue potentially barred by issue preclusion from a case dismissed for lack of jurisdiction is the jurisdictional determination itself. *Cf. Kasap*, 166 F.3d at 1248. In this case, it may thus seem that the Second Circuit cannot have ruled on the merits of any of NextWave's Bankruptcy Code arguments, because the court only decided that the bankruptcy court lacked jurisdiction to hear them. And indeed, under our jurisdictional interpretation of the Second Circuit's decision, we do not think the court "actually and necessarily" decided whether sections 525 and 1123 bar the license cancellation. We thus conclude that issue preclusion does not bar relitigation of these issues.

Far less clear, however, is whether issue preclusion bars NextWave's section 362 argument. As we have seen, the Second Circuit explicitly discussed section 362's automatic stay, finding that the bankruptcy court could not rely on the provision as an independent basis for jurisdiction because the license cancellation was a regulatory act exempt under subsection 362(b)(4). *See supra* at 28a-30a. It is true, as we have said, that this was a jurisdictional discussion, but this does not preclude it from having issue preclusive effect: if a court makes a substantive determination in order to arrive at a jurisdictional holding, the substantive determination can have issue preclusive effect so long as it was "actually litigated and determined in the prior

action." *See I.A.M. Nat'l Pension Fund*, 723 F.2d at 947 n.3. The *Restatement* gives the following example:

> A brings an action against B for personal injuries arising out of an automobile accident. Jurisdiction is asserted over B, a nonresident, on the basis that the automobile involved in the accident was being operated in the state by or on his behalf. After trial of this issue, the action is dismissed for lack of jurisdiction. In a subsequent action by A against B for the same injuries, brought in the state of B's residence, the prior determination that the automobile was not being operated by or on behalf of B is conclusive.

RESTATEMENT (SECOND) OF JUDGMENTS § 27, illustration 3 (1980).

Here, the Second Circuit appears to have decided that section 362 does not confer jurisdiction on the bankruptcy court *because* subsection 362(b)(4)'s "regulatory power" exception applies as a substantive matter. We thus agree with the Commission that issue preclusion bars NextWave from relitigating the question of whether the license cancellation falls within subsection 362(b)(4). The Second Circuit spoke clearly and unequivocally about this issue, stating that "[u]ndoubtedly, the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power,'" *In re FCC*, 217 F.3d at 138, and that "we hold that the FCC's regulatory decisions fall within [subsection] 362(b)(4)." *Id.* at n.8. And under the Second Circuit's jurisdictional reading of section 362, this decision was necessary to the case: if subsection 362(b)(4) did not apply, section

362 could have provided a basis for the bankruptcy court to assert jurisdiction over the license cancellation. In considering NextWave's Bankruptcy Code arguments, *see* Section III *infra*, we will thus assume that the license cancellation falls within the regulatory power exception to the automatic stay.

We are less sure, however, that the Second Circuit "actually and necessarily" decided as part of its jurisdictional decision that *all* provisions of section 362 do not apply to the license cancellation. In particular, as the Second Circuit implicitly acknowledged, subsection 362(b)(4)'s "regulatory power" exception does not apply to subsections 362(a)(4) and (5), which stay actions to enforce liens. *See In re FCC*, 217 F.3d at 138. Although the bankruptcy court thought the cancellation of NextWave's licenses "unarguably violate[d]" these subsections, *NextWave VI*, 244 B.R. at 267, and explicitly quoted the language in the security agreements creating a "first lien on and continuing security interest in" the licenses, *id.* at 267 n.7, the Second Circuit, in a footnote, simply observed: "Subsections (4) and (5) are concerned with liens. The bankruptcy court does not explain why they are implicated here." *In re FCC*, 217 F.3d at 138 n.7. Thus, unlike in its subsection 362(b)(4) discussion, the Second Circuit never said it was "hold[ing]" that subsections 362(a)(4) and (5) do not apply to the cancellation of NextWave's licenses. *Cf. id.* at 138 n.8. Instead, the court merely observed that the *bankruptcy court* did not explain why they are implicated. It is thus unclear whether the Second Circuit decided that subsections 362(a)(4) and (5) do not block cancellation of NextWave's licenses, or whether it simply concluded that it had no need to reach the issue because the bankruptcy court failed adequately to

address it. Since under our decision in *Connors*, if it is "uncertain whether [an] issue was actually and necessarily decided in [prior] litigation, then relitigation of the issue is not precluded," 953 F.2d at 684, we conclude that NextWave is not barred from arguing that subsections 362(a)(4) and (5) prohibit cancellation of its licenses.

Having resolved these threshold issues, we turn to the merits of NextWave's appeal.

III

NextWave argues that the Commission's cancellation of its licenses violated sections 525, 1123, and 362 of the Bankruptcy Code. Under the Administrative Procedure Act, we must "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law [or] . . . in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2). This provision requires us to invalidate agency action not only if it conflicts with an agency's own statute, but also if it conflicts with another federal law. *See, e.g.*, *Scheduled Airlines Traffic Offices, Inc. v. Dept. of Def.*, 87 F.3d 1356, 1361 (D.C. Cir. 1996) (applying 5 U.S.C. § 706(2)(A) and declaring Department of Defense policy invalid under Miscellaneous Receipts statute); *see also Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F.2d 603, 608 (1st Cir. 1989) (stating that the quoted passages from section 706 are "general in their meaning" and "do not restrict the courts to consideration of the agency's own enabling statute").

We begin with section 525:

> [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). No one disputes that the Commission is a "governmental unit" that has "revoke[d]" a license for purposes of section 525, nor that NextWave is a "bankrupt or a debtor under the Bankruptcy Act." Pointing to the fact that the Commission has filed proofs of claim in bankruptcy court based on its security interests in PCS licenses, *see, e.g.*, Proof of Claim, *In re NextWave Pers. Communications, Inc.*, No. 98 B 21529 (Bankr. S.D.N.Y. Dec. 16, 1998) (filed on behalf of creditor The United States of America), NextWave argues that the installment payment obligations were dischargeable debts under the Bankruptcy Code. *See* 11 U.S.C. § 1141(d) (stating that dischargeable debts under Chapter 11 generally include "any debts that arose before the date of . . . confirmation" of the debtor's reorganization plan). And because failure to make installment payments was the "sole triggering mechanism" for automatic cancellation, NextWave continues, its licenses canceled "solely because" it failed to pay dischargeable debts. Appellants' Reply Br. at 8.

The Commission never denies that if NextWave had made its payments, the company could have retained its licenses. Nor does the Commission dispute that NextWave's license fee obligations were at least in part genuine, enforceable debts—indeed, the Commission's own regulations provide for their collection if left unpaid. *See* 47 C.F.R. § 1.2110(g)(4)(iv) ("A licensee in the PCS C or F [B]locks shall be in default, its license shall automatically cancel, *and it will be subject to debt collection procedures*, if the payment due on the payment resumption date . . . is more than ninety (90) days delinquent.") (emphasis added). Instead, the Commission offers a series of unpersuasive arguments intended to demonstrate why, notwithstanding section 525's apparent applicability, the provision does not bar cancellation of NextWave's licenses.

First, the Commission urges us to read section 525 in light of section 362. The latter section, the Commission suggests, "serves the important purpose of providing a debtor with some breathing room in the situations to which it applies. Accordingly, [section] 362 should be broader than [section] 525, providing for breathing room even in some situations where cancellation ultimately would be permitted." Appellee's Br. at 21-22. Thus, the Commission argues, because (on its reading) the automatic stay does not apply to this case, section 525 should not apply either. Fleshing out this argument, Intervenors suggest that "[i]t would make little sense for Congress to exempt governmental 'regulatory' actions from the stay [under subsection 362(b)(4)] but then flatly forbid them in [section] 525. Basic structural coherence requires the conclusion that [section] 525 does not prevent a license cancellation already cor-

rectly found exempt from the stay as regulatory." Intervenors' Br. at 18.

This is an interesting argument, but it fails for several reasons. To begin with, it is inconsistent with section 525's plain language. Section 525 clearly and explicitly prohibits governmental units, for *whatever* reason, from canceling licenses for failure to pay a dischargeable debt: "a governmental unit may not . . . revoke . . . a license . . . to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title." 11 U.S.C. § 525(a). Nothing in section 525 or 362 states that section 525 is subject to subsection 362(b)(4)'s regulatory power exception, or that the exception should be read to limit section 525's clear reach. Thus, while interpretation of the Bankruptcy Code is a "holistic endeavor," and "[a] provision that may seem ambiguous in isolation" can often be "clarified by the remainder of the statutory scheme," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L.Ed.2d 740 (1988), here we see no such ambiguity. Various bankruptcy and district courts, accordingly, have held that section 525 can apply even if the automatic stay does not. *See, e.g., William Tell II, Inc. v. Illinois Liquor Control Comm'n (In re William Tell II, Inc.)*, 38 B.R. 327, 330 (N.D. Ill. 1983) ("even if a state proceeding is not automatically stayed, a bankruptcy court has authority to enjoin certain conduct under 11 U.S.C. § 525"); *In re The Bible Speaks*, 69 B.R. 368, 373 n.5 (Bankr. D. Mass. 1987) ("[Section] 525(a) is directed at governmental units and may apply even where the automatic stay has no effect.").

Moreover, contrary to Intervenors' argument, this interpretation of section 525 does not render the Code "structural[ly] [in]coheren[t]." Though this reading does mean that an action exempted under subsection 362(b)(4) might nonetheless be barred by section 525, it does not render subsection 362(b)(4) meaningless, because that subsection covers a different and wider variety of actions than section 525. For example, subsection 362(b)(4) exempts from the automatic stay (among other things) "*any* act" by a governmental unit to "obtain possession of property of the estate . . . or to exercise control over property of the estate," so long as the act is taken to enforce the unit's "regulatory power." 11 U.S.C. § 362(a)(3), (b)(4) (emphasis added). Section 525, in contrast, prohibits governmental units only from taking certain *specific* actions with respect to an extremely limited subset of a debtor's property —licenses and similar grants—or with respect to employment opportunities.

Even if the Commission were correct that section 525 should be read to permit all actions exempted from the automatic stay by subsection 362(b)(4), that argument would be inapplicable to this case because subsection 362(b)(4) does not apply to the stay of acts to "create, perfect, or enforce" liens against property of the estate or of the debtor imposed by subsections 362(a)(4) and (5). Here, NextWave executed security agreements giving the Commission a "first lien" on the company's interest in the licenses, and under subsections 362(a)(4) and (5), "a creditor holding a lien on property of the estate may not enforce the lien by seizure, foreclosure, or otherwise." 3 COLLIER ON BANKRUPTCY ¶ 362.03[6] (15th ed. rev. 2000). Stayed actions include "self-help remedies against collateral" such as "repossession." *Id.*

¶ 362.03[6][b]. Before the bankruptcy court, Commission counsel acknowledged that canceling the licenses and seeking to collect on the debt was "tantamount . . . to foreclosing on collateral." Hearing Tr. at 14, *In re NextWave Pers. Communications, Inc.*, No. 98 B 21529 (Bankr. S.D.N.Y. May 26, 1999). Thus, contrary to the Commission's argument, and notwithstanding the applicability of the regulatory power exception, section 362's automatic stay *does* apply here. This is thus not a case in which section 525, if applicable, would bar an action exempt from the automatic stay.

The Commission next argues that section 525 is inapplicable because NextWave's license fee obligation was not a "dischargeable" debt. In support of this proposition, the Commission offers two arguments. First, it claims that the New York bankruptcy court could not have discharged NextWave's debt because the Second Circuit, whose decisions are binding on that court, held in its initial opinion that so long as NextWave retained its licenses, its payment obligation was subject to neither modification nor discharge in bankruptcy. As a result, the Commission concludes, the payment obligation was not a debt "dischargeable" in bankruptcy while the license was held.

We disagree. To begin with, it is unclear that the Second Circuit in fact thought the bankruptcy court lacked power to alter or discharge the payment obligation while NextWave held the licenses. Though parts of its initial opinion do suggest this, *see In re NextWave*, 200 F.3d at 56, other parts suggest that the court simply thought the bankruptcy court had no authority to require the Commission to allow NextWave to *keep* its licenses after modification of its payment obligation.

See, e.g., id. at 54 ("It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject."). If the latter reading is correct, then insofar as NextWave's payment obligation was a debt (as opposed to a license condition), it *was* dischargeable by the bankruptcy court. Even if the Commission's reading of the Second Circuit's opinion is correct, the Commission's argument assumes that the phrase "debt that is dischargeable . . . under this title" in section 525(a) refers to the bankruptcy *court's* power to modify or discharge a payment obligation. The provision's plain language, however, refers to a payment obligation that can be modified or discharged under the Bankruptcy *Code*; and as we read the Second Circuit's opinion, the court merely decided that insofar as timely payment was a condition for license retention, the bankruptcy court had no authority to modify it. It never decided that a court of competent jurisdiction (such as this one) could not modify or discharge it under section 525.

The Commission also argues that because "[a] licensee's full and timely payment of its winning bid installments is an essential condition of its license grant[,] [p]ayment . . . is a regulatory requirement, not a dischargeable debt." Appellee's Br. at 22. At oral argument, Commission counsel conceded that the payment obligation *also* has the character of a dischargeable debt. As we indicated earlier, the Commission could seek to collect its license fee, and in so doing it would be subject (as the Second Circuit held) to the constraints imposed on creditors by the Bankruptcy Code. *See In re NextWave*, 200 F.3d at 56. But here, the Commission contends, it seeks only to revoke Next-

Wave's licenses, not to collect on the debt, and insofar as timely payment is a condition of license retention, it is a regulatory requirement, not a dischargeable debt, and section 525 is inapplicable.

As Commission counsel also acknowledged, this claim amounts to a request for a regulatory purpose exception to section 525: the Commission in effect argues that because (for legitimate regulatory motives) it made timely payment a regulatory requirement, it should be permitted to cancel licenses for failure to meet that requirement despite section 525's plain language ("a governmental unit may not . . . revoke . . . a license . . . to . . . a bankrupt . . . solely because such bankrupt . . . has not paid a debt that is dischargeable . . . under this title"). But basic principles of statutory interpretation preclude such a result. To begin with, section 525 contains several exceptions, but none for agencies fulfilling regulatory purposes. *See* 11 U.S.C. § 525(a) ("Except as provided in the Perishable Agricultural Commodities Act . . . the Packers and Stockyards Act . . . and section 1 of . . . 'An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes' . . . a governmental unit may not deny, revoke, suspend . . . a license. . . ."). This in itself suggests that Congress did not intend to provide a regulatory purpose exception to section 525. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188, 98 S. Ct. 2279, 57 L.Ed.2d 117 (1978) (relying on fact that Endangered Species Act "creates a number of limited 'hardship exemptions'" but none for federal agencies to conclude "under the maxim *expressio unius est exclusio alterius* . . . that these were the only 'hardship cases' Congress intended to exempt"). Moreover, other parts

of the Bankruptcy Code contain explicit regulatory purpose exceptions. Section 362, as we have seen, exempts from certain provisions of the automatic stay any "governmental unit" exercising its "police or regulatory power." 11 U.S.C. § 362(b)(4). Section 362 also contains a series of narrower exceptions for certain named agencies that have entered lending relationships, allowing them to engage in particular acts of foreclosure and other actions. *See, e.g.*, 11 U.S.C. § 362(b)(8) (exception permitting HUD Secretary to foreclose on certain mortgages insured under the National Housing Act). To us, these express exceptions demonstrate that section 525 contains neither an implied regulatory power exception for governmental units in general nor an implied agency-specific exception allowing the Commission to enforce an automatic cancellation policy pursuant to an installment payment scheme under section 309(j) of the Communications Act. *See Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation omitted).

Next, Intervenors argue that even if the license fee obligation itself is a dischargeable debt, the Commission did not cancel NextWave's licenses "solely because" of failure to pay that debt. "The 'solely because' language," they argue, "limits the bar on license revocation to circumstances where a government [agency] is simply advancing creditor interests in receiving the money due." Intervenors' Br. at 16-17. Since here, license cancellation was intended not to induce payment but

instead to "protect[] the integrity of [the] auction[] and select[] the applicant most likely to use the Licenses efficiently for the benefit of the public," section 525 is not implicated, because "it is not the 'debt' character of the defaulted obligation that is the 'sole' basis for the cancellation." *Id.* (internal quotation omitted).

We are unconvinced. Intervenors argue that "solely because" should be read to mean "solely because of creditor interests in receiving the money due." But the statute says nothing about an agency's motives in canceling a license for failure to pay a dischargeable debt—it simply says governmental units may not cancel licenses "solely because" a debtor "has not *paid*" such a debt. *See* 11 U.S.C. § 525(a) (emphasis added). It may be true, as the Second Circuit decided, that the Commission had a regulatory motive for examining NextWave's timely payment record and canceling its licenses on that basis, but as we pointed out earlier, neither the Commission nor Intervenors dispute that NextWave could have retained its licenses if it had made timely installment payments. NextWave's failure to make its payments was thus the "sole" trigger of the license cancellation, in the sense that the Commission looked to no other factor in determining whether NextWave should retain its licenses; and we think this is exactly the kind of conduct barred by section 525's plain text. Adopting Intervenors' intent-based reading of section 525 would allow governmental units to escape section 525's limitations simply by invoking a regulatory motive for their concern with timely payment, and as we have already explained, section 525 contains no implicit regulatory purpose exception.

To support their view that the phrase "solely because" permits license cancellation based on failure to pay a dischargeable debt so long as the cancellation is motivated by a non-pecuniary regulatory purpose, Intervenors point to legislative history stating that section 525 "does not prohibit consideration of . . . factors[] such as future financial responsibility or ability . . . if applied nondiscriminatorily," H.R. REP. NO. 95-595, at 367 (1977), U.S. Code Cong. & Admin. News 1978, 5787, 6322, 6323, and that "in those cases where the causes of the bankruptcy are intimately connected with the license grant . . . an examination into the circumstances surrounding the bankruptcy will permit governmental units to pursue appropriate regulatory policies and take appropriate action without running afoul of bankruptcy policy." *Id.* at 165, U.S. Code Cong. & Admin. News 1978, at 6126. But these passages do not lead us to conclude that section 525 is inapplicable here. To begin with, we may not "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S. Ct. 655, 126 L.Ed.2d 615 (1994). Moreover, while the quoted passages do suggest that agencies may make regulatory decisions (including perhaps canceling the licenses of bankrupt debtors) based on factors such as future financial responsibility or ability, they do not state that an agency may use timely payment of a dischargeable debt as the sole indicator of such responsibility, as the Commission has done here. *Cf.* H.R. REP. NO. 95-595, at 165, U.S. Code Cong. & Admin. News 1978, at 6126 ("The purpose of [section 525] is to prevent an automatic reaction against an individual for availing himself of the protection of the bankruptcy laws.").

Duffey v. Dollison, 734 F.2d 265 (6th Cir. 1984), which Intervenors invoke, reinforces rather than undermines this interpretation of section 525. In *Duffey*, the court upheld as applied to a bankrupt debtor a state law suspending the driver's license of anyone who failed to make timely payment of a state tort judgment until that person provided proof of future financial responsibility. The statute at issue there specifically required extrinsic "evidence of financial responsibility," such as a certificate of insurance or a bond, in order to reinstate a license, and was specifically re-written *not* to require payment of discharged debts as a precondition for reinstatement: "the registrar shall vacate the order of suspension *upon proof that such judgment is stayed*, or satisfied in full . . . *and upon such person's filing . . . evidence of financial responsibility. . . .*" *Id.* at 269 (quoting OHIO REV. CODE § 4509.45 (Baldwin 1975)). The Commission's automatic cancellation policy, in contrast, refers to no analogous extrinsic evidence of fitness to hold a license, and allows license cancellation to rest solely on failure to pay a dischargeable debt.

Finally, noting that section 525 is entitled "Protection against discriminatory treatment," and that the House Report on the bankruptcy bill provides that section 525 "extends only to discrimination or other action based solely . . . on the basis of nonpayment of a debt discharged in the bankruptcy case," H.R. REP. NO. 95-595, at 366-67, U.S. Code Cong. & Admin. News 1978, at 6322, the Commission suggests that the provision is inapplicable here because "[a]ll licensees lost their licenses if they failed to meet the payment deadline." Appellee's Br. at 23.

The text of section 525, however, includes "discriminat[ion]" only as an item in a series of prohibited actions: "a governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . to, [*or*] condition such a grant to, [*or*] discriminate with respect to such a grant against, [*or*] deny employment to, [*or*] terminate the employment of, *or* discriminate with respect to employment against[] a person that is . . . a debtor under this title. . . ." 11 U.S.C. § 525(a) (emphasis added). Another prohibited action in the series is (as we have just seen) to "revoke" the license of a bankrupt "solely because such bankrupt" has "not paid a debt dischargeable" under the Bankruptcy Code —precisely what happened in this case. And the House Report itself explicitly states that section 525 "extends only to discrimination *or other action* based solely . . . on the basis of nonpayment of a debt discharged in the bankruptcy case. . . ." H.R. REP. NO. 95-595, at 366-67, U.S. Code Cong. & Admin. News 1978, at 6322 (emphasis added); *see also Walker v. Wilde (In re Walker)*, 927 F.2d 1138, 1142-43 (10th Cir. 1991) (invalidating under section 525 a license cancellation policy that applied to bankrupts and non-bankrupts alike).

We have no doubt that in developing its installment payment plan, the Commission made a good faith effort to implement Congress's command to encourage small businesses with limited access to capital to participate in PCS auctions. We are also mindful that, as the Commission suggests, allowing NextWave to retain its licenses may be "grossly unfair" to losing bidders and licensees who "complied with the administrative process and forfeited licenses or made timely payments despite their financial difficulties." Appellee's Br. at 9. Any unfairness, however, was inherent in the Com-

mission's decision to employ a licensing scheme that left its regulatory actions open to attack under Chapter 11 of the Bankruptcy Code, the very purpose of which is "to permit successful rehabilitation of debtors." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527, 104 S. Ct. 1188, 79 L.Ed.2d 482 (1984); *see also* H.R. REP. NO. 95-595, at 220, U.S. Code Cong. & Admin. News 1978, at 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders."). The Code expressly contemplates that bankrupts will sometimes avoid the consequences of late or non-payment they might have faced had they not filed for bankruptcy. *See, e.g.*, 11 U.S.C. § 1123(a)(5)(G) (stating that a reorganization plan may, among other options, provide for "curing or waiving of any default"); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S. Ct. 2309, 76 L.Ed.2d 515 (1983) ("The creditor with a secured interest in property included in the estate must look to [the provisions of the Bankruptcy Code] for protection, rather than to the nonbankruptcy remedy of possession."). And the Code's restrictions have been applied even to the official actions of Government agencies. *See, e.g., Whiting Pools*, 462 U.S. at 209, 103 S. Ct. 2309 (enforcing the Bankruptcy Code against the IRS to prevent seizure of property under a tax lien and concluding that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector"). Here, as we have explained, we think section 525 prevents the Commission, whatever its motive, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11.

We do not think this conclusion frustrates the purposes of the Communications Act, because nothing in the Act required the Commission to choose the licensing scheme at issue here. Although section 309(j) suggests the possibility of using guaranteed installment payments of some kind, the statute also suggests alternative methods of facilitating small business participation. *See* 47 U.S.C. § 309(j)(4)(A). Indeed, in 1998, the Commission decided that "until further notice, installment payments should not be offered in auctions as a means of financing small businesses and other designated entities seeking to secure spectrum licenses." *See Competitive Bidding Proceeding*, 63 Fed. Reg. 2315, 2318-19 (Jan. 15, 1998). Moreover, irrespective of the Commission's decision to use installment payments as part of its licensing scheme, nothing in the Act required it to enter a creditor relationship with winning bidders, take liens on licenses, or—most important for our decision here—make timely payment a license condition. For example, the Commission could have required winning bidders to obtain third party guarantees for their license fee obligations, or required full upfront payment from C Block licensees and helped them obtain loans from third parties. The Commission could also have made license grants conditional on periodic checks of financial health, a more extensive credit check, or some other evidence that winning bidders were capable of using their licenses in the public interest. Having chosen instead a scheme that put it in a creditor-debtor (and lienholder) relationship with its licensees and conditioned licenses on timely payment of their debts, and having as a consequence run afoul of section 525 of the Bankruptcy Code, the Commission may not escape that provision's clear

command simply because it acted for a regulatory purpose.

IV

In view of our conclusion that the Commission violated section 525 of the Bankruptcy Code in canceling NextWave's licenses, we need not consider NextWave's remaining Bankruptcy Code arguments, nor its arguments that the cancellation violated principles of due process and fair notice. We therefore reverse and remand to the Commission for proceedings not inconsistent with this opinion.

So ordered.

APPENDIX B

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

File Nos. 00341CWL96, et. al.

IN THE MATTER OF PUBLIC NOTICE DA 00-49 AUCTION OF C AND F BLOCK BROADBAND PCS LICENSES NEXTWAVE PERSONAL COMMUNICATIONS, INC. AND NEXTWAVE POWER PARTNERS INC. PETITION FOR RECONSIDERATION

IN RE SETTLEMENT REQUEST PURSUANT TO DA 99-745 FOR VARIOUS BROADBAND PCS C BLOCK LICENSES

[Adopted: August 31, 2000]
[Released: September 6, 2000]

ORDER ON RECONSIDERATION

By the Commission: Commissioner Furchtgott-Roth issuing a statement.

I. Introduction

1. We have before us a Petition for Reconsideration ("Petition") filed by NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively, "NextWave").[1] NextWave requests that the

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[1] *See* Petition for Reconsideration filed by NextWave Personal Communications and NextWave Power Partners Inc. (February 11, 2000) ("NextWave Petition"). On August 11, 21 and 24, 2000,

Commission review the Wireless Telecommunications Bureau's ("Wireless Bureau") public notice, which announced an auction of the C and F block Personal Communications Service ("PCS") spectrum licenses previously licensed to NextWave.[2] For the reasons set forth below, we deny NextWave's Petition. In addition, we dismiss Antigone Communications, Limited Partnership and PCS Devco, Inc.'s ("Antigone/Devco") Application for Review and Settlement Request as moot.

II. Background

2. Section 309(j)(4)(D) requires the Commission, when promulgating auctions regulations, to ensure that small businesses and other designated entities are given the opportunity to participate in the provision of spectrum-based services.[3] In accordance with its mandate, the Commission created provisions in the auctions program to promote participation by small businesses in broadband PCS, such as limiting eligibility for the C and F block auctions to those with total assets and revenues below a certain threshold, and offering bidding credits and installment payment plans.[4]

NextWave filed letter supplements to its Petition which we also address in this order.

[2] *See* "Auction of C and F Block Broadband PCS Licenses," *Public Notice*, DA 00-49, 15 FCC Rcd 693 (2000) (*January 12th Public Notice*). On June 7, 2000, the Wireless Bureau released a public notice postponing the C and F block auction until November 29, 2000. *See* "Auction of Licenses for C and F Block Broadband PCS Spectrum Postponed Until November 29, 2000," *Public Notice*, DA 00-1246 (rel. June 7, 2000).

[3] See 47 U.S.C. § 309(j)(4)(D).

[4] The installment payment plan for C block permitted licensees that qualified as small businesses to pay 90% of the bid price over a

3. NextWave was the high bidder on 95 licenses in the broadband PCS C, D, E, and F block auctions that concluded in 1996 and 1997.[5] A petition to deny was filed against NextWave's C block license application and, ultimately, the Wireless Bureau found NextWave in violation of the Commission's foreign ownership restrictions. NextWave's C block licenses were conditionally granted on January 3, 1997, however, subject to certain restructuring obligations to bring the company into compliance with the Commission's foreign ownership rules.[6] Each of NextWave's C and F block licenses

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period of ten years, with interest paid for the first six years and interest and principal for the remaining four. *See* 47 C.F.R. § 24.711(b)(3) (1996). The installment payment plan for F block permitted licensees that qualified as small businesses to pay 80% of the bid price over a period of ten years, with interest paid for the first eight years and interest and principal for the remaining two. *See* 47 C.F.R. § 24.716(b)(3) (1997). All but two bidders in the 1996 C block auction qualified as small businesses.

[5] *See* "Entrepreneur's C Block Auction Closes: FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 96-716 (rel. May 8, 1996); "Entrepreneur's C Block Reauction Closes—FCC announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 96-1153, 11 FCC Rcd 8183 (1996); "D, E, and F Block Auction Closes—Winning Bidders in the Auction of 1,479 Licenses To Provide Broadband PCS in Basic Trading Areas," *Public Notice*, DA 97-81 (rel. Jan. 15, 1997). While the C and F block licenses that NextWave won were to be paid for by installment payments, NextWave paid for its D and E block licenses in full in accordance with the Commission's rules.

[6] *See* "Wireless Telecommunications Bureau Announces Conditional Grant Of Broadband Personal Communications Services Entrepreneurs' C Block Licenses To Nextwave Personal Communications, Inc.—Final Down Payment due by January 10, 1997," *Public Notice*, DA 97-12 (rel. Jan. 3, 1997); In re Applications of

was explicitly conditioned on full and timely payment of all installments under the Commission's installment payment plan, and each license stated that "[f]ailure to comply with this condition will result in the automatic cancellation of this authorization."[7] Antigone/Devco filed an Application for Review of the Commission's decision to conditionally grant NextWave's licenses on March 17, 1997. Antigone/Devco subsequently filed a settlement request setting forth the terms of a proposed settlement under which the Application for Review would be withdrawn.[8]

4. After it received its C block licenses, NextWave and other PCS block licensees petitioned the Commission for relief in order to modify their installment payment obligations.[9] In response, the Commission suspended C and F block installment payments temporarily[10] and initiated a rulemaking proceeding in order to consider whether to provide relief, and if so,

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NextWave Personal Communications Inc. for Various C Block Broadband PCS Licenses, *Memorandum Opinion and Order*, 12 FCC Rcd 2030, 2034, ¶ 9 (1997).

[7] License at 2.

[8] *See* Settlement Request Pursuant to DA 99-745, filed by Antigone/Devco (filed April 29, 1999); Request for Approval of Withdrawal of Pleading and Motion To Dismiss With Prejudice, filed by Antigone/Devco (filed June 1, 1998).

[9] *See* "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-679, 12 FCC Rcd 24230 (1997).

[10] Installment payments were suspended for C block licensees on March 31, 1997, and for F block licensees on April 28, 1997. *See* Installment Payments for PCS Licenses, *Order*, 12 FCC Rcd 17325 (1997); "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883, 13 FCC Rcd 1286 (1997).

the scope of that relief to C and/or F block licensees.[11] Ultimately, the Commission adopted several restructuring options to assist C block licensees in meeting their debt obligations, including resumption of payments, disaggregation, amnesty and prepayment.[12] All of the elections entailed licensees paying the full bid price, on a *pro rata* basis, for any and all spectrum retained by the licensee. Licensees were required to elect from among these options by June 8, 1998, the Election Date, and resume payments by July 31, 1998.[13] In the event licensees could not make payment by July 31, 1998, the *Restructuring Orders* gave licensees a single 90-day grace period, *i.e.*, until October 29, 1998,

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[11] *Supra* at note 9.

[12] In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order*, FCC 97-342, 12 FCC Rcd 16436 (1997) (*Second Report and Order*); In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Order on Reconsideration of the Second Report and Order*, FCC 98-46, 13 FCC Rcd 8345 (1998) (*First Reconsideration Order*); In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Order on Reconsideration of the Second Report and Order*, FCC 99-66, 14 FCC Rcd 6571 (1999) (*Second Reconsideration Order*). We refer to these orders collectively as the *Restructuring Orders*.

[13] "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-471, 13 FCC Rcd 7413 (1998).

after which the licensee would be in default and its licenses would automatically cancel.[14]

5. NextWave sought and was denied a stay of the Election Date,[15] and did not file an election with the Commission. Therefore, under the Commission's rules, NextWave was deemed to have elected to resume payments under its existing Notes and Security Agreements.[16] On the same day as its election was due to the Commission, NextWave filed for protection under Chapter 11 of the Bankruptcy Code.[17] NextWave simultaneously filed an "Adversary Proceeding"[18] against the United States Government[19] asking the bankruptcy

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[14] *See First Reconsideration Order,* 13 FCC Rcd at 8354-8355, ¶¶ 25-26. *See also* Sections 1.2110(f)(4)(ii), (iii), (iv) of the Commission's Rules, 47 C.F.R. §§ 1.2110(f)(4)(ii), (iii), (iv) (1999).

[15] *See NextWave Telecom v. FCC,* No. 98-1255 (D.C. Cir. June 11, 1998); In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date, *Order*, 13 FCC Rcd 11880, 11881, ¶ 5 (1998).

[16] *See* "Electronic Election Procedures for the Broadband Personal Communications Service (PCS) C Block Installment Payment Plans," *Public Notice*, DA 98-1006, 13 FCC Rcd 10364, 10366-10367 (1998). C block licensees were also informed that if they failed to make an election they would have to pay the entire Suspension Interest on or before March 31, 1998. *See Second Report and Order*, 12 FCC Rcd at 16471, ¶ 76.

[17] *In re NextWave Personal Communications, Inc. et al.*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998).

[18] *NextWave Personal Communications, Inc. v. FCC*, Summons and Notice of Pretrial Conference in an Adversary Proceeding, Adv.Proc. No. 98-5178A (Bankr. S.D.N.Y. June 8, 1998) ("*NextWave Complaint*").

[19] The United States Department of Justice represented the United States Government (*hereinafter* "the Government") in the bankruptcy proceeding.

court to restructure its debt to the United States based on the theory that its assumption of the full amount of the C block auction debt was a "fraudulent conveyance" under bankruptcy law.[20] On August 7, 1998, NextWave sent a letter to the Commission indicating its belief that bankruptcy afforded protections that "extend the date for making an Election" under the *Restructuring Orders*.[21] On September 2, 1998, the Wireless Bureau replied by letter that it disagreed, and considered the election requirements to be binding on NextWave, notwithstanding its bankruptcy filing ("*September 2, 1998 Letter*").[22] Pursuant to our *Restructuring Orders*, the C and F block licenses granted to NextWave canceled automatically on October 30, 1998 because Next-

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[20] NextWave argued that its auction debt was voidable under the state fraudulent conveyance law of California, New York or the District of Columbia. *See NextWave Complaint*, *supra* at note 18. *See also* 11 U.S.C. § 544(b) (allowing the bankruptcy estate to "avoid" any "obligation incurred by the debtor that is viodable under applicable law"). NextWave did not contest the value of the F block licenses in the Adversary Proceeding.

[21] *See* Letter from Michael R. Wack, Vice President Regulation, NextWave Telecom Inc., to the Secretary, Federal Communications Commission, dated August 7, 1998.

[22] *See* Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Michael R. Wack, Vice President Regulation, NextWave Telecom Inc., dated Sept. 2, 1998. The Bureau Chief stated that "the rights to make an election are set forth in the Commission's *Second Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 97-82, 12 FCC Rcd 16436 (1997), *as modified by Order on Reconsideration of the Second Report and Order*, FCC 98-46 (released Mar. 24, 1998). We are unaware of any provision in the federal Bankruptcy Code or other statute, which, at this time, precludes application of the Commission's election requirements to [the Debtors]."

Wave failed to make its payment by the resumption deadline of October 29, 1998.[23]

6. In the bankruptcy proceedings, the Government opposed NextWave's attempt to use the Bankruptcy Code to retain its licenses without complying with the full and timely payment condition, and moved to dismiss the Adversary Proceeding as an improper collateral attack on our *Restructuring Orders*. The bankruptcy court rejected the Government's motion to dismiss the Adversary Proceeding, and ruled that on the fraudulent conveyance count, the Commission should be treated as a creditor, and not as a regulator.[24] On May 26, 1999, the bankruptcy court found that a constructive fraudulent transfer had occurred and, consequently, avoided approximately $3.7 billion of NextWave's aggregate $4.7 billion obligation to the Government.[25] The U.S. District Court for the Southern District of New York affirmed the bankruptcy court's decision on July 27, 1999,[26] but the United States Court of Appeals for the Second Circuit ("Second Circuit") reversed on November 24, 1999, and followed with an opinion on December 22, 1999 ("*December 22nd*

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[23] *See First Reconsideration Order*, 13 FCC Rcd at 8354-8355, ¶¶ 25-26; 47 C.F.R. § 1.2110(f)(4)(ii) (1999).

[24] *See In re NextWave Personal Communications, Inc.*, 235 B.R. 263, 271 (Bankr. S.D.N.Y. 1998) (holding that the FCC's restructuring orders were not binding in bankruptcy proceedings).

[25] *See In re NextWave Personal Communications, Inc. v. FCC*, 235 B.R. 277 (Bankr. S.D.N.Y. 1999); *In re NextWave Personal Communications, Inc.*, 235 B.R. 305 (Bankr. S.D.N.Y. 1999).

[26] *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999).

Opinion").[27] In the *December 22nd Opinion*, the Second Circuit determined that the requirement that licensees comply with the full and timely payment condition in order to retain their licenses is regulatory in nature, because the auction is the mechanism used by the Commission to assign licenses under its statutory mandate in Section 309(j) of the Communications Act. Therefore, the Second Circuit found the bankruptcy court had erred in treating the Commission as merely a creditor. The Second Circuit concluded that the bankruptcy court lacked the power to alter the Commission's licensing scheme by changing the payment terms that applied to auction winners. In addition, the Court reversed the ruling that NextWave's obligation could be avoided as a fraudulent conveyance.[28] In its

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[27] *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999), *petit. for panel reh'g and reh'g en banc denied* (Mar. 9, 2000) ("*NPCI*"). On June 9, 2000, NextWave filed a Petition for a Writ of Certiorari with the U.S. Supreme Court seeking review of the *December 22nd Opinion*. *NextWave Personal Communications, Inc., v. FCC*, Petition for a Writ of Certiorari (June 9, 2000). That Petition is pending.

[28] The Court agreed with the Government that the obligation to pay for licenses was incurred at the close of the auction, not at the time of subsequent license grant or note signing, as the bankruptcy court had found. *NPCI*, 200 F.3d at 62. On August 24, 2000, NextWave filed a Supplement in which it requested that the Commission take notice of *In Re: Kansas Personal Communications Service Ltd.*, Case No. 99-21747-11-JAR, Judgment on Decision (Bankr. D. Kan. Aug. 16, 2000), in which the bankruptcy court found that the automatic cancellation of licenses is stayed under the Bankruptcy Code. The Government has filed with the bankruptcy court its motion to stay the bankruptcy court's decision and notice of intent to appeal to the federal district court (United States' Emergency Motion for Stay Pending Appeal of the Memorandum Opinion and Order Denying Motion for Amendment of the Schedules and Statement of Financial Affairs and to Strike

December 22nd Opinion, the Second Circuit recognized that the bankruptcy court litigation had hindered the Commission's enforcement of its licensing payment rules against NextWave:

> Because of the ongoing litigation, the FCC has not yet sought to take any action vis-a-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow.[29]

7. Following the Second Circuit's decision, NextWave endeavored to amend its bankruptcy plan of reorganization by substituting full payment of its debt obligation for the reduced sum set by the bankruptcy court.[30] On January 12, 2000, the Government objected to the new reorganization plan, arguing that pursuant to the conditions of the C and F block licenses granted to NextWave, the licenses had automatically canceled when NextWave failed to make its required payments under the Commission's *Restructuring Orders*.[31] The Government's filing attached the *January 12th Public*

References to PCS Licenses (Bankr.D.Kan. Aug. 24, 2000) and Notice of Appeal and Statement of Election (Bankr. D. Kan. Aug. 28, 2000)). Having duly noted the bankruptcy court's decision and the Government's response thereto, we believe we need not consider that proceeding further in reaching a decision with respect to NextWave.

[29] *NPCI*, 200 F.3d at 59.

[30] *See Debtors' Modified First Amended Joint Plan of Reorganization, In re NextWave Personal Communications, Inc., et. al.*, No. 98B21529 (ASH) (Bankr. S.D.N.Y. Dec. 16, 1999).

[31] *See Objection of Federal Communications Commission To Debtors' Modified First Amended Joint Plan of Reorganization*, No. 98B21529 (ASH) (Bankr. S.D.N.Y. Dec. 21, 2000).

Notice in which the Commission announced the auction of various PCS licenses, including those previously conditionally granted to NextWave, on July 26, 2000 ("July 26th Auction").

8. In response to a motion filed by NextWave, the bankruptcy court subsequently issued an order holding that under the Bankruptcy Code, the FCC had no power to cancel NextWave's licenses ("*January 31st Bankruptcy Court Order*").[32] The bankruptcy court set forth its own interpretation of the FCC's rules and enjoined the FCC from going forward with the July 26th Auction. On February 10, 2000, upon the Government's motion for leave to file a petition for *writ of mandamus*, the Second Circuit stayed the *January 31st Bankruptcy Court Order* insofar as it precluded the Commission from taking steps in preparation for the auction, pending review of the mandamus petition, and established a briefing schedule to review the bankruptcy court's order. On May 25, 2000, the Second Circuit issued an opinion granting the *writ of mandamus* ("*May 25th Opinion*").[33] In the *May 25th Opinion*, the Second Circuit confirmed that bankruptcy provisions could not be used to collaterally attack the Commission's regulatory licensing scheme. The Court further explained that the Commission's rules requiring full and timely payment of installment obligations as a con-

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[32] *In re NextWave Personal Communications, Inc.*, 244 B.R. 253 (Bankr. S.D.N.Y. 2000).

[33] *In re Federal Communications Commission*, Petitioner, Docket No. 99-5063, 2000 WL 828282 (2d Cir. May 25, 2000). On July 10, 2000, NextWave filed a petition for panel rehearing and a petition for rehearing en banc, in which it requested reconsideration of the *May 25th Opinion*. The Second Circuit denied these petitions on August 23, 2000.

dition to holding FCC licenses served a fundamental regulatory purpose, and therefore could not be altered in bankruptcy.

9. On February 11, 2000, while the mandamus proceedings were pending in the Second Circuit, NextWave filed the instant Petition for Reconsideration with the Commission challenging license cancellation on the grounds that it is arbitrary and capricious, contrary to law, and barred by the doctrines of estoppel and waiver. NextWave simultaneously filed a petition for review and notice of appeal before the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit"). On June 23, 2000, the D.C. Circuit granted the Commission's motion to dismiss NextWave's petition for review and notice of appeal on the grounds that they were premature in advance of this order ("*June 23rd Order*").[34] On July 5, 2000, NextWave filed a petition for rehearing of the *June 23rd Order*, which was denied by the D.C. Circuit on August 3, 2000.[35]

III. Discussion

10. *Procedural Issues.* In challenging the issue of cancellation in its Petition for Reconsideration, NextWave apparently takes the position that the *January 12th Public Notice* is a final order constituting a decision to cancel its previously-held licenses, rather than simply a public notice announcing the date that an

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[34] *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. v. FCC*, 00-1045, 00-1046, *Order* (D.C. Cir. June 23, 2000).

[35] *NextWave Personal Communications Inc. and NextWave Power Partners, Inc. v. FCC*, 00-1045, 00-1046, *pet. for reh'g denied* (D.C. Cir. Aug. 3, 2000).

auction is scheduled to begin. While we believe that in some instances it may be proper for a party to challenge the Commission's public notices that establish or deny rights, the *January 12th Public Notice* was not an order or action of the Commission (or the Wireless Bureau) canceling NextWave's licenses. Pursuant to our rules, the licenses canceled automatically on October 30, 1998. Our records contain no timely challenge to the automatic cancellation rule by NextWave at the time of the rule's promulgation, nor did NextWave challenge the rule during the course of the proceedings culminating in the *Restructuring Orders*. NextWave did not file a request for waiver of the payment resumption deadline, as did several other parties.[36] Finally, NextWave could have filed a petition for reconsideration when the licenses canceled on October 30, 1998, but did not.[37] Thus, we believe NextWave's Petition to be late and its challenge to the *January 12th Public Notice* to be procedurally defective.[38] Nevertheless, because of

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[36] *See* In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Order*, 13 FCC Rcd 22071 (1998) ("*Extension Request Order*"), *aff'd on recon.*, In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, 14 FCC Rcd 6080 (1999) ("*SouthEast MO&O*"), *aff'd*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999) ("*SouthEast Telephone*").

[37] We do not mean to suggest that such a request would have been appropriate, only that it would have been procedurally permissible. *See also* ¶¶ 15 and 16, *infra*.

[38] We note that although it had no occasion to decide the question, the Second Circuit stated its belief that the *January 12th Public Notice* is an appealable decision or order, for the purpose of Commission and judicial review. *See May 25th Opinion*, note 29. The Court cited *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d

the importance of the issues raised in NextWave's Petition, we address NextWave's challenge to the automatic cancellation of its licenses.[39]

11. *Arbitrary and Capricious Standards.* NextWave argues that the automatic cancellation of its licenses and *January 12th Public Notice* were arbitrary and capricious and contrary to reasoned decision-making[40] because the Commission has violated its own

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512, 522 (D.C. Cir. 1999) ("*Mountain Solutions*") for the proposition that the Commission's treatment of the denial of a waiver request is an adjudicatory decision. In that case, Mountain Solutions requested a waiver of the Commission's rules governing the deadline for down payments. The Commission denied the waiver request in an appealable order. *See* In the Matter of Mountain Solutions Ltd., Inc. Emergency Petition for Waiver of 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets in the Broadband Personal Communications Services (PCS) C Block Auction, *Memorandum Opinion and Order*, 13 FCC Rcd 21983, 21997, ¶ 26 (1998). We believe that *Mountain Solutions* is procedurally inapposite to the case before us because NextWave is not requesting reconsideration of an order, but rather, reconsideration of a public notice establishing a date to auction licenses for spectrum previously licensed to it. Furthermore, as discussed above, Mountain Solutions had requested a waiver of the rule, which NextWave has not done.

[39] *See* In The Matter Of Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, *Order*, 14 FCC Rcd. 6561, 6562, ¶ 3 (1999) (Commission considered an application for review of a public notice establishing an auction date despite the procedural deficiency of the application).

[40] The Supreme Court has stated that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed

regulations and departed from consistent prior practice by "purporting" to cancel NextWave's licenses without any previous declaration that NextWave had defaulted on its installment payments.[41] We disagree. Cancellation is fully consistent with our congressional mandate, the Commission's regulations, and precedent. As the D.C. Circuit has recognized in a related context, the Commission has given "fair notice of the importance it attached to meeting payment dates . . . ."[42] The necessary corollary to this requirement is that licenses cancel if timely payment is not made. The requirement to pay in full and on time is paramount to preserve the reliability and integrity of our auction licensing program. Furthermore, the Commission has designed its competitive bidding system with the goal of awarding licenses expeditiously to bring competitive wireless services to the public without undue delay.[43] Providing for the "automatic" cancellation of licenses for nonpayment is designed to permit the most expeditious auction of spectrum licenses in furtherance of this goal.

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to a difference in view or the product of agency expertise." *See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

[41] *See* NextWave Petition at 9-10.

[42] *Mountain Solutions*, 197 F.3d at 522 (relating to default rules for downpayments applied to C block bidders).

[43] *See* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349, ¶¶ 4-5 (1994). We also note that Section 309(j)(3)(A) of the Communications Act, as amended, requires that the Commission pursue "the development and rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative or judicial delays." 47 U.S.C. § 309(j)(3)(A).

12. NextWave's argument that cancellation is arbitrary and capricious ignores the multitude of Commission pronouncements that licenses would cancel automatically if the applicable installment payments were not timely received by October 29, 1998. At the time that NextWave was conditionally granted its licenses, the payment rules provided that a license would cancel automatically following the expiration of any grace period without the successful resumption of payment or upon default with no grace period.[44] As noted above, the full and timely payment condition was explicitly stated on the face of each license[45] and referenced in the Notes and Security Agreements that memorialized the payment terms and obligations applicable to each license.[46] The *First Reconsideration*

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[44] 47 C.F.R. § 1.2110(e)(4)(iii) (1997).

[45] Each C and F block license issued to NextWave expressly stated that "[t]his authorization is conditioned upon the full and timely payment of all monies due pursuant to Sections 1.2110 and 24.711 of the Commission's Rules and the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization." *See, e.g.*, C block License at 2.

[46] For example, the Note signed by NextWave for each C and F block license it received stated at 3:

> The Maker hereby acknowledges that the Commission has issued Maker the above referenced License pursuant to the Communications Act of 1934, as amended, that it is conditioned upon full and timely payment of financial obligations under the Commission's installment payment plan, as set forth in the then-applicable orders and regulations of the Commission, as amended, and that the sanctions and enforcement authority of the Commission shall remain applicable in the event of a failure to comply with the terms and conditions of the License,

Order amended the rules to provide that C and F block licensees must resume payment by July 31, 1998, and that "C and F block licensees shall be in default if their payment due on the resumption date . . . is more than ninety (90) days late" (*i.e.*, after October 29, 1998).[47]

13. In addition to the rules and orders issued by the Commission, the Wireless Bureau issued a series of public notices that gave Commission licensees specific instructions regarding the dates that payments were due and the consequences of non-compliance. In a Public Notice released on April 17, 1998, the Wireless Bureau stated that licensees who failed to meet the July 31, 1998, payment resumption deadline could submit their payment on or before October 29, 1998, without being considered delinquent, if they timely paid a five percent late fee.[48] In a Public Notice dated September 18, 1998, the Wireless Bureau emphasized that licensees that miss the late payment deadline

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regardless of the enforceability of this Note or the Security Agreement.

[47] *See First Reconsideration Order*, 13 FCC Rcd at 8354-8355, ¶¶ 25-26. The Commission established the dates for installment payment resumption in "Wireless Telecommunications Bureau Announces 1998 Election Date for Broadband PCS C Block Licensees; Payments for C and F Block Licensees Resume July 31, 1998," *Public Notice*, DA 98-741, 13 FCC Rcd 7413 (1998) ("*1998 Election Date Notice*"). *See also* 47 C.F.R. §§ 1.2110(f)(4)(iii), (iv) (1999).

[48] *See 1998 Election Date Notice*. To assist in making elections, the Commission sent to each C block licensee a statement of current account balances. NextWave received the pre-election notice sent to all C block licensees.

would be in default and their licenses would automatically cancel.[49]

14. Beyond these public notices, the Wireless Bureau's *September 2, 1998 Letter* directly informed NextWave that the Commission took the position that NextWave's pending bankruptcy case did not relieve it of its regulatory obligations under the Commission's *Restructuring Orders*.[50] After the *September 2, 1998 Letter*—nearly two months before the final payment date—it would have been unreasonable for NextWave to believe that the Commission expected it to make the election required by the *Restructuring Orders*, but not to make the concomitant payments required pursuant to that election and specified in the *Restructuring Orders*. Thus, NextWave could not reasonably have assumed that the Commission agreed with its position that its bankruptcy filing freed it from its regulatory obligations, such as the timely payment requirement.

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[49] *See* "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," *Public Notice*, DA 98-1897, 13 FCC Rcd 18213 (1998).

[50] *See supra* at note 22. The *September 2, 1998 Letter* is consistent with our longstanding statements regarding compliance with regulatory requirements by Commission licensees in bankruptcy. For example in paragraph 135 of the Fifth Memorandum Opinion and Order in the competitive bidding docket (PP Docket No. 93-253), 10 F.C.C. 403 (1994), we noted that a designated entity with installment payments that went into bankruptcy would be able to transfer its license through a bankruptcy court sale only if it had maintained its installment payments during the bankruptcy (or had obtained a Commission-granted grace period), and otherwise complied with our regulatory requirements for designated entities. Nothing in the Commission's language suggests that these requirements are suspended or abrogated by a bankruptcy filing.

15. Recognizing that the cancellation of NextWave's licenses occurred automatically under our rules on October 30, 1998 is, in fact, fully consistent with our treatment of similarly situated C block licensees. As noted above, in October 1998, immediately prior to the payment resumption deadline, a number of licensees claimed to be facing serious financial difficulties, notwithstanding the relief we had provided in our *Restructuring Orders*. Those licensees filed requests for waiver of the October 29, 1998 payment deadline.[51] In our *Extension Request Order*, we declined to further extend the deadline, noting that we had already provided a lengthy suspension period and explaining that to extend the deadline still further would "only serve to undermine the enforcement of [our] payment deadlines."[52] Subsequent to that order, two of the five licensees that had requested waivers made the requisite payment, whereas SouthEast Telephone, Inc., and Wireless Ventures, Inc. lost their licenses by operation of the automatic cancellation rule.[53] The Wireless Bureau did not issue a "declaration" of default, but simply released a public notice announcing its intention

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[51] Airadigm Communications, Inc., Urban Comm-North Carolina, Inc., SouthEast Telephone, Inc., Wireless Ventures, Inc., and Personal Communications Network, Inc. all filed requests for waiver of the October 29, 1998 deadline.

[52] *Extension Request Order*, 13 FCC Rcd at 22073, ¶ 5.

[53] Urban Comm-North Carolina, Inc. filed for bankruptcy under Chapter 11 of the Bankruptcy Code (Case No. 98-B-10086, Bankr. S.D.N.Y. 1998), and also filed a fraudulent conveyance action seeking to reduce the amount of its debt for the licenses (Adv.Pro. No. 99-8125 Bankr. S.D.N.Y. 1999). As in the case of NextWave, the Government has taken the position that the licenses issued to Urban Comm-North Carolina canceled for failure to make the October 29, 1998 payment.

to include the spectrum previously licensed to South-East and Wireless Ventures in our March 23, 1999 auction.[54]

16. The only material differences of which we are aware between NextWave and these companies are that NextWave was in bankruptcy some months prior to the resumption deadline, and NextWave did not seek a waiver of the payment deadline. Had NextWave filed for a waiver at that time, we are not aware of any basis on which relief would have been afforded to it and not the other licensees that did request equitable relief.[55] To now decline to enforce the automatic cancellation of NextWave's licenses would provide NextWave, retroactively, with just the relief that we declined to provide to those that had properly requested it. Such a result would be unjustified.[56]

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[54] *See* "C Block PCS Spectrum Auction Scheduled for March 23, 1999; Comment Sought on Procedural Issues," *Public Notice*, DA 98-2318, 13 FCC Rcd 24947 (1998). SouthEast's challenge to our denial of its waiver request was ultimately rejected by the D.C. Circuit on November 24, 1999. *See SouthEast Telephone*, *supra* at note 36.

[55] Even now NextWave has not utilized the appropriate vehicle of requesting a waiver or other equitable relief. We do not undertake in this order to address the adequacy of a request that has not been made. Our purpose is merely to illustrate that the cancellation of NextWave's licenses is consistent with the treatment of others similarly situated.

[56] In failing to pay despite the automatic cancellation rule, NextWave apparently was relying on the automatic stay of the Bankruptcy Code. That reliance was erroneous. *See, e.g., May 25th Opinion*, at 32-35 (holding that the timely payment condition is regulatory, and therefore the automatic stay does not apply). We are not aware of any precedent supporting the proposition that

17. NextWave argues that before there can be an automatic cancellation of a license, the Commission must "declare" that the licensee was in default under its payment obligations and that such a declaration was not made in this instance. The Commission did not contemplate a separate individual "declaration" to achieve "automatic" license cancellation, especially for C and F block licensees. C and F block payments had been suspended for over a year. The Commission therefore had a strong interest in ensuring that the spectrum would be returned quickly if licensees did not have the financial ability to meet the payment obligations established by their winning bids at the auction. At the time NextWave defaulted on its payment obligations, the licenses, notes, security agreements, and operative Commission rules all called for "automatic cancellation" upon a payment default.[57] Section 1.2110(f)(4)(iv) of the Commission's rules provided that if the payment obligations are missed the licensee "will be declared in default, its licenses will automatically cancel, and will be subject to debt collection procedures."[58] This rule does not require a distinct,

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a waiver is warranted, retroactively, on account of mistaken reliance on an inapplicable provision.

[57] *See* 47 C.F.R. § 1.2110(f)(4)(iv) (1998).

[58] Recently the Commission restated this rule as follows: "[i]f an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures." *See* In the Matter of Amendment of the Commission's Rules—Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of*

affirmative act, involving a separate "declaration" of default for each licensee that has missed a payment as a precursor to automatic license cancellation. Indeed, to require that the Commission take affirmative steps to declare a licensee in default before the operation of the cancellation of the license would render the automatic nature of the process futile and meaningless. Nor, as explained above, have we followed the practice of issuing a separate declaration of default in prior cases.[59] For all these reasons, we reject NextWave's interpretation of our default and cancellation rules and reaffirm that the failure to make full payment in a timely manner following exhaustion of all applicable grace periods constitutes a default, and results in the automatic cancellation of the license without further Commission action.

Proposed Rule Making, FCC 00-274 (rel. August 14, 2000), ¶ 28 (*Part 1 Reconsideration Order*).

[59] NextWave offers no case in which the Commission has issued a separate formal "declaration" of default before the license cancellation rules were applied. To the extent that NextWave relies on a letter from Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Div., Wireless Telecommunications Bureau, to Jack Bond, Mountain SMR Group, L.L.C., DA 98-378, 13 FCC Rcd 4504 (1998) (*Mountain SMR*), to support its position that a separate "declaration of default" is required, its argument is misplaced. In *Mountain SMR*, a winning bidder in an SMR service auction failed to make its required down payment, and requested waiver of the Commission's bid withdrawal and down payment rules. The staff issued a decision in which it denied the requests for waiver and specified the amount of default payment that was due pursuant to Sections 90.905(b) and (c) of the Commission's rules. In the course of the decision, the staff stated that because Mountain SMR missed its down payment, it was "deemed to be in default" on these obligations. *Id* at 4508. The plain purpose of the staff letter was not to declare a default, but to deny the waiver request and specify the amount of payments due as a result of the default.

18. In a August 11th Supplemental filing, NextWave calls our attention to *Trinity Broadcasting of Florida v. FCC*,[60] where the D.C. Circuit held that we had failed to provide adequate notice of the interpretation of our minority ownership rules that we sought to apply to Trinity. NextWave argues that our rules did not clarify that cancellation could occur without a prior declaration of default. The interpretation urged by NextWave is not a reasonable one and could not reasonably be relied upon.[61] Even if it were reasonable to read the rule this way, NextWave could not have relied upon the alternative interpretation it urges. Whether cancellation was "automatic," or would require a prior "declaration," it was certainly clear that the consequence of NextWave's failure to pay on time would be nothing less than the loss of its licenses. NextWave could not have been waiting for a declaration of default, because, even under its interpretation, such a declaration would itself trigger automatic cancellation without recourse to NextWave. Thus, the only way that NextWave could have avoided the loss of its licenses, even under the rule interpretation it urges, was to avoid a default by making full and timely payment on or before the

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[60] 211 F.3d 618 (D.C. Cir. 2000).

[61] NextWave's suggested alternative interpretation of our rules —that a licensee making a "partial" payment would be subject to automatic cancellation, while a licensee that misses a payment entirely would be protected from automatic cancellation—is obviously not a reasonable one. *See* August 11th Supplemental filing at 2. Moreover, as we have already stated, automatic cancellation was specified on the face of its licenses, and in the Notes and Security Agreements executed by NextWave.

payment due date, which it unquestionably failed to do.[62]

19. We also reject NextWave's argument that automatic cancellation and the *January 12th Public Notice* are inconsistent with the Wireless Bureau's decisions in a series of non C block cases—specifically, the *Lancaster Communications*,[63] *Cordell Engineering*,[64] *TE-MCG*,[65] and *Ivan Brisbin*[66] cases. In *Lancaster*

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[62] Nor does *Trinity* support NextWave's argument that the Commission was required to inform NextWave specifically that the automatic stay would not override FCC licensing regulations. *Trinity* concerned differing interpretations of Commission rules, not the interaction of our rules with other federal law. In any event, NextWave's argument ignores the Government's consistent position taken throughout the litigation, that NextWave's bankruptcy case represented an impermissible collateral attack on our *Restructuring Orders* and our authority to place conditions on FCC licenses. NextWave also ignores the *September 2, 1998 Letter*, which, as discussed elsewhere, did inform NextWave directly (and before cancellation actually occurred) of the Commission's rejection of NextWave's position that its bankruptcy filing precluded enforcement of our *Restructuring Orders*. For these reasons, NextWave's reliance on *Trinity* is unavailing.

[63] *See* Letter from Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, to Thomas Gutierrez, Esq., Counsel for Lancaster Communications, Inc., DA 98-2052, 1998 WL 709412 (FCC) (rel. Oct. 9, 1998) (*Lancaster Communications*).

[64] Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Meredith S. Senter, Jr., Esq., Counsel for Cordell Engineering, DA 99-277, 14 FCC Rcd 5003 (1999) (*Cordell Engineering*).

[65] Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, to Lloyd W. Coward, Esq., Counsel for TE-MCG Consortium, DA 99-258, 14 FCC Rcd 2173 (1999) (*TE-MCG*).

[66] In the Matter of Ivan Brisbin (Call Sign WPCB813) Request for Waiver of Section 90.149(a) of the Commission's Rules, *Order*

Communications, *Cordell Engineering* and *TE-MCG*, the Commission, as a result of an administrative oversight, accepted payments from the licensees after the payment deadlines had passed, thereby constructively waiving the installment payment deadlines so that the licenses at issue did not cancel. The Commission is not required to repeat previous errors in order to maintain consistency with precedent.[67] Moreover, in this case, the Commission has not acted in such a way that reasonably could be construed as constructively waiving the October 29, 1998, late payment deadline.

20. Moreover, it is significant that in *Lancaster Communications*, *Cordell Engineering*, and *TE-MCG*, the parties were not C or F block licensees and were not affected by the extraordinary measures the Com-

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on Reconsideration, DA 00-59, 15 FCC Rcd 724 (2000) (*Ivan Brisbin*).

[67] The D.C. Circuit recently rejected a similar argument presented by SouthEast Telephone, after its licenses automatically canceled when it failed to make the required payment by October 29, 1998. *See SouthEast Telephone*, *supra* at note 36. SouthEast, like NextWave, relied on *TE-MCG* in arguing that the Commission was acting improperly when it enforced its timely payment rules because the Commission had granted waivers of late payments to some licensees in the past in other, non-PCS, services. The D.C. Circuit understood that these past instances were "based in part on the FCC's inadvertent acceptance of late payments and resulting constructive waiver of the payment deadlines" and the Court concluded that in these circumstances, "the mere fact that the agency granted TE-MCG's request does not require it to grant petitioner's request." *Id.* at 1. As the Court recognized, an agency is not required to continue to repeat its past errors in order to remain consistent with past decisions. *Id. See also Chem-Haulers, Inc. v. ICC*, 565 F.2d 728, 730 (D.C. Cir. 1977); *Texas International Airlines v. CAB*, 458 F.2d 782, 785 (D.C. Cir. 1971).

mission took to facilitate payment by such licensees.[68] In attempting to accommodate the needs of the C Block licensees in the *Restructuring Orders*, the Commission reiterated its belief that the ability to make installment payments is evidence of licensees' ability to access the capital necessary to both pay for the licenses and provide service to the public.[69] Having allowed C and F block licensees to defer any installment payments for more than a year, the Commission took the position that it would strictly enforce the resumption deadline, and not permit any further extensions.[70] In these circumstances, it is hardly arbitrary or capricious for the Commission to recognize the applicability of its automatic cancellation rules to a licensee that failed to make a payment by the resumption deadline. As a party in the C block restructuring proceedings, NextWave certainly knew that we intended to strictly enforce the October 29, 1998 payment deadline, particularly in light of the year of suspension of payments already afforded to C block licensees.[71]

21. *Ivan Brisbin* is also inapposite. There, the Commercial Wireless Division granted a late request for waiver of the Commission's rules establishing license renewal terms for Specialized Mobile Radio (SMR) licensees[72] and reinstated its license on the grounds that

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[68] *See Restructuring Orders*, *supra* at note 12.

[69] *See First Reconsideration Order*, 13 FCC Rcd at 8348, ¶ 8.

[70] The Commission clearly stated that it would "not entertain any requests for an extension" beyond the payment resumption date. *See Second Report and Order*, 12 FCC Rcd at 16451-16452, ¶ 30. *See also Extension Request Order*, *supra* at note 36.

[71] *See, e.g.*, *Extension Request Order*, *supra* at note 36; *South-East Telephone MO & O*, *supra* at note 36.

[72] *See* 47 C.F.R. § 90.149(a) (1998).

the licensee had completed construction and had been operating over the course of the license term. The full and timely payment rules, applicable to NextWave, were not at issue in *Ivan Brisbin*, which was not a payment default case. Moreover, because NextWave is not in commercial operation, its case does not present the same public interest concerns, *i.e.*, the uninterrupted provision of service, that informed the Wireless Bureau's decision in *Ivan Brisbin*.

22. NextWave also contends that in asserting cancellation, the Commission departed without explanation from the consistent course of conduct it followed in the NextWave bankruptcy proceedings, particularly in regard to an agreement reached in principle between the Government and Nextel Communications, Inc. ("Nextel") to settle the NextWave bankruptcy. The circumstances surrounding this agreement demonstrate that NextWave's contention is erroneous. The Government consistently maintained throughout the litigation that NextWave's Adversary Proceeding represented a collateral attack on the *Restructuring Orders*. The bankruptcy court, however, rejected this position and ruled that NextWave could retain its licenses for significantly less than its winning bid at auction. The Government appealed. Thereafter, the bankruptcy court allowed NextWave's reorganization efforts to proceed. Until resolution of that appeal, the Government appropriately entertained settlement proposals.[73] Settlement discussions do not constitute an admission

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[73] Until the Second Circuit's decision in December 1999 (and later affirmed in May 2000), the Commission was bound by the law of the case and was prevented from enforcing cancellation. *See* ¶ 6 *supra*.

that the positions that a party has maintained and continues to press in the litigation are incorrect.

23. NextWave also argues that in enforcing the automatic cancellation rules, the Commission failed to consider the significant congressional policy judgments that are embodied in the Bankruptcy Code, including equality of distribution among creditors, a fresh start for debtors and the efficient and economical administration of cases, or to attempt to weigh those judgments against the Commission's own policy objectives. We have, in fact, made the assessment that NextWave seeks. Our consistent position throughout the bankruptcy litigation reflects just the sort of consideration that NextWave complains to be lacking. As we explain below, even when these bankruptcy policies are considered, the public interest is best served by enforcing our automatic cancellation rules against NextWave. Indeed, the D.C. Circuit has stated that "the Commission should assure that licensees do not use bankruptcy as a means of circumventing their obligation to operate in the public interest."[74]

24. In making public interest assessments under the Communications Act we take into account the policies embodied in other federal statutes, including the Bankruptcy Code.[75] We have fully considered the policies

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[74] *See LaRose v. FCC*, 494 F.2d 1145 at 1146 n.2 (D.C. Cir. 1974) (*LaRose*).

[75] *See LaRose v. FCC*, 494 F.2d at 1146 n.2, 1147-1148; *Second Thursday Corp.*, 22 FCC2d 515 at 516, ¶ 5 (1970); *Telemundo, Inc. v. FCC*, 802 F.2d 513 at 518 (D.C. Cir. 1986). *See also* In the Matter of Mobilemedia Corporation, et.al., *Memorandum Opinion and Order*, 14 FCC Rcd. 8017 (1999); In re Application of San Diego Television, Inc., Debtor-in Possession, *Memorandum Opinion and*

embodied in the Bankruptcy Code as presented by NextWave and find that the public interest in maintaining the integrity of the licensing process through auctions, the need to ensure that licenses are allocated to those licensees that are best qualified to hold them, and our desire to in this way further competition in the marketplace outweigh NextWave's individual business interests and those of its creditors.[76] Furthermore, the preservation and protection of the public interest in facilitating the goals of the Communications Act of 1934 as set forth in Section 309(j) are decisive here.[77] Section 309(j) embodies a presumption that licenses should

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Order, 11 FCC Rcd 14689, 14693 ¶ 13 (1996) (*San Diego*); In re Application of Various Subsidiaries and Affiliates of Geotek Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 790, 809 n.90 (2000).

[76] While under *LaRose* we are to consider ways in which our rules can be enforced without harming innocent creditors, we believe *LaRose* to be inapplicable under the instant facts. *LaRose* concerned an application to transfer existing licenses, and a decision by the Court that creditors should not be penalized for the malfeasance of the licensee's operators or principals. Unlike *LaRose*, all creditors of NextWave, and of other C block licensees, should have understood that the maintenance of their investment was contingent on their company's ability to pay the winning bid price as provided in our rules. Indeed, it is likely that creditors of other licensees did lose their investment as a result of the operation of our rules. We do not believe it would be appropriate to decline to apply our rules governing cancellation, and thereby eviscerate our regulatory scheme for assigning licenses, in order to protect NextWave's creditors from a known risk that they undertook at the time they invested.

[77] In addition, Section 308(b) the Communications Act of 1934, as amended, states that "the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b).

be allocated as a result of an auction to those who place the highest value on the use of the spectrum. Such entities are presumed to be those best able to put the licenses to their most efficient use. If licensees were allowed to adjust their winning bid obligations after the fact in bankruptcy, the result of the auction would be negated, and the integrity of the auction process would be completely undermined. The winning bidder would be allowed to retain licenses despite having lost the above presumption. Nor would this be fair to those who: 1) participated in the auction but were outbid by NextWave; 2) would like an opportunity to bid on the licenses now, and; 3) perhaps most importantly, complied with our *Restructuring Orders*. Some of the licensees that complied with our orders actually forfeited their licenses because they could not ultimately meet their bid obligations; the balance either returned spectrum pursuant to our *Restructuring Orders* or made their installment payments as required. It would be unfair to permit a licensee that could not satisfy its bid to file for bankruptcy, tying up the spectrum in the process, and then emerge from bankruptcy at some later time and retain the licenses, while others that complied with our rules lost their licenses.

25. Congress gave the Commission the authority to auction radio spectrum licenses in order to facilitate the fulfillment of its mandate, which is, *inter alia*, to promote the rapid deployment of new technologies, products, and services to the American public while recovering for the public the value of that spectrum.[78] In order to implement the auction program, Congress delegated to the Commission the authority to make the

[78] 47 U.S.C. § 309(j)(3).

rules by which the program operates, including the payment rules. Strict enforcement of payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications and that spectrum is awarded to those qualified bidders who value the spectrum most. Insisting that licensees demonstrate their ability to pay as a condition to holding licenses is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace. NextWave is providing no service. The spectrum licensed to NextWave has gone unused since early 1997 and represents licenses in 90 markets across the United States. Since the cancellation and the *January 12th Public Notice*, there has been an overwhelming interest in this spectrum.[79] NextWave's failure to utilize the spectrum and its attempts to shield the spectrum in bankruptcy have hindered the growth of innovative and competitive telecommunications services in many areas of the United States, to the detriment of the American public. Under the circumstances presented, and on balance, we cannot accommodate the policies embodied in the Bankruptcy Code without causing undue harm to the integrity of our

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[79] *See* Comments filed on June 22, 2000, by Alpine PCS, Inc., America Connect, Inc., BellSouth Corporation, Carolina PCS I Limited Partnership, Nextel Communications, Inc., Rural Telecommunications Group *et al.*, Twenty First Wireless, Inc., and Verizon Wireless in response to In the Matter of Amendment of the Commission's Rules Regarding Payment Financing for Personal Communication Services (PCS) Licensees, WT Docket No. 97-82, *Further Notice of Proposed Rulemaking*, FCC 00-197 (rel. June 7, 2000).

auction and licensing process and further harming the public's interest in the efficient deployment of telecommunications services.

26. *Application of Federal Bankruptcy Laws.* NextWave argues that the release of the *January 12th Public Notice* violates Sections 362(a), 525, 1123, and 1124 of the Bankruptcy Code. To the extent NextWave argues that the Bankruptcy Code operates to preclude license cancellation under our rules, that argument has been summarily rejected by the Second Circuit and is precluded under the doctrine of *res judicata*.[80]

27. *Estoppel and Waiver.* NextWave claims that the Commission is barred by the doctrines of equitable estoppel, judicial estoppel, and waiver from asserting that its licenses have canceled.[81] NextWave asserts that the Commission did not seek payments from it and did not send quarterly notices of payment obligations, specifying the outstanding balance of the debt. NextWave also cites to statements made by Department of Justice attorneys in the bankruptcy case, which NextWave claims led it and its investors to believe that the Commission was taking the position that it could not cancel licenses during the pendency of the bankruptcy case. We note that these arguments were made

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[80] We note that NextWave has argued to the D.C. Circuit in its now-dismissed petition for review and its papers relating to the motion to dismiss that these questions were not decided by the Second Circuit. We disagree. We do not read the Second Circuit's *May 25th Opinion* as an invitation to argue before us or the D.C. Circuit the applicability of various Bankruptcy Code provisions.

[81] *See* NextWave Petition at 19-20.

to the Second Circuit, and were responded to by the Government.[82]

28. The party seeking to raise the defense of equitable estoppel must first establish the following elements: (1) the party to be estopped must be aware of the facts; (2) the party to be estopped intended his act or omission to be acted upon; (3) the party asserting estoppel did not have knowledge of the facts; and (4) the party asserting estoppel reasonably relied on the conduct of the other to his substantial injury.[83] In addition to these elements, a private litigant seeking to estop the government bears a heavy burden. Estoppel will not lie unless the party can show affirmative misconduct by the government[84] that goes beyond mere negligence, delay, inaction or failure to follow internal agency guidelines[85]; erroneous oral and written advice given by a lower level official is not sufficient.[86] None of these prerequisites is satisfied here.

29. The Commission did not act in a manner that would have led NextWave reasonably to believe that its licenses would not cancel if it failed to make timely payment. In fact, NextWave had ample notice to the contrary. As discussed above, outside the bankruptcy

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[82] *See In re: Federal Communications Commission*, Case No. 99-5063, Petition for a Writ of Mandamus (2nd Cir. February 22, 2000), pp.36-46 (*Mandamus Petition*).

[83] *See Mangaroo v. Nelson*, 864 F.2d 1202, 1204 (5th Cir. 1989).

[84] *Drozd v. INS*, 155 F.3d 81, 90 (2d Cir. 1998).

[85] *Ingalls Shipbuilding, Inc. v. U.S. Dept. of Labor*, 976 F.2d 934, 938 (5th Cir. 1992).

[86] *Office of Personnel Management v. Richmond*, 496 U.S. 414, 415-416 (1990); *see also Deaf Smith County Grain Processors v. USDA*, 162 F.3d 1206 (D.C. Cir. 1998).

context we have consistently stressed the importance of the full and timely payment condition as set forth in our rules and on the face of the licenses themselves. Under our *Restructuring Orders* it was clear that payments must resume by October 29, 1998, at the latest, to prevent cancellation, and requests by similarly situated parties to waive the payment resumption deadline were denied. In the bankruptcy case, the Government's consistent position was that NextWave could not use bankruptcy to collaterally attack our *Restructuring Orders*. The *September 2, 1998 Letter* reiterated to NextWave our position that the filing of bankruptcy did not relieve it of its regulatory obligations. It is true that NextWave argued repeatedly in court that the obligation to pay is not "regulatory," but the Government argued just as forcefully that the full and timely payment requirement is a critical regulatory condition. Given these circumstances, we do not think NextWave could reasonably have believed that we agreed with its position that the bankruptcy filing precluded enforcement of our licensing rules.

30. Turning to NextWave's specific assertions, the fact that NextWave did not receive payment notices after the bankruptcy case was filed does not establish waiver or estoppel. At the time that the payment was due, October 29, 1998, NextWave already knew from our *Restructuring Orders*, the Wireless Bureau's public notices, and the Commission's orders rejecting requests for extension of time to pay by other C-block licensees, that the Commission had established October 29, 1998 as the final due date for payments under the *Restructuring Orders*. NextWave also received the *September 2, 1998 Letter* nearly two months before payment was due. Given these formal and informal statements,

NextWave did not need a separate notice that its payments were due by October 29 in order to understand the Commission's position that it was obligated to comply with the Commission's rules regardless of the bankruptcy filing. The practice of sending out individual notice is not mandated by any Commission rule, and the fact that no special additional notice was sent to NextWave during the pendency of the bankruptcy case of the amount due does not meet the prerequisites of waiver or estoppel. As a Commission licensee, NextWave was responsible for making timely payment on the dates set by the Commission, without individual notice of payment due.[87]

31. NextWave argues that the Commission is estopped from asserting cancellation because of selected quotes from statements made by DOJ attorneys in court regarding the operation of the Bankruptcy Code. We do not find that any of these statements, taken individually or collectively, constitute an estoppel. *First*, nowhere in the statements quoted by NextWave does a DOJ attorney state that NextWave could miss a payment and still retain its licenses. *Second*, NextWave takes the selected DOJ attorney statements out of context. All of the statements were made during the course of ongoing litigation in which the Government's consistent position was that NextWave could not modify the terms and conditions of the Commission's licenses, including specifically the condition of full and timely payment. Given that express

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[87] *See also* Letter from Louis Sigalos, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to James A. LaBelle, 21st Century Telesis, Inc., DA 00-1791 (Aug. 7, 2000).

position, NextWave could not have reasonably assumed from any of the quoted DOJ attorney statements that NextWave could ignore the payment deadlines prescribed by the Commission's rules without peril to its licenses if the Government's position ultimately prevailed.[88] Notably, many of the DOJ attorney statements quoted by NextWave were made long after the October 29, 1998 payment deadline, and long after any arguable 60-day extension of the deadline under Section 108 of the Bankruptcy Code. NextWave could not possibly have relied on these post-deadline statements for its decision to fail to comply with the full and timely payment condition. *Third*, before the October payment deadline, NextWave received directly from the Commission the *September 2, 1998 Letter*, which made it clear that the Commission intended to enforce its *Restructuring Order* deadlines regardless of the bankruptcy filing. *Finally*, as a matter of law, a lawyer's passing remark is not a basis for estopping a federal

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[88] As the Government explained in its *Mandamus Petition*, at p. 38, there is nothing inconsistent between Government counsel's statements and the distinction drawn in Section 362(b)(4) of the Bankruptcy Code between an agency's forbidden efforts to collect money payments and its permissible exercise of regulatory authority. Indeed, counsel's statements are consistent with the Second Circuit's observation that, "if the FCC chooses to pursue . . . collection . . . it may find itself acting as a creditor." *NPCI*, 200 F.3d at 59 n.15. Thus, the statement that the automatic stay would preclude affirmative efforts to collect license payments did not suggest that the automatic stay would preclude operation of the Commission's rules respecting automatic cancellation for failure to comply with license conditions.

regulatory agency from enforcing its rules in the public interest.[89]

32. For the same reasons set forth above, the Commission is not judicially estopped. The Commission's consistent position in the litigation has been that the Commission's licensing rules and conditions remain applicable to NextWave notwithstanding its bankruptcy filing. Accordingly, the Commission's actions in recognizing the cancellation of the licenses for nonpayment and in announcing an auction of PCS C and F block licenses, including those NextWave previously held, are not inconsistent with any of its statements before the courts.

33. In its August 11th Supplement, NextWave relies on *Iowa Utilities Board V. FCC*.[90] Without commenting on the holding by the Eighth Circuit with respect to the judicial estoppel found by that Court, none of the statements relied upon by NextWave, nor the circumstances in which they were made, are analogous to the statements made to the United States Supreme Court concerning the proxy prices at issue in that case. As explained at length in this order, the Government's consistent position in this litigation has been that FCC license conditions should apply despite NextWave's bankruptcy filing.

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[89] *See In re Ludlow Hosp. Soc.*, 124 F.3d 22, 26 (1st Cir. 1997) (where Assistant United States Attorney gave oral assurances regarding deadline materially distinct from one-year deadline prescribed by regulation, bankruptcy trustee could not reasonably rely on those assurances as a basis for inferring blanket Government concession that bankruptcy court had equitable power to override regulatory deadlines).

[90] 2000 U.S. App. LEXIS 17234 (8th Cir. July 18, 2000).

IV. Ordering Clauses

34. Therefore, for all of the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by NextWave IS DENIED.

35. IT IS FURTHER ORDERED that as a result of the cancellation of the licenses and the denial of NextWave's Petition for Reconsideration, the Application for Review and Settlement Request filed by Antigone Communications, Limited Partnership and PCS Devco, Inc. are DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re Public Notice DA 00-49, Auction of C and F Block Broadband PCS Licenses, Nextwave Petition for Reconsideration, Order on Reconsideration (*rel. September 6, 2000*)

Government is at its best when it is most boring, when it follows laws and rules with a soporific routine. A government that is predictable and unshakable is a government on which people can rely in order to make long-term plans. After the long ordeal of the C Block bankruptcies, the Commission can best return to its routine by taking a step back and delaying the auction of the C Block licenses until there is greater clarity about the legal fate of these licenses. We should not endeavor to rush into a re-auction that may only exacerbate the already vast troubles suffered by all parties concerned. Thus, while I concur with today's decision regarding NextWave's petition for reconsideration, I would have supported a request to delay the re-auction until NextWave has had an opportunity to pursue a final decision from the Supreme Court regarding the interaction between the bankruptcy code and the Communications Act.

New technologies and ever-changing market circumstances create uncertainty and instability. Each of our auctions has dealt with different portions of the spectrum, has had different legal requirements, and has had different policy objectives. The differences in auctions make each unique. Honest and hard-working individuals, both inside and outside of the federal government, and particularly here at the FCC, invested their

time, efforts, and hopes into developing a new auction model to distribute PCS licenses. Some new government programs succeed beyond anyone's wildest dreams; others never fail to disappoint. Although perhaps clear in retrospect, at the time no signal of the C Block's fate was apparent.

It launched with great fanfare. At the time, the bid amounts were breathtakingly large. The auction seemed to mark an auspicious launch for new businesses, and a windfall of promised receipts for the federal government.

These hopes made the rapid collapse of the C-block licensees all the more dramatic, disappointing, and almost incomprehensible. In retrospect, the entire episode was not incomprehensible at all. Something dreadful went wrong. The culprit was not an individual inside or outside government; the culprit was installment payments. Their culpability is widely recognized; indeed, it is incomprehensible that this agency would ever use them again.

History is not forgiving. We cannot go back in time, completely correct our past mistakes, and start over without a trace. If we could, we would have redone the C-block auction long ago. Instead, the FCC and private parties have bravely faced the inescapable: the failure of the initial C-block auction.

What should a government agency and private parties do in the wake of a failure? Private parties can be expected to take whatever positions are necessary to save themselves. They can be expected to be mercurial and even desperate. They can be expected to seek to blame others for their plight.

The federal government could respond in a similar manner. The government's behavior could be mercurial and even desperate. It could seek to blame others for their plight.

The federal government, however, is at its best when it chooses a different path. Unlike a small company, the federal government is not threatened with evanescence. It has a future, long and bright, despite countless mistakes and bad situations. The federal government is at its best: when it is dull and boring, when it takes tedious rules and carries them out, when it is painfully predictable, when it is selfless in accepting blame for its mistakes, and when it is long-forbearing in understanding the behavior of private parties that are not at their best.

The story of the aftermath of the C-block auction, the role of the government and the private licensees is not a happy history or a pleasant drama. It is a tragedy with many victims and no heroes. It is a mixture of a comedy of the absurd and a comedy of errors—combined in a manner without comedy, only absurdity and errors. At times throughout this history, the behavior of the federal government has been difficult to predict.

The history recounted in the Commission's document has many twists and turns. But it is only part of the story. It does not, for example, describe the unexpected delays in the issuing of the initial licenses. Nor does it describe how the government's battle with NextWave is but one of several battles the government is having with C-block licensees over the role of the bankruptcy code. The federal government has had smashing legal victories against NextWave; the prog-

ress of the war is less clear in other skirmishes; and final victory for the federal government in the entire legal war is far from certain.[91]

What precisely is the federal government's view of the applicability of FCC's automatic termination of licenses to companies subject to the bankruptcy code's stay provisions? Perhaps one should ask Airadigm today, or 3 months ago, or 6 months ago, or 12 months ago. That company has been offering service for months with what it believed to be an FCC license, but which now, it seems, automatically cancelled in 1999.[92] Or perhaps one should ask Nextel about its negotiations with Commission staff for the possible transfer of NextWave's licenses in 1999 that, today, we reaffirm terminated in 1998. Or perhaps one could ask Judge Hardin, the Bankruptcy Judge in NextWave's case, who clearly seemed surprised to learn that the licenses had never been a part of that proceeding.

The battle between the Commission and NextWave has raged for two years. It is a sequence of precipitous decisions on both sides. NextWave has had victories in some courts; the Commission has had victories on appeal in higher courts. The outcomes have been hardly predictable; indeed, the entire saga is filled with more twists and turns and unexpected developments so as to appear more fictional than real.

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[91] *See e.g.* In Re: Kansas Personal Communications Services, Ltd., Case No. 99-21747-11-JAR, Judgment on Decision (Bankruptcy Court, D. Kansas Aug. 16, 2000).

[92] *See* Airadigm Contingent Emergency Petition for Reinstatement or in the Alternative for Waiver (filed February 7, 2000). Does this petition form the foundation for differential treatment?

The NextWave litigation has not yet ended. The litigation for other C-block licensees rages as well. Yet the Commission seeks now to reauction certain C-block licenses as quickly as possible. Which licenses will be offered for auction? That depends on the status of litigation at the time of the auction. Certainly, no one today could say with certainty exactly which licenses will be available in 3 months, or 6 months, or 9 months. The Commission could hold an auction with licenses available as of a given date; but the following day, based on either Commission or court action, some of those licenses may no longer be available for auction. An auction in which the legal status of licenses is still in doubt is a risky and unpredictable adventure. Some may say that the legal status is firmly and finally established in the current matter; given the dramatic history of the C-Block, I am yet to be convinced that we have read the final chapter. There is one outcome that could be far worse than the current tragedy: if the Commission held a premature auction that a court subsequently held invalid. In that situation, the number and classes of victims would only expand; the tortuous litigation of two years would be prolonged much longer.

Independent of the merits of NextWave's litigation, I believe that it would make sense for the FCC to hold a C-Block reauction only when we have greater clarity about which licenses are available. It would result in a simple, perhaps tedious auction, one without the drama and unpredictability of the past two years. But it would be government at its best. It would be a government that sees a long future and sees its measure of success in the long term, not next week or next month. It would be a government that is patient, long-forbearing,

willing to admit its faults, willing to stand by its decisions. If that were our path, we could be predictable, unshakable, and boring in our routine. And we would all be the better for it.

APPENDIX C

[Seal omitted]

Public Notice

Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

News Media Information:
(202) 418-0500
Fax-On-Demand: (202) 418-2830
Internet: http://www.fcc.gov
ftp. fcc. gov

DA 00-49
January 12, 2000

AUCTION OF C AND F BLOCK BROADBAND PCS LICENSES

Notice of Auction Scheduled for July 26, 2000

By this Public Notice, the Wireless Telecommunications Bureau ("Bureau") announces an auction of C and F block broadband Personal Communications Services ("PCS") licenses to begin on July 26, 2000. The auction will include licenses for operation on frequencies as to which previous licenses have cancelled or otherwise have been returned to the Commission. A preliminary list of licenses available for auction is included at Attachment A. Additional licenses may be added to this inventory by public notice.

For clarification, licenses for operation on frequencies as to which previous licenses have cancelled, identified in Attachment A, are available for auction under the automatic cancellation provisions of 47 C.F.R. § 1.2110(f)(4)(iii)-(iv). The previous licensees were

participating in the Commission's installment payment plan and were more than 90 days delinquent for the July 31, 1998 resumption payment. *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd. 8345 (1998); Amendment of Part 1 of the Commission's Rules —Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374 (1997), *errata*, 13 FCC Rcd. 4621 (WTB 1998) and 13 FCC Rcd. 10274 (WTB 1998).

Future public notices will seek comment on specific terms and conditions for this auction, include a schedule of pre-auction events and deadlines, and may include due diligence information concerning proceedings and other matters related to previously issued licenses for this spectrum.

Media Contact: Meribeth McCarrick at (202) 418-0654.

Wireless Telecommunications Bureau: Mark Bollinger, Deputy Division Chief, Auctions and Industry Analysis Division at (202) 418-0660.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 992, Docket 99-5063

IN RE FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

[May 25, 2000]

Before: MCLAUGHLIN, JACOBS and SACK, Circuit Judges.

JACOBS, Circuit Judge:

The Federal Communications Commission ("FCC") petitions this Court for a writ of mandamus to the United States Bankruptcy Court for the Southern District of New York (Hardin, *B.J.*). On February 7, 2000, the bankruptcy court issued an order prohibiting the FCC from re-auctioning spectrum licenses previously held by debtor NextWave Personal Communications, Inc. ("NextWave"). The FCC argues that the bankruptcy court's order violated this Court's mandate, expressed in *In re NextWave Personal Communications, Inc.*, 200 F.3d 43 (2d Cir. 1999) (*NextWave* Appeal), which held that 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." *Id.* at 54.

In our *NextWave* decision, this panel (1) rejected the bankruptcy court's determination that the FCC's requirement of full payment as a condition for spectrum licensure lacked a regulatory purpose, and (2) reversed a judgment modifying that condition. On remand, the bankruptcy court has (1) determined that the FCC's requirement of timely payment as a licensing condition is without regulatory purpose, and (2) nullified an FCC decision based on an asserted violation of that condition. The FCC contends that the *timely*-payment requirement (like the *full*-payment requirement) is (1) a regulatory condition for licensure, (2) within this Court's *NextWave* mandate, and (3) in any event, outside the limited jurisdiction of the bankruptcy court.

Because we conclude that the bankruptcy court's ruling violates our prior mandate, and that the FCC's licensing decisions are subject to the exclusive jurisdiction of the federal courts of appeals and outside the limited jurisdiction of the bankruptcy court, the petition is GRANTED. We make no comment on the prospects of the (precautionary) appeals filed by NextWave in the Court of Appeals for the District of Columbia Circuit.

BACKGROUND

A. The previous appeal[1]

In summer 1996, NextWave was the high bidder at FCC auctions for 63 personal communications services ("PCS") spectrum licenses (the "Licenses"). Next-

[1] This Court's previous opinion contains a more complete recounting of relevant events that occurred prior to the December 22, 1999 issuance of that opinion. *See NextWave* Appeal, 200 F.3d at 46-50.

Wave's winning bids aggregated $4.74 billion. Because NextWave enjoyed the status of a "small business," only ten percent of the amount bid was required to be paid in cash. *See* 47 C.F.R. § 24.711(b)(3). On February 14, 1997, following some further proceedings to correct NextWave's noncompliance with statutory ownership requirements, the FCC granted the Licenses to NextWave, conditioned upon issuance of a series of promissory notes for the $4.27 billion balance of NextWave's obligations. NextWave promptly executed the notes.

By the time these notes were executed, further auctions had been conducted at which similar licenses had been auctioned at prices significantly lower than NextWave's winning bids. Alarmed that as a result it had bid beyond its capacity to obtain financing, NextWave sought relief from the FCC and the Court of Appeals for the District of Columbia Circuit. Those efforts were unsuccessful.[2] On June 8, 1999, NextWave

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[2] *See NextWave Telecom Inc. v. FCC*, No. 98-1255, 1998 WL 389116 (D.C. Cir. June 11, 1998) (order denying stay pending review); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date (Order)*, 13 F.C.C.R. 11880, 1998 WL 278735 (FCC June 1, 1998); *see also In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Second Report and Order and Further Notice of Proposed Rule Making)*, 12 F.C.C.R. 16436, 1997 WL 643811 (FCC Oct. 16, 1997); *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Order on Reconsideration of the Second Report and Order)*, 13 F.C.C.R. 8345, 1998 WL 130176 (FCC Mar. 24, 1998); *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, (Second Order on Recon-*

filed a bankruptcy petition under Chapter 11 and commenced an adversary proceeding against the FCC. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 263, 267 (Bankr. S.D.N.Y. 1998) (*NextWave I*).

In the adversary proceeding, NextWave alleged that the transaction by which it was granted the Licenses was a fraudulent conveyance and therefore avoidable under § 544 of the Bankruptcy Code. *See id.* at 269 (citing 11 U.S.C. § 544). The FCC argued that the bankruptcy court lacked subject matter jurisdiction over NextWave's claim because exclusive jurisdiction to review FCC regulatory actions is lodged in the courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The bankruptcy court rejected this argument, holding that in its effort to collect the full auction price of the Licenses, the FCC was acting solely as a creditor, and not as a regulator. *See NextWave I*, 235 B.R. at 269-71. The bankruptcy court thus concluded that subject matter jurisdiction was sound and proceeded to try NextWave's claims.

At the conclusion of trial, the bankruptcy court found that at the time the Licenses were granted, they were worth only $1.023 billion (determined by comparison to similar licenses auctioned subsequently), and that any obligation in excess of that amount was avoidable as a constructive fraud. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 277, 304 (Bankr. S.D.N.Y. 1999) (*NextWave IV.A*). In effect, the avoidance remedy reduced by more than three-quarters the total

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sideration of the Second Report and Order), F.C.C. 99-66, 14 F.C.C.R. 6571, 1999 WL 183822 (FCC Apr. 5, 1999).

amount NextWave had bid at auction. *See* 11 U.S.C. § 544; *NextWave IV.A*, 235 B.R. at 304; *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 305, 306-07 (Bankr. S.D.N.Y. 1999) (*NextWave IV.B*).

The FCC appealed the bankruptcy court's judgment to the United States District Court for the Southern District of New York (Brieant, *J.*), which affirmed for reasons substantially the same as those stated by the bankruptcy court. *See NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 315-16, 319-21 (S.D.N.Y. 1999).[3]

The FCC appealed to this Court. On November 24, 1999, we issued an order (with opinion to follow) reversing the ruling that NextWave's obligation to the FCC was a fraudulent conveyance, and we remanded the

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[3] The district court affirmed five decisions of the bankruptcy court: *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision denying the motion to lift the automatic stay) (*NextWave V*); *NextWave IV.A*, 235 B.R. 277 (May 12, 1999 decision on the fraudulent conveyance claim), *supplemented by NextWave IV.B*, 235 B.R. 305 (June 22, 1999 decision on remedy); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of the FCC's motion to dismiss) (*NextWave III*); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to the FCC and granting to the debtor partial summary judgment with regard to the date upon which the obligations were incurred) (*NextWave II*); and *NextWave I*, 235 B.R. 263 (Dec. 7, 1998 decision granting in part and denying in part the FCC's motion to dismiss).

case to the bankruptcy court for further proceedings. *See NextWave* Appeal, 200 F.3d at 45-46, 62.

Our opinion issued on December 22, 1999. We explained that spectrum licenses (of which PCS licenses form a subset) are distributed by auction because "a method was needed that would direct licenses toward those entities and technologies that would put them to the best use," and because "Congress came to the conclusion that using market forces to allocate spectrum" would best achieve such a distribution. *Id.* at 51. In authorizing the FCC to develop a system of spectrum auctions, Congress had regulatory objectives, and was not chiefly interested in maximizing license-holders' contributions to the fisc:

> [T]he broader purpose of [47 U.S.C. § 309(j), the statutory provision authorizing spectrum auctions,] was to create *an efficient regulatory regime* based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue. Instead, it was told to auction licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum, while simultaneously recouping some of the value of the spectrum for the public.

NextWave Appeal, 200 F.3d at 52 (emphasis added; footnote omitted).

Congress mandated that spectrum licenses be distributed by auction because auction "bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue." *Id.* at 59. The auction-based scheme "reflect[s] a classical belief in the efficacy of market forces," the "fundamental rationale" of which is that "[t]hose qualified bidders" most likely to make efficient, technologically dynamic use of the spectrum are, on average, those to whom the spectrum licenses are most valuable, and therefore are "those who should be awarded the licenses." *Id.* at 52-53. Thus the spectrum auctions are "a *regulatory tool* for ensuring that licenses are distributed in the way that fulfils the goals of the [Federal Communications Act ('FCA')]." *Id.* at 53 (emphasis added).

Having determined that the purpose of spectrum auctions was chiefly regulatory, not fiscal, we then turned to the FCC's exclusive jurisdiction over regulation of the spectrum. Noting that the FCC's exclusive jurisdiction over licensing matters extended to the conditions placed on licenses, we held that "[w]hen the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated," it is exercising a quintessentially regulatory power. *Id.* at 54. We recognized that pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402, review of the FCC's regulatory decisions and orders is entrusted solely to the federal courts of appeals and is therefore outside the jurisdiction of the bankruptcy and district courts. *See id.*

Finally, we examined the bankruptcy court's decisions to determine whether they intruded upon the FCC's exclusive jurisdiction over spectrum licensing and the courts of appeals' exclusive jurisdiction to

review the FCC's licensing decisions. We determined that the full payment of winning bids was a regulatory condition for the retention of licenses by successful bidders:

> NextWave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, *in regulatory terms*, that NextWave was not entitled to the Licenses.

Id. (emphasis added). Because "[t]he FCC's auction rules . . . have primarily a regulatory purpose," we held that the approach taken by the bankruptcy and district courts—which allowed NextWave to keep PCS licenses under conditions that the FCC considered noncompliant—was "fundamentally mistaken." *Id.*

We thus held that even where the regulatory conditions imposed on a license take the form of a financial obligation, the bankruptcy and district courts lack jurisdiction to interfere in the FCC's allocation. Therefore, "even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis." *Id.* at 55 (emphasis added; internal citations omitted).

B. Subsequent events

On December 16, 1999—after this Court held that the FCC's licensing requirements were not subject to alteration in the bankruptcy court—NextWave filed modifications to its proposed plan of reorganization. Until then, NextWave had been contending that payment of the $4.27 billion still owed was beyond its capacity and that the incurring of the debt was a constructive fraud. But under its proposed modifications to the plan, NextWave would pay in full its overdue obligation to the FCC and undertake to pay the notes as they come due.[4] See *In re NextWave Personal Communications Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000) ("*NextWave VI*").

On January 11, 2000, NextWave sweetened its offer to the FCC and proposed to pay in a single lump sum the present value of its billions of dollars in notes. The lump-sum payment proposal was new and not part of NextWave's proffered modifications.

The day after NextWave's lump-sum offer, on January 12, 2000, the FCC issued a Public Notice of an "Auction of C and F Block Broadband PCS Licenses" (the "Public Notice"), in which the FCC announced the re-auction of the Licenses then held by NextWave. The

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[4] The bankruptcy court characterizes the modifications proposed on December 16 as an offer made "regardless of the outcome of the appeal in the Circuit Court." *In re NextWave Personal Communications Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000). The order reversing the judgment below was issued on November 24, however, so the outcome of the FCC's appeal was known at the time of the proposed modifications. *See NextWave* Appeal, 200 F.3d at 45-46.

Public Notice made no mention of the previous licensee, but the FCC's memorandum objecting to the modified reorganization plan explains that the cancellation of the Licenses was occasioned by NextWave's default under the terms of the Licenses. According to the FCC, that default resulted in the "automatic[ ] cancel[lation]" of the Licenses. *See id.*

In particular, NextWave had failed to make timely payments on the Licenses, as the licensing agreements obligated it to do. The FCC maintains that such a failure results in automatic license cancellation:

> In light of the Second Circuit's ruling, it is clear that the Debtors' C and F block PCS licenses automatically canceled pursuant to the terms and conditions upon which they were granted. Given that a licensee's failure to comply with a license's full and timely payment condition automatically results in the termination of a spectrum authorization, requiring no affirmative steps by the FCC, *see* 47 C.F.R. § 1.2110, . . . the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, are not implicated by the cancellation of the Debtors' C and F block PCS licenses. . . . Accordingly, the Debtors are divested of their C and F block PCS spectrum rights. . . .

Objection of Federal Communications Commission to Debtors' Modified First Amended Joint Plan of Reorganization, *In re NextWave Personal Communications, Inc.*, No. 98 B 21529(ASH), at 3-4 (Bankr. S.D.N.Y. Jan. 12, 2000) (FCC Objection). According to the Public Notice, the auctions are scheduled for July 26, 2000.

NextWave moved by order to show cause for an order declaring the Public Notice null and void. *See NextWave VI*, 244 B.R. at 257. The bankruptcy court granted NextWave's motion on January 31, 2000, stating the following three reasons:

> (1) Because the Licenses constituted "property of the estate," their revocation (via the Public Notice) violated the automatic stay of the Bankruptcy Code. *See NextWave VI*, 244 B.R. at 266-68 (citing 11 U.S.C. § 362(a)(1), (3)-(6)).
>
> (2) Because the cure provisions of the Bankruptcy Code, 11 U.S.C. §§ 1123(a)(5)(G) and 1124(2)(A), allow NextWave to cure any default—*i.e.*, they allow NextWave to "revers[e]" the event that triggers default—the FCC cannot rely on any default as a premise for revoking the Licenses. *Id.* at 268-69 (citing *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26-27 (2d Cir. 1982)).
>
> The bankruptcy court further held that the default cited by the FCC was in fact no default, regardless of the opportunity to cure, because NextWave was barred from making payments absent an order of the bankruptcy court, given subsequent to a hearing: "[T]he debtors had neither the authority nor the ability to make [those] payments absent notice and court approval." *NextWave VI*, 244 B.R. at 274-76; *see also* 11 U.S.C. §§ 102(1), 363. According to the bankruptcy court, NextWave's non-payment was compelled by the automatic stay and therefore cannot be an event of default: "Any notion of a legally cognizable 'default' presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first

instance." *Id.* at 274. The bankruptcy court therefore considered it "senseless to speak of a 'default'" in this case. *Id.* at 276.

(3) Under the doctrines of waiver and equitable estoppel, the FCC is now barred from revoking the Licenses because it failed earlier to contend that the Licenses were forfeit. *See id.* at 276-81.

By order dated February 7, 2000, the bankruptcy court granted NextWave's motion for an order enforcing the automatic stay and decreed that the FCC's Public Notice was "null, void, and without force or effect." *In re NextWave Personal Communications Inc.*, No. 98 B 21529(ASH) (Bankr. S.D.N.Y. Feb. 7, 2000) (order enforcing the automatic stay with respect to the Licenses).

The FCC promptly petitioned this Court for a writ of mandamus on the ground that the bankruptcy court's ruling obstructs our mandate.

DISCUSSION

This Court has the authority to grant writs of mandamus under Rule 21(a) of the Federal Rules of Appellate Procedure; but the standard for issuance is stringent, and such writs are rarely issued. Mandamus is not used simply to correct error. *See Will v. United States*, 389 U.S. 90, 98 n.6, 88 S. Ct. 269, 275 n.6, 19 L.Ed.2d 305 (1967); *In re Steinhardt Partners, L.P. (Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P.)*, 9 F.3d 230, 233-34 (2d Cir. 1993). It is reserved for "judicial usurpation[s] of power" by inferior courts. *Will*, 389 U.S. at 95, 88 S. Ct. at 273 (citation and internal quotation marks omitted); *accord Mallard v. United*

States Dist. Court, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L.Ed.2d 318 (1989). Mandamus is properly granted for two purposes:

> (1) Protection of a superior court's mandate, *see General Atomic Co. v. Felter*, 436 U.S. 493, 497, 98 S. Ct. 1939, 1941, 56 L.Ed.2d 480 (1978), to assure that "the terms of the mandate [are] scrupulously and fully carried out," and that the inferior court's "actions on remand [are] not . . . inconsistent with either the express terms or the spirit of the mandate," *In re Ivan F. Boesky Sec. Litig. (Kidder, Peabody & Co. v. Maxus Energy Corp.)*, 957 F.2d 65, 69 (2d Cir. 1992) (citation and internal quotation marks omitted); or
>
> (2) Restraining an inferior court from detours into areas in which it lacks jurisdiction (or, in some instances, forcing an inferior court to take an obligatory action), *see Ex parte Republic of Peru*, 318 U.S. 578, 583, 63 S. Ct. 793, 796-97, 87 L.Ed. 1014 (1943).

Generally, mandamus is appropriate only where no other remedy adequately protects the petitioner's interest. *See In re von Bulow (von Bulow ex rel. Auersperg v. von Bulow)*, 828 F.2d 94, 98 (2d Cir. 1987). Such a situation exists where the time required for the ordinary appeals process would deprive the petitioner of the right it claims (here, to re-auction the Licenses on the announced date, July 26, 2000). *See In re King World Productions*, 898 F.2d 56, 58-59 (6th Cir. 1990) (listing among the factors to be considered when determining the propriety of mandamus whether "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal," as well as whether "[t]he dis-

trict court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"); *cf. In re Cooper*, 971 F.2d 640, 641 (11th Cir. 1992) (holding an alternative remedy to be inadequate where it would have caused great delay in the vindication of the petitioners' rights). This Court will grant a mandamus petition only where the petitioner's right to relief is "clear and indisputable." *In re International Bus. Machs. Corp.*, 45 F.3d 641, 643 (2d Cir. 1995) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18, 103 S. Ct. 927, 938, 74 L.Ed.2d 765 (1983)) (internal quotation marks omitted).

The questions presented by this petition are whether the bankruptcy court's decision amounted to review of the FCC's "regulatory" actions, as we used that term in our opinion of December 22, 1999, *see, e.g.*, *NextWave* Appeal, 200 F.3d at 54; if so, whether that court's actions derogated from "either the express terms or the spirit of the mandate," *In re Boesky*, 957 F.2d at 69; and whether (even absent that mandate) the bankruptcy court exceeded its statutory jurisdiction by engaging in such review. We conclude that the bankruptcy court's decision: (1) amounted to the review of an order or decision of the FCC, for which the bankruptcy court lacks jurisdiction, and (2) contravened this Court's mandate. We therefore grant the petition.

A. The bankruptcy court's decision

The FCC argues that the requirement of timely payment, like the requirement of payment in full, is driven by regulatory considerations. The Commission further argues that the regulatory nature of the disputed requirement is manifest in this Court's opinion of December 22, 1999.

In the previous appeal, the district court had held that the FCC's claim to full payment "ha[d] nothing to do with the FCC's organization, execution, or implementation of the radio spectrum auction. Neither did the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses." *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311, 315 (S.D.N.Y. 1999) (internal quotation marks omitted). We held that such an approach "was fundamentally mistaken." *NextWave* Appeal, 200 F.3d at 54. Recognizing that "NextWave's inability to follow through on its financial undertakings had more than financial implications," we held that the FCC's decision as to "which entities are entitled to spectrum licenses under rules and conditions it has promulgated" is a paradigmatic instance of the FCC's exclusive regulatory power over licensing. *Id.*

The FCC's Public Notice of re-auction presented the bankruptcy court with a variation on the same question: whether it could undo the consequences of NextWave's failure to fulfill the timely-payment requirement under the Licenses, as determined by the FCC. The bankruptcy court properly characterized the issue as whether timely payment was a regulatory condition for licensure, and it then held that this Court's previous mandate does not control that question, *see NextWave VI*, 244 B.R. at 283, that is, that while *full* payment is a regulatory condition, *timely* payment is not. The

bankruptcy court's reasoning on this issue is set forth in the margin.[5]

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[5] Judge Hardin rejected, as follows, the FCC's contention that this Court's mandate controlled the issue of whether timely payment was a regulatory condition:

> Little need be said of the FCC's contention that the instant motion is governed by the Second Circuit Decision. Ultimately, it will be for the Court of Appeals to resolve this controversy, if the parties do not sooner settle it among themselves. In the meantime, the matter has been remanded to the Bankruptcy Court, and it is the responsibility of this Court to address the issues raised by this motion for review by the District and Circuit Courts.
>
> The Court of Appeals rulings in respect of *NextWave I*, concerning subject matter jurisdiction, and *NextWave II*, concerning fraudulent conveyance analysis, are the law of the case in these proceedings. But they do not touch upon the issues now before this Court, which arise from a subsequent event, the January 12 Declaration. Indeed, in remanding to the Bankruptcy Court, the Court of Appeals specifically referred to the possibility that the FCC might, in the future, seek to revoke the Licenses.
>
> The FCC relies upon the statement in the Circuit Court Decision that "the FCC made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining spectrum license" (200 F.3d at 52). However, the very next sentence states: "This 'payment in full' requirement has a regulatory purpose . . ." (*id.*), and the entire balance of the Circuit Court Decision bearing on the question of regulatory purpose and subject matter jurisdiction is concerned solely with the "payment in full" requirement, which was the only matter before the Court. The Court of Appeals did not consider the question whether the "timely payment" requirement was invested with a regulatory purpose, because the FCC had never asserted any legal position based upon NextWave's

Recognizing that it lacked power to review FCC regulatory actions, the bankruptcy court sought to cast the dispute in non-regulatory terms. Thus the court concluded that the FCC's declaration of a default (1) "lack[ed] any comprehensible regulatory objective," *id.* at 270, and (2) was therefore simply the action of an ordinary creditor:

> The Court of Appeals has held that there is a "regulatory" aspect in the FCC's "payment in full" requirement. But no such aspect can be inferred with respect to the FCC's "timely payment" requirement. No rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics.

Id. at 281.

This statement is at odds with our previous opinion. We expressly deferred to the FCC's "expert judgment as to the course that would best promote congressional objectives and serve the public interest," *NextWave* Appeal, 200 F.3d at 53; and we ultimately held that "[w]hen the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises *the full extent of its regulatory capacity*." *Id.* at 54 (emphasis added). The bankruptcy court finds that "[n]o rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics." *NextWave VI*, 244 B.R. at 281. This misses the point.

> failure to make post-petition payments on its pre-petition claims.

NextWave VI, 244 B.R. at 283 (internal citation omitted).

The FCC need not defend its regulatory calculus *in the bankruptcy court;* whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory. And if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it.

The FCC's decision to re-auction the Licenses previously granted to NextWave is one that implicates the conditions of licensure, in itself a circumstance sufficient to require the bankruptcy court's deference. Moreover, the regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time. Given this evident analogy, our analysis of the full-payment obligation (in our previous opinion) should have alerted the bankruptcy court that the FCC's determination as to prompt payment was by nature regulatory. Time of payment and amount of payment are alike functions of value. *Cf. Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. # 1 (In re Thinking Machs. Corp.)*, 67 F.3d 1021, 1022 (1st Cir. 1995) ("Time is money. . . ."). There can be little doubt that if full payment is a regulatory condition, so too is timeliness. *See NextWave* Appeal, 200 F.3d at 59-60 (detailing the regulatory purpose behind the FCC's general insistence on payment according to the terms set at auction, so that the "bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue"); *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 522 (D.C. Cir. 1999) ("[T]he Commission . . . gave fair notice of the importance it attaches to meeting payment dates. . . ."); FCC Objection at 2-4. "The Commission has

long noted the importance it attaches to timely payment." *Mountain Solutions*, 197 F.3d at 519 (citing *In re Implementation of Section 309(j) of the Communications Act, (Second Report and Order)*, 9 F.C.C.R. 2348, ¶ 197, 1994 WL 412167 (FCC April 20, 1994)).

We therefore conclude that the FCC's decision was in fact regulatory. This conclusion is reinforced by the bankruptcy court's own statement of reasons. In the course of deciding that the FCC's re-auction decision lacked any regulatory purpose, the bankruptcy court was in effect and in fact questioning the FCC's regulatory judgments:

> What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity? What public policy is served by an act of the United States Government which violates basic notions of equity, due process and the Bankruptcy Code? What purpose is served by the FCC's relinquishment of over $4.7 billion for the C Licenses? How does the [Public Notice] coexist with 47 U.S.C. § 309(j)(3)(A) looking to "rapid deployment" of spectrum "without administrative or judicial delays," or 47 U.S.C. § 309(j)(7)(A) and (B) prohibiting the FCC from exercising its regulatory discretion "on the expectation of Federal revenues["?]

NextWave VI, 244 B.R. at 282-83. Whatever the force of these rhetorical questions, the answers entail regulatory decisions and are outside the jurisdiction of the bankruptcy court.[6]

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[6] *See also, e.g., NextWave VI*, 244 B.R. at 263 (in rejecting the FCC's finding of a default, reasoning that "[t]he existence of a

In considering another of NextWave's arguments, the bankruptcy court explicitly questioned the rationale behind the FCC's decision to re-auction the Licenses:

> Finally, one of the important statutory objectives of FCA § 309(j), rapid deployment and utilization of C and F block spectrum by designated entities, would be undermined by cancellation and reauction of the Licenses. Judging by the C, D, E and F block auctions, it is highly unlikely that licenses auctioned beginning on July 26, 2000 would result in final grant of the Licenses to the high bidders before winter or spring 2001, at which time the designated entity licensees would have to raise the necessary funding to begin building out their PCS systems. NextWave is a designated entity. It was awarded the Licenses in January 1997. It represents that it has already developed the necessary infrastructure to a considerable degree. It is prepared to put the Licenses into use almost immediately. And all this must be considered in light of the fact that PCS and wireless telephone is developing at lightning speed,

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default here depends upon an interpretation of the FCC's regulations"); *id.* ("Transcendent considerations of fairness and due process, as expressed in the very statute that governs the FCC, compel the conclusion that the FCC cannot summarily eviscerate the debtors' estate on the basis of a purported 'regulatory default.'"); *id.* at 264 ("The FCC argued that, despite the language 'will be declared in default,' it was incumbent on the debtors, before a 'default' occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The history of this regulation indicates otherwise."); *id.* at 281 n. 26 ("[O]ne must wonder what was the impact on [the FCC's regulatory] objective of . . . the FCC's numerous regulations, orders, notices and instructions rescheduling and repeatedly changing payment deadlines. . . .").

> such that another year's delay is of great significance.

Id. at 271.

Although the bankruptcy court's opinion is stated in terms of whether timely payment is a regulatory condition, the question posed and answered is whether the regulatory condition of timely payment is arbitrary. Elsewhere, the bankruptcy court flatly rejects the idea that the FCC can have anything to say about communications licenses in the hands of debtors: "[O]ne must ask whether there is *any* regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar jurisdiction of the Bankruptcy Court from enforcing the Code." *Id.* at 282 (emphasis added).

In short, the FCC made timely payment a regulatory condition; and the bankruptcy court has concluded that such a condition is arbitrary, in the sense that it serves no regulatory purpose that the bankruptcy court is prepared to recognize. However, a regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid.

B. Mandamus

Our extraordinary mandamus power has two purposes: to achieve compliance with the terms and spirit of our mandates, and to constrain inferior courts to proper exercises of their jurisdiction. In this case, the two uses of mandamus overlap and reinforce one another. This Court's previous opinion reversed a decision of the bankruptcy court on the ground that that court lacked jurisdiction. The bankruptcy court again seeks to control the FCC's allocation of licenses, notwithstanding this Court's express holding that "the bankruptcy and district courts lack[ ] jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses." *NextWave* Appeal, 200 F.3d at 54. Thus a writ of mandamus protecting this Court's mandate also confines the inferior court to the lawful exercise of its jurisdiction.

1. The mandate

Our prior opinion clearly and repeatedly emphasizes that the bankruptcy court is without power to review the FCC's regulatory actions:

> If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee by allowed to keep its license despite its failure to meet the conditions to which the license is subject.
>
> *When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full*

> *extent of its regulatory capacity*. Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, *the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.*

Id. (emphasis added).

In supporting this jurisdictional holding, this Court discussed the "spheres of authority" within which agencies and courts operate:

> For over fifty years the Supreme Court has recognized that under the FCA the division of authority between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14, 62 S. Ct. 875, 86 L.Ed. 1229 (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by . . . the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S. Ct. 213, 91 L.Ed. 204 (1946).

Id.

Our mandate required the bankruptcy court to refrain from impeding the regulatory actions of the FCC, in particular, the FCC's enforcement of the payment schedule established by its regulations, orders, and decisions. The bankruptcy court founds its jurisdiction for doing so chiefly on the automatic stay provision of 11 U.S.C. § 362 and on that court's power under

the provision to decide what acts are prevented. The bankruptcy court declared the Public Notice to be null and void because:

> The [Public Notice] implicates subsections (1) and (6) and it unarguably violated subsections (3), (4) and (5) [of 11 U.S.C. § 362(a)]. Accordingly, the [Public Notice] was void.

NextWave VI, 244 B.R. at 267-68. The extensive briefing on this petition for mandamus is largely directed to this question.

The automatic stay has its limits. Here, the applicable limit is set forth in 11 U.S.C. § 362(b)(4), which provides an exception under paragraphs (1), (2), (3) and (6)[7] for:

> the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

11 U.S.C. § 362(b)(4) (West Supp. 1999). Undoubtedly, the FCC is a governmental unit that is seeking "to enforce" its "regulatory power." Nevertheless, the bankruptcy court decided that "[§] 362(b)(4) is not applicable here. The FCC's action is nothing other than a direct

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[7] Subsections (4) and (5) are concerned with liens. *See* 11 U.S.C. § 362(a)(4), (5). The bankruptcy court does not explain why they are implicated here.

attempt to enforce its pecuniary interests." *NextWave VI*, 244 B.R. at 274. This observation is flatly incompatible with this Court's mandate, as expressed in our earlier opinion. Because the timing of NextWave's payment obligation—like the amount of it—was a subject of FCC regulation, and therefore within our *NextWave* mandate, the bankruptcy court's decision violated that mandate.[8]

In short, notwithstanding the automatic stay provision, the bankruptcy court lacks jurisdiction to decide whether the FCC's regulatory decision is a proper exercise of discretion, or to decide whether it is provident and in the public interest. All of these decisions are within the exclusive jurisdiction of the federal courts of appeals:

> [Petitioner] contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the [agency's] actions and to enjoin those actions. We disagree. [Petitioner's] broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the

[8] Though we hold that the FCC's regulatory decisions fall within § 362(b)(4), we have no occasion to opine on whether the Public Notice is valid or whether the Licenses automatically canceled at some prior date.

> limited authority Congress has vested in bankruptcy courts.

Board of Governors v. MCorp Fin., Inc., 502 U.S. 32, 40, 112 S. Ct. 459, 464, 116 L. Ed. 2d 358 (1991). The bankruptcy court lacked jurisdiction to declare the Public Notice null and void on any ground: that the Public Notice violated the automatic stay, that the right to cure obviates any default, or that the government was estopped.

NextWave and various amici curiae emphasize that our mandate was limited by the disclaimer in our *NextWave* opinion that "since we do not know what steps the FCC will take vis-a-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe." *Id.* at 59. But the bankruptcy court's latest opinion was not prompted by any *collection* effort; the whole thrust of the opinion is that the FCC is unjustifiably *refusing* to take NextWave's money. In any event, this passage cannot be read as a limitation on the scope or effect of what our opinion actually decided. It is sufficiently clear that the issue raised by the timely-payment requirement was decided in our opinion: "We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC." *Id.* at 55. Even if the bankruptcy court is right on the merits of its arguments against revocation—we have no occasion to express an opinion—it is without power to act on its determination:

> [E]ven if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid

> price best effectuated the FCA's goals, they were *utterly without the power* to order that NextWave be allowed to retain them for that reason or on that basis.

Id. (citation omitted; emphasis added).

The bankruptcy court construes our mandate to mean no more than that the bankruptcy court may not abrogate the full-payment requirement on the basis of a fraudulent-conveyance holding. This under-reads our previous opinion. True, the immediate effect of the mandate was to prohibit abrogation of the full-payment requirement; but the opinion clearly instructs the bankruptcy court to refrain from interfering with the licensing decisions of the FCC.

2. Jurisdiction

Just as this Court may use its mandamus power to require compliance with its mandates, it may also issue the writ to restrain an inferior court to proper exercises of that court's jurisdiction. *See Ex parte Republic of Peru*, 318 U.S. 578, 583, 63 S. Ct. 793, 796-97, 87 L.Ed. 1014 (1943). Our previous decision was founded on congressionally imposed limits on jurisdiction. As discussed below, those jurisdictional limitations apply here with equal force.

Exclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 104 S. Ct. 1936, 1939, 80 L.Ed.2d 480 (1984); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("Exclusive jurisdiction over review of final FCC orders is vested in the Court of

Appeals. . . ."); *see also NextWave* Appeal, 200 F.3d at 54 ("[J]urisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402. . . ."). This exclusivity extends as well to collateral attacks: "A defensive attack on [an FCC decision] is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000).

The jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise. Each statutory provision that governs appeals and petitions for review from FCC decisions is broadly phrased, as follows:

Jurisdiction over all but a few FCC regulatory actions is restricted to the courts of appeals:

> *Any proceeding* to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and *in the manner prescribed in chapter 158 of Title 28*.

47 U.S.C. § 402(a) (emphasis added). The "manner prescribed in chapter 158 of Title 28" confines such petitions to the courts of appeals:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend

> (in whole or in part), or to determine the validity of—
>
> > (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47. . . .

28 U.S.C. § 2342 (emphasis added).

Section 402(a) makes an exception for cases that fall under § 402(b), but again offers no opening to the bankruptcy court. Cases that fall within § 402(b) are appealable only in the Court of Appeals for the District of Columbia Circuit:

> Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> . . . . .
>
> > (5) By the holder of any construction permit or *station license* which has been modified or revoked by the Commission.

47 U.S.C. § 402(b)(5) (emphasis added). PCS licenses are "station licenses" within the technical meaning of § 402(b)(5), and fall within its ambit.[9]

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[9] The statutory definitions clarify that the term "station license" means the "instrument of authorization required . . . for the use or operation of apparatus for transmission of energy, or communications, or signals by radio." 47 U.S.C. § 153(42) (Supp. 1999). Transmission by radio is defined broadly to include all electromagnetic broadcast transmissions, not just those transmitting traditional broadcast-radio content. *See id.* § 153(33). The FCC

Section 402(b) is applicable to all appeals from the FCC's licensing actions: "The language of this subsection [*i.e.*, § 402(b)], when considered in relation to that of subsection (a), also would make it clear that judicial review of *all cases involving the exercise of the Commission's radio licensing power* is limited to [the Court of Appeals for the D.C. Circuit]." *Cook, Inc. v. United States*, 394 F.2d 84, 86 n.4 (7th Cir. 1968) (quoting S. Rep. No. 82-44, at 10 (1951)) (emphasis added; internal quotation marks omitted). NextWave remains free to pursue its challenge to the FCC's regulatory acts.[10] In response to the FCC's revocation of the

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has "'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168, 88 S. Ct. 1994, 2000, 20 L.Ed.2d 1001 (1968) (quoting S. Rep. No. 73-781, at 1 (1934)) (referring to 47 U.S.C. § 153(b), (cc) (1965), *recodified at* 47 U.S.C. § 153(33), (42) (Supp. 1999)).

[10] Section 402 specifies exclusive jurisdiction for appeals from FCC "decisions" and "orders." Here, the FCC has issued no order formally announcing the cancellation of the Licenses; revocation is made explicit in a filing before the bankruptcy court (which filing is not itself an order) and is implicit in the Public Notice announcing the re-auction of the Licenses previously held by NextWave. Nevertheless, as this Court's prior opinion makes clear, we think that the FCC action in question is unmistakably regulatory in nature. But even if the FCC's acts do not amount to "decisions" or "orders" of the Commission, subject to the jurisdiction of the courts of appeals, that would not expose the FCC's acts to review in the bankruptcy court. A regulatory action short of a decision or order is an exercise of regulatory discretion that is *not* subject to review. *See Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967, 968 (D.C. Cir. 1967) (holding that a regulatory action that did not impose an obligation, deny a right, or fix a legal relationship was not reviewable); *see also, e.g., Telecommunications Research & Action Ctr.*, 750 F.2d at 78-79 ("[W]here a statute commits review of agency action to the Court of Appeals, any suit

Licenses, NextWave has filed protective notices of appeal in the D.C. Circuit, one under § 402(a) and the other under § 402(b). Cases within § 402(a) and cases within § 402(b) are "mutually exclusive." *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997) (citation and internal quotation marks omitted). But as noted in those notices of appeal, NextWave expects that the D.C. Circuit will simply dismiss whichever appeal is improper. *See, e.g., Tribune Co. v. FCC*, 133 F.3d 61, 66 n.4 (D.C. Cir. 1998); *Kessler v. FCC*, 326 F.2d 673, 679 n.4 (D.C. Cir. 1963).

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seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." (emphasis added)); *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974) ("[T]o be final an order must impose an obligation, deny a right or fix some legal relationship. . . ." (citation and internal quotation marks omitted)).

In this case, we have no doubt that the Public Notice of the Auction of C and F Block Broadband PCS Licenses is an appealable decision or order of the FCC. *See, e.g., Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 520 n.12 (D.C. Cir. 1999) (treating denial of a waiver as an "adjudicatory decision"); *Fidelity Television, Inc. v. FCC*, 502 F.2d 443, 452 (D.C. Cir. 1974); *cf. Mesa Airlines v. United States*, 951 F.2d 1186, 1188 (10th Cir. 1991); *California Assoc. of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1987).

The FCC's Notice announced that specified licenses—those formerly possessed by NextWave—were to be re-auctioned. It is easy to conclude that this "den[ies] a right." *Illinois Citizens Comm.*, 515 F.2d at 402. And if that decision is appealable, its regulatory nature requires that it be appealed in the court of appeals.

CONCLUSION

We conclude that the bankruptcy court acted in derogation of this Court's mandate and beyond its statutory jurisdiction when it nullified the FCC's Public Notice. The violation of our mandate and the jurisdictional defect are independently sufficient to justify mandamus.

Accordingly, the petition for a writ of mandamus is GRANTED. The bankruptcy court is directed to vacate its order of February 7, 2000, and to enter an order denying NextWave's motion for enforcement of the automatic stay with respect to the Licenses.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy No. 98 B 21529 (ASH)

IN RE NEXTWAVE PERSONAL COMMUNICATIONS INC., ET AL., DEBTORS

Jan. 31, 2000

DECISION ON MOTION TO ENFORCE THE AUTOMATIC STAY

ADLAI S. HARDIN, JR., Bankruptcy Judge.

On January 12, 2000 the Federal Communications Commission ("FCC") gave public notice (the "January 12 Declaration") to the debtors (collectively, the "debtors" or "NextWave") in these jointly administered Chapter 11 cases that all of NextWave's C block and F block licenses (the "Licenses") for broadband personal communications service ("PCS") had been automatically cancelled under FCC regulations as of late 1998 or January 1999. The January 12 Declaration was issued a scant nine days before the scheduled January 21, 2000 hearing on NextWave's Modified First Amended Joint Plan of Reorganization (the "Plan"), under which NextWave proposed to pay *in full* the balance of its outstanding installment obligations to the FCC and all amounts owing to unsecured creditors.

Aside from the Draconian economic consequences of cancellation to other creditors and equity, the January 12 Declaration was shocking because it followed over one year of intense litigation costing the debtors' estates upwards of $10 million in professional fees and other expenses in three Federal courts entailing expenditure of untold hours of judicial resources by one Bankruptcy Judge (Hardin), at least four District Judges (Brieant, Parker, Pollack, Chin) and at least three Circuit Judges (McLaughlin, Jacobs, Sack), all of which was premised on the assumption that the Licenses were vested in NextWave, and all of which was utterly unnecessary and incomprehensible if the Licenses had in fact and law been automatically cancelled over a year ago. The January 12 Declaration conflicted with countless written and oral utterances and acts of the FCC throughout the past year. And, astonishingly, the January 12 Declaration followed by one day a letter from the President of NextWave to the Chairman of the FCC offering to satisfy NextWave's entire ten-year installment obligation to the FCC by making a single lump sum payment upon confirmation in excess of $4.3 billion.

Faced with catastrophic consequences to all parties in interest in these debtors' estates, NextWave moved by order to show cause returnable January 21, 2000 for an order holding the FCC's January 12 Declaration null and void on the grounds, *inter alia*, that it violated the automatic stay, 11 U.S.C. § 362(a). As amplified below, the motion is granted for three quite separate reasons: (I) the January 12 Declaration violated the Bankruptcy Code; (II) the debtors cannot be held to have defaulted for failure to make payments on a pre-petition claim which they could not make under the Code without a

court order; and (III) the FCC is barred by its own conduct from asserting a retroactive forfeiture under the doctrines of equitable estoppel and waiver.

Jurisdiction

This Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York dated July 10, 1984 (Ward, Acting C.J.). This is a core proceeding under 28 U.S.C. § 157(b).

Background

The material facts in these Chapter 11 proceedings have been set forth in varying detail in five published decisions of this Court, one decision of the District Court and one published decision of the Court of Appeals, all briefly described below. This decision will set forth the factual and decisional background only to the extent necessary to give context to the issues presented and decided on this motion. For a more comprehensive statement of facts, *see NextWave IV.A*, 235 B.R. 277 (Bkrtcy. S.D.N.Y. 1999).

On May 6 and July 16, 1996, NextWave was declared the high bidder for 63 licenses in the FCC's auction and reauction, respectively, of C block licenses (the "C Licenses"). NextWave filed the required long form applications seeking FCC approval, to which objections were filed. On January 3, 1997 the FCC announced that NextWave would receive its C Licenses, conditioned on compliance with its financial obligations to the FCC.

On January 9, 1997 NextWave made an additional deposit with the FCC bringing its total cash deposits to $474,364,806, or 10% of its total bid price. On February 19, 1997 NextWave executed notes (the "Notes") and accompanying security agreements in the aggregate face amount of $4,269,283,223 (rounded, $4.3 billion), dated as of January 3, 1997. The FCC awarded the C Licenses to NextWave affiliate NPCI.

Another NextWave affiliate was high bidder for certain F block licenses (the "F Licenses") which were issued to NextWave in the spring of 1997. The litigation with the FCC concerned only the C Licenses, until the January 12 Declaration.

Between the conclusion of the C block auction and reauction on May 6 and July 16, 1996 and the actual issuance of the C Licenses in January/February 1997 in exchange for $4.7 billion of cash and Notes, the value of PCS spectrum as perceived in the marketplace plummeted. As a consequence, NextWave and the other C block license winners were unable to raise a single dollar of the estimated $1.6 billion of public financing which the C block licensees needed to build out their PCS systems. Recognizing this fact, the FCC issued orders suspending all payments on both C block and F block licenses in the spring of 1997, conducted public hearings and issued certain restructuring orders.

The NextWave entities filed voluntary petitions under Chapter 11 on June 8, 1998. On the same date NextWave filed the complaint in an adversary proceeding against the FCC alleging two separate causes of action. Count I alleged a claim under Section 544 of the Bankruptcy Code for constructive fraudulent conveyance; Count II sought equitable subordination of the

indebtedness to the FCC under Section 510 of the Bankruptcy Code by reason of the FCC's "*de facto* control" over NextWave and its alleged "inequitable, unconscionable and unfair conduct" between July 1996 and January 1997 (in essence, flooding the market with spectrum in order to drive the "scarcity value" out of spectrum). This Court made six substantive rulings in the adversary proceeding, five memorialized in written decisions. The District Court affirmed all six rulings, and the Court of Appeals reversed the District Court and this Court in a published decision. Each of these rulings will be discussed to the extent appropriate in the context of this motion.

Prior Court Decisions

Nextwave I *(235 B.R. 263)*

In response to the complaint, the FCC simultaneously filed a motion in the District Court to withdraw the reference and a motion to dismiss the adversary proceeding for lack of subject matter jurisdiction. The District Court denied the motion to withdraw the reference in October 1998 and remanded to this Court to decide the motion to dismiss. After a hearing in November, this Court issued its decision denying the motion to dismiss as to Count I (fraudulent conveyance) and granting the motion to the extent of dismissing Count II (equitable subordination). *NextWave I*, 235 B.R. 263 (Bankr. S.D.N.Y. Dec. 7, 1998). Count II was dismissed because "the second cause of action is based upon conduct of the FCC acting in its regulatory capacity [and][t]his Court will decline to review or adjudicate the consequences of the FCC's acts and omissions in matters over which Congress has granted the FCC primary jurisdiction." 235 B.R. at 265. The motion to

dismiss Count I was denied because "the first cause of action arises solely out of the FCC's status as a creditor of NextWave and does not seek to challenge any act or omission of the FCC or to affect the FCC in any manner except in its capacity as a creditor." *Id.* This Court concluded that nothing in the enabling statute, Federal Communications Act ("FCA") § 309(j), or elsewhere in the FCA manifested an intention of Congress to preempt the operation of the Bankruptcy Code in cases where the FCC was acting in the capacity of a creditor, whose actions, rights and obligations as a creditor would affect the rights and obligations of other creditors and parties in interest in a debtor's estate.

NextWave II (235 B.R. 272)

The FCC next made a motion for partial summary judgment fixing the date on which NextWave became obligated to pay the $4.7 billion of its winning bids, a crucial determination in a constructive fraudulent conveyance proceeding where the central issue is whether the consideration given by the debtor (cash plus debt) exceeded the value of the property transferred to the debtor in exchange therefor (the C Licences). Since NextWave's financial obligation to the FCC under the FCC's auction regulations would not have been $4.7 billion but some indeterminable lower figure if for any reason the FCC did not grant NextWave the C Licenses (less than 5% of the $4.7 billion if, for example, the C Licenses were reauctioned for amounts exceeding NextWave's bids), and since the actual transfer of the C Licenses in exchange for $473 million cash and $4.3 billion of Notes did not take place until January/February 1997, this Court fixed January 3, 1997 as the

critical date for constructive fraudulent conveyance purposes.

NextWave III

On April 2, 1999 this Court denied the FCC's second motion to dismiss in an unpublished decision from the bench.

NextWave IV.A (235 B.R. 277)

On May 12, 1999, after a trial on the issue of valuation of the Licenses, this Court issued its Decision on Constructive Fraudulent Conveyance Claim concluding that "$1,023,211,000 may be said to constitute the fair market value of the entire consideration received by NPCI in exchange for the entire $4.7 billion of Transfers, for purposes of fraudulent conveyance analysis." 235 B.R. at 304.

NextWave IV.B *(235 B.R. 305)*

After a further hearing, on June 22, 1999 this Court issued its Decision on Remedy. Noting the "utter irrationality of the FCC's proposed remedy," 235 B.R. at 311, and rejecting the remedy of rescission which the FCC expressly stated was "not what we seek," 235 B.R. at 308, this Court adopted the traditional constructive fraudulent conveyance remedy of avoidance, the effect of which was to reduce the NextWave obligation from $4.7 billion (10% of which has been paid) to $1,023,-000,000, being the actual fair market value of the C Licenses in January/February 1997.

***NextWave V** (235 B.R. 314)*

Following the Decision on Remedy, *NextWave IV.B*, the FCC moved to lift the automatic stay under 11 U.S.C. § 362(d)(i) for "cause." The "cause" relied upon was the failure, or rather the prospective failure, of NextWave to pay the full amount ($4.7 billion) of its winning auction bids by reason of this Court's Decision on Remedy in *NextWave IV.B*. As a consequence of the prospective default, the FCC sought an order for relief from stay from this Court so that the Licenses could be automatically cancelled under the terms of the FCC regulations. Considering the issue thus raised to be governed by the initial decision on subject matter jurisdiction in *NextWave I*, this Court ruled that, since the FCC is subject to the Bankruptcy Code in its capacity as a creditor, the reduction in NextWave's obligation to the FCC in the Decision on Remedy did not result in a present or prospective default and, lacking any default, there was no "cause" to lift the stay. Accordingly, the motion was denied.

The District Court Decision

On July 27, 1999 the District Court (Hon. Charles L. Brieant) issued a decision and order affirming all six aforementioned rulings of the Bankruptcy Court. *NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 241 B.R. 311 (S.D.N.Y. 1999).

The Court of Appeals Decision

On November 24, 1999 the Court of Appeals for the Second Circuit issued an order reversing the judgment of the District Court and remanding the case for

further proceedings, with an opinion to follow. The opinion (the "Circuit Court Decision") was issued on December 22, 1999. *Federal Communications Commission v. Nextwave Personal Communications, Inc.* (*In re Nextwave Personal Communications, Inc.*), 200 F.3d 43 (2d Cir. 1999). It is not clear whether the FCC appealed *NextWave III*, *NextWave IV.A*, *NextWave IV.B* or *NextWave V*. But it is clear that none of those decisions was addressed in the Circuit Court Decision. The Circuit Court Decision reversed the Bankruptcy Court and the District Court in respect of *NextWave I* and *II*.

With respect to the former, the Circuit Court Decision disagreed with the basic premise of *NextWave I* which distinguished between the FCC acting in its capacity as a regulatory agency, as to which the District Court/Bankruptcy Court would have no subject matter jurisdiction, and the FCC as a creditor, as to which the District Court/Bankruptcy Court would have jurisdiction to adjudicate debtor-creditor issues arising under the Bankruptcy Code. While recognizing the FCC's dual role as creditor and regulator under FCA § 309(j), the Court of Appeals concluded that the "payment in full" requirement of the FCC regulations, while a credit provision in the context of a C block licensee paying in installments, was also related to a regulatory function as to which the FCC had primary jurisdiction. Starting with the Congressional premise, articulated in the legislative history, that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and

efficiently than if handed out for free," the Circuit Court Decision concluded:

> . . . the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and retaining a spectrum license required through a § 309(j) auction. *See* 47 C.F.R. § 24.708.[1]
>
> This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions.

200 F.3d at 52. Rejecting the Bankruptcy Court's premise that the fraudulent conveyance claim "concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave]" and the District Court's premise that the fraudulent conveyance claims did not "implicate the FCC's power to regulate the issuance or use of spectrum licenses," the Circuit Court Decision said:

> This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to insure that spectrum licenses end up in the hands of those most likely to further Congressionally defined objectives. The fact that market forces are the technique used

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[1] 47 C.F.R. § 24.708 states, in relevant part:

> (a) **Except with respect to entities eligible for installment payments** (*see* § 24.711), each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon **full and timely payment** of the winning bid amount. (Emphasis supplied.)

> to achieve that regulatory purpose does not turn the FCC into a mere creditor. . . .

Id. at 54. Having so ruled, the Circuit Court Decision went on to say the following:

> This is not to say that [the District Court and Bankruptcy Court] lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors.

Id. at 55. And in footnote 11 on the same page, the Circuit Court Decision said:

> 11. The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors." *NextWave I*, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocation of licenses. Such was the case here. . . .

Thus, the Circuit Court Decision "remand[ed] the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary." *Id.* at 62.

Turning to *Nextwave II*, the Circuit Court Decision concluded that "NextWave became obligated to the

FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent." *Id.* at 56.

The Circuit Court Decision agreed with the proposition (quoting from *NextWave IV.A*, 235 B.R. at 290) "that the question of reasonably equivalent value is determined by the 'value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of the debt* which is challenged.'" *Id.*; emphasis in Circuit Court Decision. Accordingly, "[t]he date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable." *Id.* at 56. The Circuit Court Decision framed the issues as follows:

> When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

Id. at 57. The Circuit Court Decision answered the latter question: "We conclude that NextWave bid $4.74 billion for the right—excluding other bidders—to be the qualified licensee of the licenses." *Id.* at 57.[2] On this premise, the Circuit Court Decision held that

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[2] This Court ruled in *Nextwave II* that NextWave's cash payments and Notes aggregating $4.74 billion were consideration not for the mere *right* to be the qualified licensee, but for the actual C Licenses themselves. In fact, as shown in *NextWave IV.A*, 235 B.R. at 291-93, NextWave's only *irrevocable* financial commitment (its "ticket of admission" to the approval process) at the close of the auctions was the 3% penalty (equating to $142,309,000) under the FCC regulations, 47 C.F.R. § 1.204(g)(2), although its contingent liability was much greater. *See* footnote 3.

"NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction." *Id.* at 56.[3]

Confirmation Proceedings

NextWave's First Amended Disclosure Statement was approved by order dated July 27, 1999. Over 99% of all creditors and equity interest holders who submitted ballots voted in support of the debtors' Plan, and a hearing on confirmation of the Plan was scheduled for September 8, 1999. On August 31, 1999 the Court of Appeals granted the FCC's motion for a stay of the confirmation hearing pending appeal.

On December 16, 1999, NextWave filed modifications to the Plan, providing, *inter alia*, that the debtors would pay all unsecured creditors and the FCC *in full*, regardless of the outcome of the appeal pending in the Circuit Court. The confirmation hearing on NextWave's modified Plan was further adjourned, ultimately to January 21, 2000.

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[3] In *NextWave II* this Court concluded that, at the close of the C block auctions, NextWave did not incur a *liability* for its $4.74 billion aggregate winning bids—it incurred a *contingent liability*, necessarily less than $4.7 billion, for penalties including the difference between NextWave's winning bids and the winning bids in a subsequent reauction of the C Licenses. Thus, if the C Licenses had been reauctioned for $4.74 billion or more, the contingent liability could have been reduced to less than 5% of $4.74 billion. Moreover, the issue in the fraudulent conveyance proceeding did not concern a hypothetical, unquantifiable and non-existent contingent liability for penalties; it concerned the value of the consideration actually received by NextWave (the C Licenses) in exchange for its actual cash payments and Notes issued in February 1997 aggregating $4.74 billion.

Seeking to persuade the FCC to reach an agreement, NextWave's President wrote to the FCC Chairman on December 29 explaining that under its modified Plan NextWave would pay the FCC, at confirmation, "an amount equal to all principal and interest accrued to date, plus any applicable late payment fees," and thereafter NextWave "would resume quarterly payments of its $4.3 billion principal and over $1.5 billion interest obligation in accordance with the Commission's schedules, lasting through the Company's PCS license term" (NextWave letter dated December 29, 1999 to the FCC Chairman, Exhibit A annexed to Bevel Declaration).

Continuing its negotiations with the FCC, by letter to the FCC Chairman dated January 11, 2000 and delivered on that date, NextWave proposed

> an arrangement under which NextWave would make a single lump sum payment at confirmation to satisfy its entire obligation [in excess of $4.3 billion] to the FCC. Accelerating all our payments in this manner would eliminate any future installment payments, and would provide the Commission with absolute assurance that it will never have to deal with the issue of collecting any additional license payments from NextWave.

Exhibit B to Bevel Declaration.

The January 12 Declaration

The FCC responded to NextWave's January 11 letter by issuing the January 12 Declaration. This consisted of three documents, all dated and issued January 12: the FCC's formal objection to NextWave's Modified Plan; a news release bearing the headline "FCC In-

forms Court That NextWave Licenses Have Cancelled and Sets Date for Auction;" and a Public Notice of "Auction of C and F Block Broad Band PCS Licenses" scheduled for July 26, 2000.

It is important to note that *at no time* prior to the January 12 Declaration did the FCC ever assert the position, or even intimate, that NextWave's C and F Licenses had automatically cancelled in late 1998 or early 1999 or at any other time on account of a default resulting from the passage of some ambiguous deadline for the payment of some unquantified amount in respect of the FCC's pre-petition claims against NextWave. To the contrary, the FCC made repeated declarations in judicial proceedings utterly inconsistent with the notion that NextWave's Licenses automatically cancelled in January 1999, and all three Federal courts which have issued rulings in these proceedings have done so upon the assumption that the licenses were not cancelled.[4]

The Alleged "Default"

The foundation of the January 12 Declaration of cancellation of the Licenses is a "default" by NextWave in its installment obligations under the Notes. The threshold question is whether there was a "default," in

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[4] For example, the Court of Appeals said:

> . . . [T]he FCC has not yet sought to take any action vis-a-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow. . . . It is possible that if the FCC chooses to pursue some of these options—say, collection on the notes—it may find itself acting as a creditor. (200 F.3d at 59 n.15).

the sense of a legal breach of duty having enforceable legal consequences, as distinguished from a "default" in the colloquial sense of failure to pay timely under some legally suspended, superceded or otherwise unenforceable obligation.

It is, of course, true that there has been a delay in payment of principal and interest under the Notes, and that delay will persist until the debtors' Plan becomes effective, if it ever does. It is also true that past due installments, interest and penalties have not been waived or forgiven and will have to be paid, or the Licenses ultimately will be cancelled. But it does not follow that NextWave's failure to pay timely under the terms of the Notes or the FCC regulations constituted a legal "default" triggering forfeiture of the Licenses.

The alleged "default" is phantom for two quite different reasons.

First, the retroactive declaration of forfeiture for failure to pay an unquantified and possibly unquantifiable amount, within an unspecified and possibly undeterminable deadline, with no prior notice and therefore no opportunity to comply with the obligation (whatever the obligation was) raises serious questions of Constitutional deprivation of property without due process of law. The existence of a default here depends upon an interpretation of the FCC's regulations, because all payments by C and F block licensees were suspended by FCC orders in March and April 1997. As shown in Appendix A to this decision, the FCC regulations concerning resumption of payment obligations are numerous, complex and confusing both as to payment deadlines and amounts due. It appears that the FCC itself is incapable of determining even now, long after the fact,

either the date(s) of NextWave's default(s) or the amount(s) then due. It is offensive to due process to make a retroactive declaration of cancellation of property rights based upon a "default" more than a year ago which cannot be identified either as to date or amount due, of which the debtors had no fair notice and no opportunity to cure.

Transcendent considerations of fairness and due process, as expressed in the very statute that governs the FCC, compel the conclusion that the FCC cannot summarily eviscerate the debtors' estate on the basis of a purported "regulatory default." The FCA requires notice and an opportunity to be heard where violations touching its regulatory purview warrant the revocation or suspension of a license. *See* 47 U.S.C. § 312 ("Administrative Sanctions"—requiring the FCC to serve an order to show cause on thirty days' notice for station license revocation procedures or cease and desist orders) and 47 U.S.C. § 303 ("Powers of the Commission"—requiring fifteen days' notice and opportunity to request a hearing for actions taken to suspend an operator's license). The Bankruptcy Code also requires, as an element of basic fairness and due process, notice, a hearing and court approval before actions impacting vital interests may be taken. The FCC's reliance upon a purported "regulatory" default, itself premised upon constantly shifting and sometimes inconsistent agency interpretations, only exacerbates the fundamental unfairness of its action. Deprivation of property by agency fiat, without any procedural or due process safeguards, cannot be countenanced.

Second, the debtors' failure to make post-petition payments on the Notes cannot be deemed a legal

"default" triggering a forfeiture of the Licenses because such payments were prohibited under the Bankruptcy Code. Even if the FCC regulations suspending the 1997 suspension orders clearly and unambiguously specified payment deadlines and amounts due for C and F block licensees, the payment obligations thus identified were necessarily suspended for the NextWave debtors upon their filing petitions under Chapter 11 on June 8, 1998. As shown in point II, below, the Bankruptcy Code prohibits a debtor from making payments on pre-petition claims to a select creditor or creditors. With exceptions not here applicable, under Section 363 and other provisions of the Code the debtors' property can be used to pay pre-petition claims only pursuant to court order or in the context of a confirmed plan of reorganization. Since a Chapter 11 debtor is precluded from making post-petition payments on a pre-petition claim, NextWave's failure to make payments on the Notes in accordance with a time schedule set by the Notes or by the FCC regulations cannot be deemed a legal "default" triggering automatic cancellation of the Licenses.

The Alleged "Automatic" Cancellation

The FCC's authority for automatic cancellation is 47 C.F.R. § 1.2110(f)(4)(iv), which provides:

> (iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day nondelinquency period and subsequent automatic grace period, if such a grace period is available, *will be declared in default*, its license will automatically cancel, and will be subject to debt collection procedures. (emphasis supplied)

Under the regulation, a "default" must "be declared" before "automatic" cancellation can occur.

The FCC argued that, despite the language "will be declared in default," it was incumbent on the debtors, before a "default" occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The history of this regulation indicates otherwise. As originally promulgated in 1994, the default and cancellation provision read as follows:

> (4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.
>
> (i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.
>
> (ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction buildout requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise

> approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.
>
> (iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O.

59 FR 44272-01 at 44298 (Implementation of Section 309(j) of the Communications Act—Competitive Bidding, August 26, 1994) (emphasis supplied). As originally promulgated, it was indeed up to the licensee to actively request a grace period, and there was no requirement that a default be "declared." But this language was changed to the now applicable "will be declared in default." The FCC never declared a default.

The FCC has argued that the "automatic" cancellation provision is analogous to the regulations in *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989) and *In re Yellow Cab Co-op. Ass'n*, 132 F.3d 591 (10th Cir. 1997), where cancellation involved no action and no exercise of judgment or discretion on the part of the administrative agency. The licenses for airport landing slots in *Gull Air* and taxicab medallions in *Yellow Cab*, by their terms, depended for their continued existence on actual utilization of the landing slots and taxicab medallions and lapsed when no longer used. Thus, termination of the licenses took place with no act, declaration, judgment or discretion exercised or exercisable by the regulatory agency.

The facts are quite different here. Cancellation in this case is not predicated on a "use it or lose it" requirement, but upon delay in payment. The regulation involved requires the FCC to do something (declare a default), and the FCC has the power, in its sole judgment and discretion, to suspend, reinstate and repeatedly change deadlines for payment of C and F block spectrum licenses, both generally and for specific licensees, and to waive payment defaults, and it has repeatedly exercised that power, all as documented in Appendix A.

Moreover, even if the regulation did not require a declaration of default and the FCC did not have discretion to suspend, reinstate, extend and waive payment deadlines, it is still not accurate to say that cancellation is truly "automatic." This is so because, in the real world, unless and until the FCC takes some affirmative action to assert dominion over the licenses of a defaulting licensee, life will go on as before and the parties (including the FCC) will go on spending millions of dollars in litigation costs, DIP lenders will continue lending millions of dollars secured by the licenses, the licensee will continue to expend money in preparation to build out its PCS systems and the courts will continue to expend countless hours of judicial resources, all on the assumption that the licenses have not cancelled. And that is exactly what happened in this case.

Finally, it is not true that no agency discretion is involved in the cancellation. The Restructuring Orders themselves are replete with agency considerations justifying decisions to either extend or refuse to extend the automatic grace periods. If the FCC has sufficient discretion to suspend payments, extend grace periods

and grant waivers in the cases of individual licensees, then the contention that the automatic cancellation provision involves no agency discretion is untenable. The very timing of the January 12 Declaration shows a calculated act designed to divest the debtors of the Licenses immediately after the January 11 letter, and before the January 21 confirmation hearing. The cancellation may be "automatic," but it must nevertheless be invoked. It is that invocation, on January 12, 2000, which is the subject of the debtors' motion.

Discussion

I. ***The FCC's January 12 Declaration violated the Bankruptcy Code.***

The FCA does not preempt the Bankruptcy Code.[5] One cannot point to any language in the FCA that expressly or impliedly purports to limit, abridge or affect the Code insofar as it would apply to the FCC as a creditor. Before turning to the FCC's arguments in opposition, we shall examine the Bankruptcy Code implications of the January 12 Declaration.

A. ***The automatic stay***

The automatic stay provided for in Section 362(a) of the Bankruptcy Code is one of the statutory cornerstones of the bankruptcy and reorganization process. It ensures (i) that the assets of a debtor's estate remain intact for adjudication by the Bankruptcy Court and (ii) equality of distribution to creditors in accordance with the priority and distribution scheme of the Code."[6] *See*

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[5] "The FCC makes no claim that the FCA supercedes the Bankruptcy Code." FCC Memorandum in Opposition at 11 ftn. 3.

[6] The legislative history states:

e.g., *In re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540, 1545 (2d Cir. 1989) (Bankruptcy Code "requires that all creditors, both public and private, be subject to the automatic stay"), *cert. denied sub nom.*, *Suffolk County Treasurer v. Barr*, 493 U.S. 1058, 110 S. Ct. 869, 107 L. Ed. 2d 953 (1990). It also ensures that contractual and State or Federal law rights and remedies such as acceleration, forfeiture, imposition of judgment liens and foreclosure will be precluded, held in abeyance or in some cases "cured" and thereby reversed, in order that the ultimate objective of reorganization in Chapter 11 or Chapter 13 for the benefit of all creditors will not be thwarted by the action of a single creditor. *In re Monroe Park*, 18 B.R. 790, 791 (Bankr. D. De1. 1982) ("It is clear that Congress intended a financially troubled debtor to be able to reorganize after there has been a default and acceleration even in the face of state law which requires the consent of the creditor for cure and reinstatement once the entire amount has become due.") *See* point I B, below. As noted in *Collier on Bankruptcy*:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), U.S. Code Cong. & Admin. News p. 6296, reprinted in Collier on Bankruptcy App. Pt. 4(d)(i); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), U.S. Code Cong. & Admin. News pp. 5840-5841, reprinted in Collier on Bankruptcy App. Pt. 4(e)(i).

> In reorganization cases, the stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization. Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations. Secured creditors and judgment creditors might race to seize and sell the debtor's assets in order to obtain satisfaction of their claims, without regard to the interests of other creditors or the value of keeping assets together in an operating business. The stay prevents this piecemeal liquidation, offering the chance to maximize the value of the business.

3 *Collier on Bankruptcy* ¶ 362.03[2] at pp. 362-15 (15th Ed. rev. 1999).

The courts in this Circuit hold that any action taken in violation of the automatic stay is void and without force or effect. *48th Street Steakhouse, Inc. v. Rockefeller Group, Inc.* (*In re 48th Street Steakhouse, Inc.*), 835 F.2d 427, 431 (2d Cir. 1987) ("actions taken in violation of the stay are void and without effect" (quoting *Collier on Bankruptcy*)), *cert. denied*, 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988). *See also Shimer v. Fugazy Express, Inc.* (*In re Fugazy Express, Inc.*), 114 B.R. 865, 873 (Bankr. S.D.N.Y. 1990) ("[s]ince § 362 of the Code stays all enforcement activity automatically, the 1988 FCC letter [purportedly canceling the license] is accordingly without effect" (citing *In re Garrett*, 47 B.R. 170, 171 (Bankr. E.D.N.Y. 1985) ("[t]he action of a party in violation of the stay without court approval is

void and without effect"))), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991).

The automatic stay is embodied in 11 U.S.C. § 362(a). Section 362(a) provides as follows, in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301 . . . of this title . . . operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation . . . of a[n] . . . administrative, or other action or proceeding against the debtor . . . to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > * * *
> >
> > (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> >
> > (4) any act to . . . enforce any lien against property of the estate;
> >
> > (5) any act to . . . 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 under this title;
> >
> > (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

All of the quoted subsections of Section 362(a) are implicated by the FCC's issuance of the January 12

Declaration. There can be no question that the FCC's act is claim-based—the January 12 Declaration of cancellation was explicitly and exclusively predicated upon NextWave's failure to make timely payment of installments due post-petition on the FCC's prepetition claim under the Notes. There can be no doubt that the Licenses constitute "property of the estate" under Section 541 of the Bankruptcy Code.[7] The January 12

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[7] The FCC has never argued that the licenses are not property of the estate. Section 541 is broadly construed to encompass all conceivable interests of the debtor in property, *United States* v. *Whiting Pools*, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515 (1983). Although the Circuit Court Decision stated in different context that a license "does not convey a property right" in the traditional sense (200 F.3d at 51), the law is clear that possessory and intangible interests in general and FCC licenses in particular do constitute property of the estate in bankruptcy. *See e.g.*, *In re Central Arkansas Broadcasting Company*, 68 F.3d 213, 214 (8th Cir. 1995) (interests of debtor in FCC license property of the estate); *In re Tak Communications Inc.*, 985 F.2d 916 (7th Cir. 1993) (same); *In re PBR Communications Systems, Inc.*, 172 B.R. 132, 134 (Bankr. S.D. Fla. 1994) (same); *In re Ridgely Communications, Inc.*, 139 B.R. 374 (Bankr. D. Md. 1992) (same); *Shimer* v. *Fugazy Express, Inc.* (*In re Fugazy Express, Inc.*), 114 B.R. 865, 870-71 (Bankr. S.D.N.Y. 1990), *aff'd*, 124 B.R. 426 (S.D.N.Y. 1991) (same). Upon the grant of the licenses, the debtors were required to execute not only the Notes but security agreements giving the FCC "a first lien on and continuing security interest in all of the Debtor's rights and interests in the License and all proceeds, profits and products of any sale of or other disposition thereof. . . ." The FCC filed UCC financing statements in several jurisdictions, putting the world on notice of its security interest in the licenses. A "security interest" is an "interest in property obtained pursuant to a security agreement." *Black's Law Dictionary* (6th ed. 1990) at 1357. Uniform Commercial Code § 1-201(37) provides "'Security Interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."

Declaration implicates subsections (1) and (6), and it unarguably violated subsections (3), (4) and (5).

Accordingly, the January 12 Declaration was void.

B. *The right to cure defaults and reinstate obligations to avoid forfeiture and facilitate reorganization*

One of the essential objectives of the automatic stay under Section 362(a) is to avoid the effective nullification of other provisions of the Bankruptcy Code designed to facilitate the central Code objective of reorganization, including the right to cure defaults under Sections 1123(a)(5)(G) and 1124(2)(A). Section 1123(a)(5)(G) provides that "a plan shall . . . (5) provide adequate means for the plan's implementation, such as . . . (G) curing or waiving any default." Section 1124(2)(A) expressly contemplates a plan which "(A) cures any such default that occurred before or after the commencement of the case under this title," and this applies "(2) notwithstanding any contractual provision *or applicable law* that entitles" a creditor to demand or receive accelerated payment.

Thus, even if there was a default in the "timely" payment of installments under the Notes, the Bankruptcy Code explicitly provides for the right to cure the default and reinstate the obligation. The "cure," although not defined, is "reversal" of the event that triggered the default and a return to a pre-default status quo. *DiPierro v. Taddeo (In re Taddeo*), 685 F.2d 24, 26-27 (2d Cir. 1982); *In re Liberty Warehouse Assocs. Ltd. Partnership*, 220 B.R. 546, 548 (Bankr. S.D.N.Y. 1998) ("Under § 1124(2), a debtor can cure its prepetition default under a note or other debt instrument").

As concisely stated by the Second Circuit, "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified." *Taddeo*, 685 F.2d at 27.

Although *Taddeo* was a Chapter 13 case, its holding applies with equal force in the Chapter 11 context, as the language in both Chapters is substantially similar. *Compare* 11 U.S.C. § 1322(b)(5) (stating that a chapter 13 plan may "provide for the curing of any default within a reasonable time. . . .") *with* 11 U.S.C. § 1123(a)(5) (quoted above) *and* 11 U.S.C. § 1124(2)(A) (quoted above) *and* 11 U.S.C. § 1222(B)(5) (stating that a plan may "provide for the curing of any default within a reasonable time. . . ."). Furthermore, the concept of "cure" and/or reinstatement appears throughout the Bankruptcy Code and is globally intended to permit a debtor to put the debt in question back on track and effect a reorganization. *See* 11 U.S.C. §§ 365(b)(1),[8] 1110(a)(1)(B),[9] 1168(a)(1)(B),[10] and the sections cited and quoted above. This concept and the intent behind it is borne out by the legislative history to Section 1124(2), which states that

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[8] Providing that if there has been a default in an executory contract or unexpired lease, in order to be assumed, the trustee must "cure[] or provide[] adequate assurance that the trustee will promptly cure, such default."

[9] Allowing secured party to take possession of aircraft equipment and vessels unless a default under the security agreement, lease or contract is cured.

[10] Allowing secured party to take possession of rolling stock or accessories thereto unless a default under the security agreement, lease or contract is cured.

> *a claim or interest is unimpaired by curing the effect of a default and reinstating the original terms of an obligation when maturity was brought on or accelerated by the default. The intervention of bankruptcy and the defaults represent a temporary crisis which the plan of reorganization is intended to clear away. The holder of a claim or interest who under the plan is restored to his original position, when others receive less or get nothing at all, is fortunate indeed and has no cause to complain.* Curing of the default and the assumption of the debt in accordance with its terms is an important reorganization technique for dealing with a particular class of claims, especially secured claims.

S. Rep. No. 989, 95th Cong., 2d Sess. 120 (1978), U.S. Code Cong. & Admin. News p. 5906 (emphasis supplied). "In short, 'curing a default' in Chapter 11 means . . . the event of default is remedied and the consequences are nullified." *Taddeo*, 685 F.2d at 29.

No more dramatic exemplar of the rehabilitative objectives of the "cure" provisions of the Bankruptcy Code could be imagined than this very case. NextWave has proposed in its Modified Plan to pay upon confirmation all amounts accrued and owing to the FCC through the date of confirmation (including installment payments, interest, late charges and penalties), reinstate the payment schedule initially agreed to with the FCC and specified in the Notes, and pay all unsecured creditors, *in full*. If the statutory right to cure were not honored and the FCC were permitted to reclaim NextWave's licenses by retroactive forfeiture, the result would be economic catastrophe for the holders of $627 million of secured and unsecured debts and the

probable destruction of any value in NextWave for equity holders who invested $420 million. The FCC itself would forfeit for the public full payment of the entire $4.7 billion bid by NextWave for the C Licenses, plus interest and late fees. Perhaps the FCC speculates it may achieve a greater financial return for the public in the scheduled July 26 auction of NextWave's licenses, but that is an equation expressly forbidden by the governing statute, FCA § 309(j)(7)(A), discussed in point IV, below.

C. *The prohibition against discriminatory treatment*

For this Court to give legal effect to retroactive cancellation of the Licenses would effectively validate the functional equivalent of an *ipso facto* provision (also referred to as a bankruptcy default provision), which serves to inflict a penalty or forfeiture on a debtor for exercising a Federal right. *Taylor v. Albany Employees Federal Credit Union* (*In re Taylor*), 146 B.R. 41, 46-47 (M.D. Ga. 1992) (holding *ipso facto* clauses invalid as a matter of law because they serve to penalize debtors from exercising their federal right to file for bankruptcy), *rev'd on other grounds*, 3 F.3d 1512 (11th Cir. 1993); *Riggs Nat'l Bank of Washington, D.C. v. Perry* (*In re Perry*), 29 B.R. 787, 790-91 (D. Md. 1983) (holding that *ipso facto* clauses are unenforceable as a matter of law because they unfairly tip the scale in favor of creditors by effectively granting automatic relief from the automatic stay), *aff'd*, 729 F.2d 982 (4th Cir. 1984); *General Motors Acceptance Corp. v. Rose* (*In re Rose*), 21 B.R. 272, 275-79 (Bankr. D.N.J. 1982) ("Enforceability of these clauses would, in effect, render a penalty on debtors." *Id.* at 277). *See also* 7

Collier on Bankruptcy ¶ 1124.03[2] at p. 1124-10 (15th Ed. rev. 1999) (stating that Section 1124(a)(2) of the Bankruptcy Code "permits the plan to reinstate the maturity of a claim or interest without curing any defaults with respect to the financial condition of the debtor that are included in the Section 365(b)(2)(A) *ipso facto* clauses. This interpretation of Section 1124(a) is correct").

Section 525(a) of the Bankruptcy Code is a statutory companion of the foregoing principle. Section 525(a) prohibits a governmental unit from revoking a license in retaliation for commencement or prosecution of a bankruptcy case or the alleged nonpayment of a pre-petition claim. The statute provides, in relevant part:

> (a) Except as provided in [not applicable], a governmental unit may not deny, revoke, suspend or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title . . . or another person with whom such debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title . . . or has not paid a debt that is dischargeable in the case under this title. . . .

See, e.g., *In re Bill*, 90 B.R. 651, 658 (Bankr. D.N.J. 1988) (suspending driver's license for failure to pay surcharge violated § 525); *In re The Bible Speaks*, 69 B.R. 368, 373 (Bankr. D. Mass. 1987).[11] It is well recog-

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[11] Stating that:

> It is not consistent with the statute to permit the Board to act based upon a Chapter 11 school's insolvency merely because it

nized that "[t]he prohibition against discrimination based upon the filing of a bankruptcy case necessarily extends to discrimination based upon automatic or likely consequences of such filing." 4 *Collier on Bankruptcy* ¶ 525.02[1] at pp. 525-7.

It appears that the FCC has violated Section 525 in its attempt to retroactively cancel the Licenses. The apparent discrimination is alleged in two forms.

One form is the alleged differences in treatment of NextWave, on the one hand, and other C block and other spectrum license holders, on the other, summarized in the submission of debtors' counsel. To establish this form of discrimination would require discovery proceedings and an evidentiary hearing to afford both sides procedural due process.

The other form of discrimination appears from the facts which are before the Court. After a year of intense litigation the FCC has been vindicated in the Court of Appeals in its contention that a regulatory purpose was implicit in the "full payment requirement" in the FCC regulations. That regulatory objective is fulfilled in the debtors' modified Plan now awaiting a confirmation hearing. It would have been more than fully served under the NextWave proposal of January

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> takes such action with respect to all schools who are insolvent, whether they are inside or outside of bankruptcy. Such an interpretation preserves the "fresh start" policy of the Bankruptcy Code. It prevents the Debtor's present financial difficulties from being the charter for his future. It also promotes the policy of allowing the Debtor breathing room and a respite from outside pressure.

The Bible Speaks, 69 B.R. at 373 (footnote omitted).

11 to pay the entire $4.3 billion outstanding obligation in a lump sum upon confirmation, rather than in installments over the next seven years. As further amplified under point IV, below, the FCC has not and cannot articulate any regulatory interest entailed in the "timely payment" requirement for the modest delay in interest and installment payments to date. The "timely payment" requirement is purely economic (*i.e.*, the time value of money), and the economic consequence of delay will be fully cured by payment in full of all applicable interest, penalties and late fees upon confirmation under the debtor's modified Plan, if the Plan is ever allowed to reach a confirmation hearing and is confirmed.

Lacking any comprehensible regulatory objective, one must consider the consequences of the FCC's January 12 Declaration. As stated by the FCC in its Objection to confirmation, reorganization of NextWave without the Licenses would be impossible, and the debtors' assets would likely be liquidated and sold in Chapter 7. Equity investors could suffer a total loss on their investments aggregating $420 million. Secured and unsecured debt aggregating $627 million might recover a small percentage. The FCC (or rather, the public fisc) may also suffer economically, perhaps severely. The proposed July 26, 2000 reauction of NextWave's C and F Licenses will be open only to "designated entities" qualified to bid for C and F block spectrum under the FCC's regulations. Designated entities are by definition start-up, entrepreneurial entities and regional telephone companies lacking the financial resources of the major players in the wireless market, such as AT & T, Sprint and Nextel. In the 1999 reauction of predominantly C block spectrum, 34

licenses received no bids, and the rest were sold at values equating to a small fraction of the approximately $4.7 billion plus interest and late fees to be paid by NextWave under its modified Plan.

Finally, one of the important statutory objectives of FCA § 309(j), rapid deployment and utilization of C and F block spectrum by designated entities, would be undermined by cancellation and reauction of the Licenses. Judging by the C, D, E and F block auctions, it is highly unlikely that licenses auctioned beginning on July 26, 2000 would result in final grant of the Licenses to the high bidders before winter or spring 2001, at which time the designated entity licensees would have to raise the necessary funding to begin building out their PCS systems. NextWave is a designated entity. It was awarded the Licenses in January 1997. It represents that it has already developed the necessary infrastructure to a considerable degree. It is prepared to put the Licenses into use almost immediately. And all this must be considered in light of the fact that PCS and wireless telephony [*sic*] is developing at lightning speed, such that another year's delay is of great significance.

These facts would appear to present a clear and convincing *prima facie* case of retaliation in violation of Section 525. However, I am reluctant to make a finding that an agency of the United States Government has acted with *mala fides* in the conduct of its statutory duties without giving the FCC a further opportunity to present evidence and argument in support of a good faith, non-retaliatory explanation for its actions and, correspondingly, counsel for NextWave an opportunity to examine into the Agency's motivation through ap-

propriate discovery. Accordingly, I shall not rule upon the debtors' argument under Section 525. In the hope that a ruling may be rendered unnecessary by the course of events, I shall order the parties to desist from further proceedings in respect of Section 525 until one side or the other makes an appropriate request on the record, either orally or in writing, to reopen the issue.

D. ***The FCC's bankruptcy law contentions***

The FCC's contention that the January 12 Declaration did not constitute an "act" violating the automatic stay within the meaning of subsections (3), (4) and (5) of Section 362(a) because the cancellation was "automatic" as of late 1988 or January 1999 does not withstand analysis. As already explained, even if the cancellation were truly "automatic" it would mean nothing unless the FCC did something to "exercise control over," or "enforce [its] lien against" the Licenses. Until the FCC took an affirmative "act" with respect to the Licenses —the January 12 Declaration—no one even knew of the putative cancellation, and all parties (including the FCC) and all three Federal courts proceeded upon the assumption that the Licenses were the property of the NextWave estate. The FCC's argument is too facile. A first-time act of dominion over property of the debtors' estate cannot be exempted from the operation of Section 362(a) by an expedient, post hoc assertion that no present act occurred because it all happened "automatically" more than a year ago.

The automatic stay is broadly written and broadly construed. Section 362(a)(3), (4) and (5) stay "any act" to obtain possession of, exercise control over, or enforce a lien against, property of the estate. *Delpit v. Commissioner of Internal Revenue Service*, 18 F.3d 768, 771

(9th Cir. 1994) ("[s]ection 362 'is exceedingly broad in scope' and 'should apply to almost any type of formal or informal action against the debtor or the property of the estate'" (quoting *Collier on Bankruptcy*)). There is no dispute that it applies to the Federal government and its agencies, such as the IRS and the FCC. *Fugazy Express*, 114 B.R. at 872-73 ("at the time of the filing the License was property of the Debtor's estate and had remained so. The FCC was subject to the automatic stay and precluded from rendering any administrative cancellation of the License once the Debtor filed a petition in bankruptcy. . . . Thus, the License remained property of the estate, even though administratively it became subject to cancellation." *id.* at 873).

Contrary to the FCC's arguments (and the *Gull Air* and *Yellow Cab* decisions, discussed above), there is substantial authority holding that regulatory provisions which interfere with property of a debtor's estate, even by "automatic" operation of the regulation, violate the automatic stay. *See*, *In re American Central Airlines, Inc.*, 52 B.R. 567, 569-571 (Bankr. N.D. Iowa 1985) (stating that, with respect to administrative action to reallocate FAA landing slots, "[t]he mere fact that an interest exists by the grace of government no longer precludes the interest from being treated as a property right," *id.* at 571, and holding that "any act to enforce this [use it or lose it] contractual provision against the Debtor's will constitutes an act to obtain possession of property of the estate and an attempt to exercise control over property of the estate," *id.* at 570, and an "unlawful act" in violation of 11 U.S.C. § 362(a)(3), *id.* at 571). "[R]egulatory provisions in direct conflict with control of the property [of the debtor's estate] by the Bankruptcy Court violate the automatic stay." *In re*

National Cattle Congress, Inc., 179 B.R. 588, 597 (Bankr. N.D. Iowa 1995) (citing *MCorp. Financial Inc. v. Board of Governors of Federal Reserve System*, 502 U.S. 32, 39, 112 S. Ct. 459, 116 L.Ed.2d 358 (1991) and *Missouri v. U.S. Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 479 U.S. 910, 107 S. Ct. 307, 93 L.Ed.2d 282 (1986)), *remanded on other grounds*, 91 F.3d 1113 (1996). Under this authority, an FCC regulation effecting automatic cancellation of a debtor's property rights by reason of any default would itself violate the automatic stay.

Furthermore, the term "act" as employed in Section 362 must be broadly construed to include the failure to stop actions that could have been stopped. 3 *Collier on Bankruptcy* ¶ 362.03[8] at 362-63 (15th Ed. rev. 1999); *see In re Hellums*, 772 F.2d 379 (7th Cir. 1985); *In re Sucre*, 226 B.R. 340, 347 (Bankr. S.D.N.Y. 1998) (creditor has affirmative duty to discontinue garnishment action). The FCC certainly had the discretionary authority to take any number of actions to avert or delay the purported automatic cancellation (see discussion under the heading The Alleged "Automatic" Cancellation, above), including simply not issuing the January 12 Declaration. The FCC's decision to issue the January 12 Declaration was not "automatic."

And, as already noted, but for the FCC's affirmative act in issuing the January 12 Declaration, all parties and the Courts would have proceeded, as they have throughout these proceedings, upon the assumption that the Licenses were not cancelled and remained the property of NextWave. Thus, in the real world it did require an "act" to give effect to the putative automatic cancellation, and that act violated the automatic stay.

Finally, it cannot be overemphasized that the FCC itself has repeatedly acknowledged that the automatic stay applies to the automatic cancellation provisions of its regulations, and that the automatic stay precludes automatic cancellation in the absence of an order of the Bankruptcy Court lifting the stay. No better evidence of this can be found than in the motion to lift the automatic stay which the FCC actually did make in late May 1999, and which was the subject of *NextWave V*. The Memorandum of Law in support of the FCC's Motion to Lift Automatic Stay, dated May 28, 1999, expressly acknowledged that the automatic stay "is currently in place pursuant to 11 U.S.C. § 362(a)" (p. 1) and continued:

> Accordingly, the FCC respectfully submits that "cause" exists under section 362(b)(1) for the Court to lift the automatic stay *so that* the regulations' *automatic cancellation* provisions *may take effect.*

Id. at 2; emphasis supplied. The concluding lines in the FCC's Memorandum state:

> For the reasons stated above, the Court should grant the FCC's motion to lift the automatic stay *so that the Licenses may cancel automatically*.

Id. at 4; emphasis supplied.[12]

The FCC was correct in May 1999—Section 362(a) does indeed require a court order lifting the automatic stay before the "automatic cancellation provisions may take effect . . . so that the Licenses may cancel automatically." No such order was granted in June 1999, and none was sought prior to the January 12 Declaration. Both the January 12 Declaration and the purported automatic retroactive cancellation of the Licenses are violations of the automatic stay.

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[12] For other judicial acknowledgments by the FCC that a motion would be necessary to revoke or cancel NextWave's Licenses, *see*, *e.g.*:

- FCC Memorandum dated in May 1998 in support of motion to disqualify NextWave's counsel, at page 21, footnote 5, referring to "any motion by the FCC to lift the automatic stay for the purposes of revoking NextWave's C block licenses."
- Statements by FCC counsel in arguments before District Judge Parker on November 9, 1998: "During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission" (Tr. 5), and before this Court on November 12, 1998 "The regulations provide that upon failure to make the payments the license is automatically cancelled. *That hasn't (happened) in this case due to the automatic stay*" (Tr. 30, emphasis supplied).
- With respect to the F block licenses, statement by FCC counsel on May 26, 1999 before this Court "There is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses. As I understand it, they can comply with their payment obligations, they may well be in a position to reorganize around their F-block property" (Tr. 17).

The FCC's contention that its action was somehow shielded under the "governmental" exception to the automatic stay found in Section 362(b)(4) is not well-founded. Section 362(b)(4) provides:

> (b) The filing of a petition under . . . , does not operate as a stay—
>
> (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

In interpreting this recently amended provision's exception of the automatic stay to a governmental exercise of "police and regulatory" power, case law developed under former Sections 362(b)(4) and (5) remains as viable guidance. *In re Mohawk Greenfield Motel Corp.*, 239 B.R. 1, 5 at n.6 (Bankr. D. Mass. 1999) citing 3 *Collier on Bankruptcy* ¶ 362.05[5][b] (16th Ed. 1999) and 2 Norton Bankruptcy Law and Practice 2d § 36.18 (1999).

The legislative history of Section 362(b)(4) is instructive as to the meaning of "police and legislative power." The House Report on the 1978 Reform Act states:

> paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to

> prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws or attempting to fix damages for violation of such law, the action or proceeding is not stayed under the automatic stay.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 343 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 51-52, reprinted in 1978 U.S.C.C.A.N. 5787, 5838, 5963, 6299. Representative Edwards' and Senator DeConcini's comments further clarify that Section 362(b)(4) must "... be given a narrow construction ... and not ... apply to actions by a governmental unit *to protect a pecuniary interest in property of the debtor or property of the estate*." P. L. 95-598, 1978 U.S.C.C.A.N. 5787, 6444-45, 6513. (emphasis supplied)

Thus, the test to determine if this narrow exception applies is whether the governmental action is in pursuance of a pecuniary purpose or public policy. *In re Dunbar*, 235 B.R. 465, 471 (9th Cir. BAP 1999). Under the pecuniary purpose test, Section 362(b)(4) will not except the automatic stay where "government action relates 'primarily to the protection of the government's pecuniary interest in the debtor's property' ... pursued 'solely to advance a pecuniary interest of the governmental unit.'" *Id.* citing *Universal Life Church, Inc.*, 128 F.3d 1294, 1297, 1299 (9th Cir. 1997), *cert. denied*, 524 U.S. 952, 118 S. Ct. 2367, 141 L. Ed. 2d 736 (1998). The public policy test, however, examines whether the governmental action is in furtherance of matters of public policy or merely the adjudication of private rights as between the government and the debtor. *In re Dunbar*, 235 B.R. at 471. ("Where the agency's action affects only the parties immediately

involved in the proceedings, it is exercising a judicial function and the debtor is entitled to the same protection from the automatic stay as if the proceeding were being conducted in a judicial forum."). *See also*, *In re Fugazy Express, Inc.*, 124 B.R. 426 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992) (retroactive cancellation of license by FCC not shielded by Section 362(b)(4) since action did not impact the health or safety of the public).

Section 362(b)(4) is not applicable here. The FCC's action is nothing other than a direct attempt to enforce its pecuniary interests. The stated premise of the FCC's action is the debtors' post-petition payment default. The FCC has attempted to exercise a self-help remedy for a purely financial default under the guise of a regulatory act. As noted by the Second Circuit in *Fugazy*, which also dealt with a purported FCC automatic retroactive cancellation:

> Nothing in the Code suggests that a party is entitled to engage in "self-help" in derogation of the automatic stay. *See In re Computer Communications, Inc.*, 824 F.2d 725, 731 (9th Cir. 1987) ("Judicial toleration of an alternative procedure of self-help and post hoc justification would defeat the purpose of the automatic stay").

In re Fugazy Express, Inc., 982 F.2d at 776.

The FCC acted as a creditor, and as discussed elsewhere in this decision, not in any regulatory capacity. Thus, the FCC's citations to *In re Gull Air, Inc.*, *supra*, and *In re Yellow Cab Co-op. Ass'n*, *supra*, are unpersuasive because these cases consider issues pertaining

to regulatory non-use conditions, not vindication of the government's pecuniary interest.

II. *There can be no "default" for failure to make a payment precluded under the Bankruptcy Code*

At the core of this matter is the FCC's attempt to invoke a self-help remedy for the debtors' post-petition default on a pre-petition claim. The petition date is June 8, 1998. The January 12 Declaration recites "delinquencies" in payment more than 90 days from July 31, 1998, delinquencies clearly falling within the post-petition period and clearly arising from the January 3, 1997 Notes. "A claim is not rendered a post-petition claim simply by the fact that time for payment is triggered by an event that happens after filing of the petition." *In re Oxford Management, Inc.*, 4 F.3d 1329, 1335 n.7 (5th Cir. 1993).

Any notion of a legally cognizable "default" presupposes that the debtors could have lawfully made post-petition payments to the FCC in the first instance. As a matter of fundamental bankruptcy law, the debtors could not have made post-petition payments on account of this pre-petition claim absent an order of this Court, after notice and a hearing according due process to all affected parties. *See* 11 U.S.C. §§ 102(1) and 363.

Section 363(b)(1) authorizes the debtors, through application of Section 1107(a), to "use, sell, or lease, other than in the ordinary course of business, property of the estate," but only *after* notice and a hearing. "Section 363 is designed to strike [a] balance, allowing a business to continue its daily operations without excessive court or creditor oversight and protecting secured creditors and others from dissipation of the estate's

assets." *In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997) citing *In re Roth American*, 975 F.2d 949, 952 (3d Cir. 1992) and quoting *In re H & S Transportation Co., Inc.*, 115 B.R. 592, 599 (M.D. Tenn. 1990). Section 1108 authorizes the debtors to operate the business, and therefore Section 363(c)(1) allows the debtors "unless the court orders otherwise, . . . [to] enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and [to] use property of the estate in the ordinary course of business without notice or a hearing." *In re Lavigne*, 114 F.3d 379, 384 at n.3; 11 U.S.C. § 363(c)(1).

The debtors' business (recognizing that it is still a start-up company) is "to build and operate [PCS] systems in geographical areas referred to as Basic Trading Areas ('BTAs'), and to provide wireless Internet access and voice services to a broad range of distribution partners." *First Amended Disclosure Statement*, dated July 27, 1999 at 5. Courts commonly apply the "horizontal" and "vertical" test to determine whether a transaction is "ordinary." *See In re Lavigne*, 114 F.3d at 384. But neither test is apposite here. In no way could it have been the ordinary course of NextWave's business to make payments on the $4.7 billion pre-petition claim of the FCC post-petition, even if that claim had not been challenged as a fraudulent conveyance in a hotly contested adversary proceeding. Even ordinary course creditors (such as inventory or parts suppliers, utilities and the like) cannot be paid their pre-petition claims without a court order. It is fundamental in a Chapter 11 case that the pre-petition claims of all creditors, whether coming due pre- or post-petition, get paid only by court order or in accordance with a court-confirmed

plan of reorganization. As aptly expressed in *In re H & S Transportation Co., Inc.*:

> Thus, the authorization in § 363 that the trustee may use property of the estate in the "ordinary course of business" without notice or a hearing cannot be construed to permit payments that frustrate the theory and philosophy of the Bankruptcy Code. *Pressman v. Bank of St. Louis* (*In re J.T.L., Inc.*), 36 B.R. 860, 862 (Bankr. E.D. Mo. 1984). *See Employee Transfer Corp. v. Grigsby* (*In re White Motor Corp.*), 831 F.2d 106 (6th Cir. 1987) (does not authorize conversion of prepetition debt to postpetition debt); *Lopa v. Selgar Realty Corp.* (*In re Selgar Realty Corp.*), 85 B.R. 235, 240 (Bankr. E.D.N.Y. 1988) (does not authorize sale of primary asset without notice and hearing); . . . *J.T.L.*, 36 B.R. at 862 (does not authorize postpetition payment of interest on prepetition note). Rather, the Court must interpret whether payments were made in the "ordinary course of business" with sensitivity to the Code's overriding policy of maximizing the value of the debtor's estate for the benefit of the creditors.

115 B.R. at 599. Actions which violate Section 363 are "void," *In re Lavigne*, 114 F.3d at 385 (purported cancellation of policy was void as an extraordinary disposition of property of the estate without notice or hearing). Any unauthorized post-petition payments to the FCC on account of its pre-petition claim would be avoidable at the instance of the debtors or other creditors as an unauthorized post-petition transfer under Section 549. *See* 11 U.S.C. § 549(a)(1)(B) ("the trustee may avoid a transfer of property of the estate . . . that occurs after

the commencement of the case; and . . . that is not authorized under this title or by the court").

It is senseless to speak of a "default" when, as a matter of bankruptcy law, the debtors had neither the authority nor the ability to make such payments absent notice and court approval. This is not a case where the FCC is entitled to post-petition payments on the Notes because it has shown that it needs adequate protection of its lien, *see* 11 U.S.C. §§ 361 and 362(d)(1), or that the value of its lien is in any way impaired. The FCC can point to no provision of the Bankruptcy Code that accords it a right to "timely" payment of postpetition delinquencies, such as a commercial landlord may claim under Section 365(d)(3). The FCC must, like other creditors, go through the plan process and have its claim administered under the Bankruptcy Code. The FCC could have applied to this Court to compel NextWave to make post-petition payments. But it did not do so.

Indeed, had the FCC ever made the debtors aware that it stood ready to enforce cancellation of the debtors' principal assets, the debtors could have applied to this Court under Section 363, or possibly even Section 105 under the necessity of payment doctrine, or the debtors could have attempted to arrange DIP financing to pay the amounts and sought approval under Section 364. But the FCC never did so.

The protection due the FCC under the Bankruptcy Code exists in the debtors' Plan. The FCC will be paid in full, the putative "defaults" cured and nullified. No creditor can ask for better protection, in or out of

bankruptcy. The FCC cannot stand upon 97 C.F.R. § 1.2110(f)(4)(iv) to suborn Title 11:

> It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations. *See, e.g.*, *Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 n.** (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989) ("statutory language . . . prevail[s] over inconsistent regulatory language"); *Pacific Gas and Elec. Co. v. United States*, 664 F.2d 1133, 1136 (9th Cir. 1981) ("a regulation which operates to create a rule out of harmony with the statute, is a mere nullity") (citing *Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S. Ct. 397, 80 L.Ed. 528 (1936)); *United States v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981) ("Whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute applicable to those present here").

Furlow v. United States, 55 F. Supp. 2d 360, 364-65 (D. Md. 1999) (Treasury Department regulation impermissibly conflicting with 26 U.S.C. § 151).

There exists a host of protections, not only for the benefit of the debtors, but for the benefit of all constituent parties including the FCC, designed to ensure the rational, systematic and equitable reorganization of this estate. Self-help repossession by ambush is not one of them—it is repugnant to the very essence of the Bankruptcy Code.

III. *The January 12 Declaration of automatic cancellation is barred by the doctrines of equitable estoppel and waiver*

The January 12 Declaration and the FCC's position on this motion are confounded by the FCC's prior course of conduct and statements throughout these proceedings. Consider, for example, the following FCC quotations (emphasis supplied in each quotation):

- As early as July 13, 1998, the FCC argued: "The bankruptcy code also excepts from its automatic stay provisions 'the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.' 11 U.S.C. § 362(b)(4). *Under this provision, however, an agency's enforcement of a final regulatory order against a bankrupt is subject to the automatic stay, and the bankrupt retains its right to challenge any such order in the appropriate forum. See Board of Governors of the Federal Reserve Sys. v. MCorp Financial, Inc.*, 502 U.S. 32, 41, 44-45, 112 S. Ct. 459, 116 L.Ed.2d 358 (1991). Thus, despite the necessary dismissal of this adversary proceeding for lack of subject matter jurisdiction, *NextWave will still enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs. See NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992)."[13]

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[13] Memorandum of Law in Support of FCC's Motion for Mandatory Withdrawal of the Bankruptcy Court Reference and Dismissal of NextWave's Adversary Proceeding (Adversary Doc. No. 5) (the "Dismissal Memorandum") at 18 n.5.

- "Because the FCC provided certain confidential information to WG & M, WG & M should also be disqualified from defending NextWave against *any motion by the FCC to lift the automatic stay for the purposes of revoking NextWave's C block licenses.*"[14]

- "Mr. Alter: The motion that is being made by the Federal Communications Commission is not by any means to bar this debtor from getting relief in bankruptcy. *During the pendency of the bankruptcy, the Bankruptcy Court and the automatic stay would hold the creditors at bay, including the Federal Communications Commission.*"[15]

- "[Mr. Alter]: The regulations provide that upon failure to make the payments the license is *automatically cancelled. That hasn't (happened) in this case due to the automatic stay. . . .*"[16]

- "Mr. Alter: . . . [T]hey [NextWave] are still quite a substantial company and [*the FCC has*] *not challenged their payment obligation under the F-block license. There is no trigger for the automatic cancellation that I understand to date with regard to the F-block licenses.* As I understand it, if they can comply with their payment

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[14] Memorandum of Law in Support of FCC's Motion to Disqualify Weil Gotshal & Manges as NextWave's Counsel dated July 22, 1998, at 21-22 n.5.

[15] Transcript of Proceedings before the District Court, November 9, 1998, at 5.

[16] Transcript of proceedings before the Bankruptcy Court, November 12, 1998, at 30. The transcript erroneously attributed this quotation to the Court.

obligations, they may well be in a position to reorganize around their F-block property."[17]

- "[T]he radio spectrum licenses (*the "Licenses*") issued by the FCC to the NextWave Debtors . . . *would be transferred directly to Nextel* or one or more of its subsidiaries identified by Nextel in its transfer application relating to the Licenses. . . ."[18]

- "To provide the consideration for the transfer of substantially all of *the assets of the NextWave Debtors, including the Licenses*, to Nextel. . . ."[19]

- "The approval of the transfer of *the NextWave Debtors' assets* to Nextel . . . will be submitted to and subject to the approval of the Bankruptcy Court."[20]

- "This letter responds to your letter of September 9, 1999, which requested additional information on the agreement reached between the FCC staff, the Department of Justice ("DOJ") and Nextel on the terms under which the government would support an alternative bankruptcy reorganization plan proposed by Nextel Communications, Inc. ("Nextel") for *the PCS licenses now*

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[17] Transcript of proceedings before the Bankruptcy Court, May 26, 1999, at 17.

[18] Term Sheet for Comprehensive Settlement Agreement and Joint Plan of Reorganization ("Term Sheet") dated August 10, 1999, p. 1 at ¶ I(B).

[19] Term Sheet p. 4 at ¶ III(A).

[20] Term Sheet p. 6 at ¶ III(D).

held by NextWave Personal Communications, Inc. ("NextWave").

* * * * * *

As reflected in the term sheet, if the bankruptcy court approves the Nextel plan, then the FCC's General Counsel agreed to recommend that the full Commission grant a waiver of the C and F block eligibility rules to allow a transfer of *NextWave's licenses* to Nextel pursuant to a court-approved reorganization plan."[21]

- "The Federal Communications Commission ("FCC") respectfully submits this memorandum of law in support of its motion pursuant to 11 U.S.C. § 362(d)(1) ("section 362(d)(1)") and Rule 4001 of the Federal Rules of Bankruptcy Procedure for an order lifting *the automatic stay* in the above captioned bankruptcy case, *which is currently in place* pursuant to 11 U.S.C. § 362(a).

* * * * * *

Accordingly, the FCC respectfully submits that "cause" exists under section 362(d)(1) for the Court to *lift the automatic stay so that the regulations' automatic cancellation provisions may take effect.*"[22]

Aside from these and many other similar oral and written statements by the FCC, the FCC's entire

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[21] Letter dated September 27, 1999 from the FCC Chairman to Representative Tom Bliley.

[22] May 28, 1999 Memorandum of Law in Support of FCC's Motion to Lift Automatic Stay at 1-2.

course of conduct (*i.e.*, what the government did, and did not do) right up to the January 12 Declaration is consistent with only one set of assumptions: NextWave "would enjoy bankruptcy protection from collection of C block license payments pending reorganization of its business affairs"; the automatic stay would "hold the creditors at bay, including the [FCC]"; the automatic stay, "currently in place," precluded the automatic cancellation of NextWave's licenses without prior application to the Bankruptcy Court; NextWave continues to hold the licenses as part of its assets which the FCC negotiated to transfer to Nextel under a "Term Sheet for Comprehensive Settlement Agreement and Joint Plan of Reorganization."

All parties in interest, *including the FCC*, conducted themselves in a way which clearly demonstrated reliance upon these assumptions. Consider the following:

- Nearly $10 million has been expended by lawyers and other professionals for the parties (not including the FCC).
- NextWave engaged in an entire trial of and subsequent appeals in the Adversary Proceeding (including to the Second Circuit).
- Approval of the Disclosure Statement, solicitation of creditors, the original scheduling of confirmation and its stay by the Second Circuit took place.
- DIP Lenders have extended $35 million credit secured by assets including the F Licenses relying upon prior representations and conduct of the FCC.

- The Official Creditor's Committee, which represents more than $500 million of creditors "relied extensively upon those representations [by the FCC] in conducting itself in these cases. The Committee represents that had it any inkling that the FCC viewed the licenses as subject to automatic cancellation for non-payment, it would certainly have sought judicial determination of this issue before the first payment was past due."[23]

- "Had the Debtors and their creditors known that they would forfeit almost $500 million in License down payments and the Licenses, thus wiping out any chance for recovery on the hundreds of millions in claims, by failing to make interest payments on pre-petition debt in bankruptcy, they would have made every effort to come up with the money while the reorganization effort continued".[24]

- Extensive litigation with Nextel, some of which remains pending, resulted from the Term Sheet between Nextel and the FCC looking to the transfer of NextWave's Licenses to Nextel.

While courts have expressed reluctance to apply the doctrine of equitable estoppel to government in situa-

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[23] Statement of the Official Creditor's Committee in Support of, and Joinder in, Order to Show Cause Against FCC for Enforcement of the Automatic Stay with Respect to the Debtor's C and F Block Licenses, 4 at ¶ 17.

[24] Debtor's Reply Brief in Support of Order to Show Cause Against the FCC for Enforcement of the Automatic Stay with Respect to the Debtors' C and F Block Licenses ("Debtor's Reply Brief") at 27.

tions where government is acting in its sovereign capacity, the same rationale does not hold where, as here, government is acting in a commercial capacity. For example, in *Federal Deposit Insurance Corp. v. Sarandon*, Case No. 91 Civ. 5109, 1992 WL 36132 (S.D.N.Y. Feb. 19, 1992), the court made this distinction clear:

> The rule of no estoppel against the government, as articulated in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L.Ed. 10 (1947), may be better described as a rule of no estoppel against the government when the government acts in its sovereign capacity rather than in a commercial capacity. When the FDIC sues to collect on a promissory note it is acting in a commercial and not in a sovereign capacity, and should be as vulnerable as any other litigant to principles of estoppel when it acts in a fashion that prejudices private citizens.

Similarly, the court in *Federal Deposit Insurance Corp. v. Harrison*, 735 F.2d 408 (11th Cir. 1984), found that the FDIC was acting as a commercial creditor in its efforts to collect payment on certain notes and stated:

> Proprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.

As stated by the Supreme Court in *Dickerson v. Colgrove*, 100 U.S. 578, 580, 25 L.Ed. 618 (1879):

> The estoppel here relied upon is known as an equitable or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied to promote the ends of justice. . . . It accomplishes that which ought to be done between man and man. . . .

The FCC argues that estoppel may apply to the government "only in those limited cases where the party can establish both that the Government made a misrepresentation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct," citing *Drozd v. I.N.S.*, 155 F.3d 81, 90 (2d Cir. 1998) and *City of New York v. Shalala*, 34 F.3d 1161 (2d Cir. 1994). However, these cases are readily distinguishable in that the plaintiffs there sought to estop government agencies from acting in their regulatory capacity. Where the government acts in a commercial capacity, as in the instant case, equitable estoppel is appropriate with or without findings of misrepresentation.

Indeed, the notion of "misconduct" is beside the point. What is important here is that the FCC acted one way for more than a year, and parties spent or loaned millions assuming that it meant what it said. Reliance was both reasonable and inevitable. Equitable

estoppel will operate to prevent irrevocable harm from such a radical change of position as the January 12 Declaration.

As to waiver, "bankruptcy courts as courts of equity, should look with disfavor on contract forfeitures, especially if forfeiture would imperil a debtor's reorganization efforts. There is a tendency to overlook a failure to comply strictly with the terms of a contract when the parties by their conduct, have tolerated deviations in performance." *See In re Photo Promotion Assocs., Inc.*, 45 B.R. 878, 882 (S.D.N.Y. 1985).

The law recognizes that the government, like any other contracting party, must give reasonable notice of any new compliance schedule if it chooses to unilaterally impose such a schedule. *See*, *e.g.*, *Bailey Specialized Bldgs., Inc. v. United States*, 186 Ct. Cl. 71, 404 F.2d 355, 359 (1968).[25] Such a waiver by one with authority will estop the government and the requirement cannot be suddenly revived to the prejudice of a party who has changed his position in reliance on the supposed suspension. *Gresham & Co. v. United States*, 200 Ct. Cl. 97, 470 F.2d 542, 555 (1972). *See also Miller Elevator Co., Inc. v. United States*, 30 Fed. Cl. 662, 688 (1994).

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[25] *See also* Glen T. Carberry & Phillip M. Johnstone, *Waiver of the Government's Right to Terminate For Default In Government Defense Contracts*, 17 PUB. CONT. L. J. 470, 478-81 (1988). In addition, implied waiver can occur when there is (1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on failure to terminate and continued performance by him under the contract, with the government's knowledge and express or implied consent. *See DeVito v. United States*, 188 Ct. Cl. 979, 413 F.2d 1147, 1154 (1969).

In recognizing that waivers are applicable against the government, the D.C. Circuit has held that where, as here

> a government official has authority to waive the regulations allegedly violated [pursuant to its discretionary authority], "we look instead to the standards of waiver that would govern between private parties." . . . Thus when, in the course of making an agreement, an official with power to waive a regulation that would bar the agreement acts in a way that signals to a private party an objective intent to waive the regulation, and the private party relies on that behavior, the government official is estopped from voiding the agreement on the basis of the regulation.

Cinciarelli v. Reagan, 729 F.2d 801, 807-08 (D.C. Cir. 1984) (emphasis added). *Branch Banking & Trust Co. v. United States*, 120 Ct. Cl. 72, 98 F. Supp. 757, 766, *cert. denied*, 342 U.S. 893, 72 S.Ct. 200, 96 L.Ed. 669 (1951).

The FCC has the power and discretion to waive timely payment. The FCC acted in a way which said expressly and by implication that payments were suspended during NextWave's Chapter 11. NextWave and other parties acted in reliance.

It has been held that the FCC must consider the impact of its actions upon innocent creditors in assessing public interest with respect to FCC licenses. *Second Thursday Corp.*, 22 F.C.C.2d 515, 516 (1970); *LaRose v. FCC*, 494 F.2d 1145, 1146 & n.6 (D.C. Cir. 1974) ("[a]dministrative agencies have been required to consider other federal policies, not unique to their particular

area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest"). In the present case, a decision to declare that the debtors' licenses were automatically cancelled one year ago, in the face of prospective full payment and immediate deployment, arbitrarily leaves the creditors and shareholders of these estates—representing $1.047 billion of claims—with little if any chance for recovery.

On the undisputed facts, the FCC has waived its "timely payment" requirement. Ultimately, NextWave must comply with the "payment in full" requirement, or the Licenses will be cancelled. But the debtors must be granted due process and their day in court under the Bankruptcy Code and a fair opportunity to pay their debt to the FCC in a confirmed Plan.

IV. ***No regulatory purpose countenanced by the governing statute is served by the "timely payment" requirement***

The Court of Appeals has held that there is a "regulatory" aspect in the FCC's "payment in full" requirement. But no such aspect can be inferred with respect to the FCC's "timely payment" requirement. No rational explanation has been offered to show that timeliness has any objective other than pure debtor-creditor economics.[26]

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[26] If the "timely payment" requirement served a *bona fide* regulatory objective, one must wonder what was the impact on that objective of the FCC's March and April 1997 orders indefinitely suspending all payments for C and F block licensees, the FCC's numerous regulations, orders, notices and instructions rescheduling and repeatedly changing payment deadlines, and the FCC's

What has been completely overlooked in the FCC's regulatory aspect contentions is that they conflict with the spirit and the letter of the agency's governing statute. The FCA does not mandate that the FCC should seek to extract maximum consideration for PCS licenses. To the contrary, Congress has specified as one of four basic objectives of spectrum auctions "(C) recovery for the public of *a portion of* the value of the public spectrum resource." 47 U.S.C. § 309(j)(3)(C). The statute goes further and expressly precludes the FCC from basing regulatory determinations on revenue considerations. FCA § 309(j)(7)(A) and (B), under the heading "Consideration of revenues in public interest determinations," provides as follows:

> **(A) Consideration prohibited**
>
> In making a decision pursuant to section 303(c) of this title to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission *may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues* from the use of a system of competitive bidding under this subsection.

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repeated grant of waivers of payment defaults by other spectrum licensees. And how does that impact differ from the impact of the NextWave delay in payment?

(B) Consideration limited

In prescribing regulations pursuant to *paragraph (4)(A)* of this subsection, the Commission *may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues* from the use of a system of competitive bidding under this subsection.

47 U.S.C. § 309(j)(7)(A), (B); emphasis supplied.[27]

Paragraph (7)(A) applies to the FCC in its function of assigning or allocating spectrum, and it prohibits the FCC from exercising that regulatory function based on "the expectation of Federal revenues."

Paragraph (7)(B) governs the FCC in prescribing regulations pursuant to paragraph (4)(A). Paragraph (4)(A) provides as follows:

(4) Contents of regulations

In prescribing regulations pursuant to paragraph (3), the Commission *shall*—

(A) consider *alternative* payment *schedules* and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, *or other schedules* or methods that promote the objectives described in paragraph (3)(B), and combinations of such schedules and methods;

47 U.S.C. § 309(j)(9)(A); emphasis supplied.

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[27] The words "public interest," "convenience" and "necessity" obviously refer to the FCC's regulatory jurisdiction.

Thus, Congress has ordered the FCC in Section 309(j)(4)(A) to "consider alternative payment schedules" to accomplish the legislative objectives, while in Section 309(j)(7)(B) Congress specifically prohibited the FCC from prescribing such regulations having a regulatory purpose "solely or predominantly on the expectation of Federal revenues." Certainly the statute contemplates that the FCC prescribe regulations respecting the installment payments called for by the legislation. But Congress has made clear that the expectation of revenue, *i.e.*, debtor-creditor economics, may not inform the FCC's regulatory equation. Precisely the same issue has arisen in the context of Section 362(b)(4) of the Bankruptcy Code, and the courts have uniformly drawn the distinction between administrative proceedings or actions that are regulatory in nature and those that are purely economic. *See* discussion under point I.D, above.

The FCC is bound by the statute from which it derives its jurisdiction. "It is a fundamental principle of American law that legislative statutes take precedence over conflicting administrative regulations." *Furlow v. U.S.*, 55 F. Supp. 2d 360, 364 (D. Md. 1999); *Caldera v. J.S. Alberici Const. Co.*, 153 F.3d 1381, 1383 (Fed. Cir. 1998) ("Statutes trump conflicting regulations"); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989) ("statutory language . . . prevail[s] over inconsistent regulatory language"); *Bukala v. U.S.*, 854 F.2d 201, 203 (7th Cir. 1988) ("an agency's interpretation of a statute . . . cannot supersede statutory language"); *Johnson v. Heckler*, 769 F.2d 1202, 1212 (7th Cir. 1985); *Pacific and Gas Elec. Co. v. U.S.*, 664 F.2d 1133, 1136 (9th Cir. 1981) ("a regulation which operates to create a rule out of harmony with the

statute is a mere nullity") (citing *Manhattan Gen. Equip. Co. v. C.I.R.*, 297 U.S. 129, 134, 56 S. Ct. 397, 80 L.Ed. 528 (1936); *U.S. v. Gordon*, 638 F.2d 886, 888 (5th Cir. 1981)) ("whatever effect the agency regulation may have under other circumstances, it cannot supersede a statute applicable to those present here"). Nor can the FCC's regulations override the Bankruptcy Code. *U.S. v. Shumway*, 199 F.3d 1093, 1104-05 (9th Cir. 1999); *Freeman v. City of Mobile*, 193 F.3d 1179 (11th Cir. 1999) (agency cannot amend or supplant an act of the legislature).

Finally, one must ask whether there is any regulatory concern of such consequence that it should override the protections and policy considerations that lie at the very core of the Bankruptcy Code, or bar the jurisdiction of the Bankruptcy Court from enforcing the Code. What regulatory principle or public interest does the FCC invoke to outweigh the investment in these debtors of over $1 billion in debt and equity? What public policy is served by an act of the United States Government which violates basic notions of equity, due process and the Bankruptcy Code? What purpose is served by the FCC's relinquishment of over $4.7 billion for the C Licenses? How does the January 12 Declaration coexist with 47 U.S.C. § 309(j)(3)(A) looking to "rapid deployment" of spectrum "without administrative or judicial delays," or 47 U.S.C. § 309(j)(7)(A) and (B) prohibiting the FCC from exercising its regulatory discretion "on the expectation of Federal revenues?"

The FCC cannot, either by its regulations or its interpretation of its regulations, supervene either the Federal Communications Act or the Federal Bankruptcy Code. Where those regulations or the agency's

interpretation thereof conflict with either the FCA or the Bankruptcy Code, the will of Congress as expressed in the statutes must prevail.

V. *The Circuit Court Decision does not address the issues presented on this motion*

Little need be said of the FCC's contention that the instant motion is governed by the Second Circuit Decision. Ultimately, it will be for the Court of Appeals to resolve this controversy, if the parties do not sooner settle it among themselves. In the meantime, the matter has been remanded to the Bankruptcy Court, and it is the responsibility of this Court to address the issues raised by this motion for review by the District and Circuit Courts.

The Court of Appeals rulings in respect of *NextWave I*, concerning subject matter jurisdiction, and *NextWave II*, concerning fraudulent conveyance analysis, are the law of the case in these proceedings. But they do not touch upon the issues now before this Court, which arise from a subsequent event, the January 12 Declaration. Indeed, in remanding to the Bankruptcy Court, the Court of Appeals specifically referred to the possibility that the FCC might, in the future, seek to revoke the Licenses (*see* footnote 4, above).

The FCC relies upon the statement in the Circuit Court Decision that "the FCC made 'full and timely payment of the winning bid' a regulatory condition for obtaining and retaining spectrum license" (200 F.3d at 52). However, the very next sentence states: "This 'payment in full' requirement has a regulatory purpose . . ." (*id.*), and the entire balance of the Circuit Court Decision bearing on the question of regulatory purpose

and subject matter jurisdiction is concerned solely with the "payment in full" requirement, which was the only matter before the Court. The Court of Appeals did not consider the question whether the "timely payment" requirement was invested with a regulatory purpose, because the FCC had never asserted any legal position based upon NextWave's failure to make post-petition payments on its pre-petition claims.

Conclusion

For the foregoing reasons, the debtors' motion is granted. Counsel for NextWave will prepare forthwith an order consistent with this decision, fax it to counsel for the FCC for approval as to form (without prejudice to appeal) and submit it to this Court.

In accordance with the Court of Appeals' order of January 24, 2000, ruling upon the FCC's "Emergency Motion for a Stay of Bankruptcy Court Proceedings and Leave to File a Mandamus Petition," confirmation of any Plan of reorganization is stayed pending further order of the Court of Appeals. This Court admonishes the parties to cooperate in seeking expedited review on appeal in order that these Chapter 11 cases may be brought to a conclusion without unnecessary prejudice to the debtors' estates and the public interest entailed in further delay.

APPENDIX A

The Alleged "Default"

The FCC maintains that the debtors' Licenses automatically and retroactively ceased to exist at some point in late 1998 or January 1999 as a result of a "default" by NextWave citing 47 C.F.R. § 1.2110(f)(4)(iv).[28] Yet the FCC cannot answer the most basic question as to the date of the default, the amount of the default, or the documents which might have apprised the debtors of the then impending default and forfeiture. As shown below, the answers to these questions are completely unclear.

Notice of the Alleged Default

The first issue, reading from 47 C.F.R. § 1.2110(f)(4)(iv), is whether the debtors were ever given any notice of a default, because some form of notice of default, at the very least a declaration, is required by the phrase "will be declared in default."

At argument the FCC was extensively questioned as to whether any notice of default was given. Conceding that no notice was given to the debtors other than the January 12 Declaration, the FCC instead argued that it

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[28] Subsection (iv) provides:

> Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, *will be declared in default*, its license will automatically cancel, and will be subject to debt collection procedures. (emphasis supplied).

had published policy statements in its record which constructively gave notice of default and automatic cancellation under 47 C.F.R. § 1.2110(f)(4)(iv). (These published statements are addressed below.)

Moreover, the FCC also maintained that it was not required to specifically notify the debtor of the default, that under the regulation default occurred automatically despite the language "will be declared in default," and that it was incumbent on the debtors, before a "default" occurred, to seek an extension or waiver before any discretion of the FCC could be invoked. The FCC did, however, give other parties notice of their payment defaults.[29] The FCC did not do so in this case. Its argument that the January 12 Declaration served as notice of default is little better than a post hoc rationalization for the failure to provide the same notice to the debtor it extended to other licensees. The fact is that the FCC simply ignored 47 C.F.R. § 1.2110(f)(4)(iv)'s direction that a default "will be declared."

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[29] *See, e.g., In Re Roberts-Roberts & Assocs.*, 12 F.C.C.R. 1825, 1997 WL 43121 (Feb. 4, 1997) (granting waiver of downpayment rules for incorrect payment after notice of delinquency issued); *In Re Southern Communications Systems, Inc.*, 12 F.C.C.R. 1532, 1997 WL 43127 (Feb. 4, 1997) (waiver of late payment default where payment made one day late and upon notice of delinquency); *In Re Longstreet Communications Int'l., Inc.*, 12 F.C.C.R. 1549, 1997 WL 43114 (Feb. 4, 1997) (waiver of late payment default where payment made nine days late and upon notice of delinquency); *In Re RFW, Inc.*, 12 F.C.C.R. 1536, 1997 WL 43097 (1997) (waiver of late payment default where payment made six days late and upon notice of delinquency); *In Re Wireless Telecommunications Co.*, 12 F.C.C.R. 1544 (Feb. 4, 1997) (waiver of late payment default where payment made two days late and upon notice of delinquency).

The Date of the Alleged Default

The FCC is unable to specify a date for the debtors' alleged default. The FCC's position in its objection to confirmation and in its brief is that a default occurred sometime (variously) in late 1998 or January 1999, while the January 12 Declaration only recites a delinquency more than 90 days after July 31, 1998. The FCC relies on the provisions of the installment payment "Restructuring Orders" to support its vague assertion of a default date at some point in January 1999.

To appreciate these Restructuring Orders, some history of the of regulatory sequence is necessary. On March 31, 1997, the FCC issued an order which suspended the installment payment obligations of C block licensees "until further notice," although interest continued to accrue during the suspension. *In the Matter of Installment Payments for PCS Licenses*, 12 F.C.C.R. 17325, 1997 WL 144207 (1997). A corresponding suspension was issued for F block licensees on April 28, 1997.

The suspension was lifted in a September 25, 1997 "restructuring" order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 12 F.C.C.R. 16436, 1997 WL 643811 (Sept. 25, 1997) (the "First Restructuring Order"), and modified in two subsequent orders, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 13 F.C.C.R. 8345, 1998 WL 130176 (March 23, 1998) (the "Second Restructuring Order"), and *In the Matter of Amendment of the Commission's Rules Regarding In-*

stallment Payment Financing for Personal Communications Services (PCS) Licensees, 14 F.C.C.R. 6571, 1999 WL 183822 (March 31, 1999) (the "Third Restructuring Order", collectively the three are referred to as the "Restructuring Orders"). The First Restructuring Order instituted the resumption of installment payments for C and F block licensees as of March 31, 1998 and instituted an automatic 60-day grace period (payment date of May 30, 1998). 12 F.C.C.R. 16436 at ¶ 25. The First Restructuring Order further set out three options to resumption of payments originally due for C block licenses, with an election to be made by June 8, 1998. The Second Restructuring Order modified the options available to C block licensees, changed the automatic 60-day grace period to a 90-day period, and reset the payment resumption date from March 31, 1998 to a date 90 days after publication of the Second Restructuring Order in the Federal Register, with a 5% late payment fee due for amounts paid within this period. 13 F.C.C.R. 8345 at ¶¶ 6, 15. The Third Restructuring Order did not alter these due dates.

In a confusing series of rulings, the FCC delayed the issuance of a final installment payment resumption date, finally setting it for July 31, 1998. 13 F.C.C.R. 7413, 1998 WL 180790 (April 17, 1998) ("Installment payments for broadband PCS C and F block licensees will resume on July 31, 1998. On that date, licensees are required to pay accrued interest from April 1, 1998, through and including July 31, 1998, plus one-eighth of their Suspension Interest. Payments received after July 31, 1998, but on or before October 29, 1998, must include a late payment fee equal to 5% of the amount that was due on July 31, 1998.").

In the meantime, amendments to 47 C.F.R. § 1.2110 became effective on March 16, 1998 which both modified and incorporated some of the terms of the First and Second Restructuring Orders. However, the FCC only released an interpretive guidance document some six months later in the September 18, 1998 *Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules*, 13 F.C.C.R. 18213, 1998 WL 639381 (September 18, 1998) (the "Guidance Notice"). The Guidance Notice instructs:

> The Commission recently amended 47 C.F.R. § 1.2110 to provide that licensees that do not make an installment payment on or before a due date are automatically granted a 90 day grace period ("non-delinquency period") and assessed a late fee equal to 5 percent of the missed installment payment ("late fee"). *If remittance of the missed installment payment and the 5 percent late fee is not made on or before expiration of the non-delinquency period, a second 90 day period ("grace period") is automatically granted and an additional late fee equal to 10 percent of the missed installment payment is assessed.* Licensees are not required to make an application to the Commission to receive the non-delinquency period or the grace period. Furthermore, licensees are not required to remit the 5 percent late fee prior to the expiration of the non-delinquency period to be eligible for the grace period. Late fees accrue on the first business day after a missed installment payment and upon the expiration of the non-delinquency period.
>
> Specifically, under the revised rule, a licensee must pay the missed installment payment, the 5 percent

late fee, the 10 percent late fee (if applicable) and any lender advances the licensee may be obligated to pay (including but not limited to Uniform Commercial Code filing fees and attorney fees for debt collection). This payment must be made in full, in one payment, before the expiration of the nondelinquency period or grace period. Payments made during a nondelinquency period or a grace period shall be applied in the following order of priorities: (i) lender advances (ii) late fees (iii) interest payable and (iv) principal owed.

Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996.

Payment due dates for missed installment payments and accompanying late fee(s) are independent of the regular installment payment schedules. Licensees should be aware that the late payment provisions are calculated on a 90 calendar day basis, while installment payments are based on a quarterly payment schedule. Quarterly payments may cover up to 92 calendar days, depending upon the month in which the payment is due. In many instances, missed installment payments and accompanying late fee(s) may be due before the next quarterly installment payment. Payments of missed installment payments and accompanying late fee(s) must be made simultaneously and in a timely manner. Par-

> tial payments will not be sufficient to avoid default. (emphasis supplied)

According to the Guidance Notice, the operative grace period for installment payments should be 180 days from the modified resumption date (July 31, 1998), or January 28, 1999. However, the Guidance Notice was not released until well after the April 17 revision of the resumption date to July 31, 1998. Assuming that a licensee would have found this public notice, any licensee in September of 1998 would have faced interpretive guidance relating to a potential default date of July 31, 1998, established five months earlier on April 17 and extending the previous due date of March 31 which itself was established on March 23 in the Second Restructuring Order, only to find himself within a grace period extending until October 28 (then only a month or so away), which was established by implication on March 16 in the amendments to 47 C.F.R. § 1.2110 and could only be determined with reference to the April 17 order, with a possible second grace period assessing a doubled penalty rate to run for an additional 90 days.

Of course, the foregoing analysis may not accord with the FCC's contemporaneous or post hoc interpretations of its regulations, or indeed possibly some other regulations this Court has not found, even after its own diligent computer search through the often vague and conflicting flotsam of FCC releases.

It certainly does not accord with the representations made to this Court by the FCC. The FCC in its memorandum claims October 31, 1998 as the deadline, citing to *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment for Personal Communications Services (PCS) Licenses*,

Order on Consideration of Second Report and Order, 13 F.C.C.R. 8345 at ¶¶ 15, 21-30, 1998 WL 130176 (March 24, 1998). Yet, this date is completely inconsistent, from this Court's reading, with the later-issued Guidance Notice. The only thing that is clear is that, whatever the putative default date was, it was a moving target. As daunting as it has been for this Court to attempt to reconstruct this sequence well after the fact, it would have been beyond perplexing for a licensee at the time to fix any reasonable notion of what obligation was due when.

Not surprisingly, in this contested matter the FCC has been unable to articulate any date upon which the debtor's installment obligations were due, even noting that their calculation of January 1999 was in part informed by the 60-day extension provision of Bankruptcy Code Section 108. Subtracting 60 days from January 1999 results in some date in November 1998, for which no support exists in the regulations. Add to this the fact that the debtor filed its petition in June of 1998, in the midst of miasma of conflicting, shifting deadline amendments, and there is little surprise that FCC counsel at the hearing was able to identify a date certain for a default.

Even assuming, say, that January 28, 1999 were the correct date for the expiration of any applicable grace period, it does not follow that a "default" occurred. Payment obligations were suspended until July 31, 1998, but the debtors filed their petition on June 8, 1998. Thus the suspension was in effect when the debtor commenced this case. No obligation was then due. Under the grace period regulations, no obligation would have been due, this Court assumes in the absence

of any other cogent explanation, until January 28, 1999. The FCC's claimed default date calculation, which falls sometime in either of October or November 1998 excluding any effect of Section 108, is utterly inconsistent with its guidance documents which would have putatively granted grace periods until January 28, 1999. If that is indeed the FCC's "rough" calculation, the debtors cannot have been in default when the FCC claims it to have been. The debtors' obligations on the Notes were incurred as of January 3, 1997 (but executed on February 19, 1997). The March 31, 1997 suspension order suspended any installment payment obligations and they were not resumed until July 31, 1998 (at the earliest, although interest continued to accrue). Thus, the putative default amounts, if indeed they can be calculated, were entirely post-petition. The legal effect of any putative default or automatic cancellation issuing in the post-petition period is discussed in the main body of this decision.

The Amount of the Alleged Default

What was the amount of the debtor's alleged default in late 1998 or January 1999? There is no answer.

The only documentation of what might have been due, contained in a supplemental submission by the FCC, is a statement to NextWave dated May 26, 1998 of total interest due of $2,474,901.66 for payments comprising five payments due from 4/30/97 through 3/31/98. How these payments could have been "due" as of May 26, 1998 while the various suspensions and grace periods were in effect is not at all clear, especially in light of the April 17, 1998 extension of the resumption date to July 31, 1998.

The Restructuring Orders, the March 16, 1998 amendment to 47 C.F.R. § 1.2110 and the Guidance Notice do give some guidance as to method of calculation, but the guidance is hopelessly complex and confusing. *See* First Restructuring Order ¶¶ 25-27, (requiring "all payments due and owing on and after March 31, 1998 be made in accordance with the terms of the licensee's Note, associated Security Agreement, and the Commission orders and regulations," with all interest accrued over the suspension period becoming due and payable over a two-year period in one-eighth of the amount of suspension period interest payable with each regular installment payment until paid). As to regular installment payments, the First Restructuring order provides:

> We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment dues dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998 will be pro-rated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licen-

> sees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on June 30, 1998, and will include the amount of interest accrued from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (i.e., interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that includes any amortized Suspension Interest. All payments after that date will continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

Id. at ¶ 27. The Second Restructuring Order made the following changes:

> . . . we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date. As mentioned above, the Commission's rules allow a 90-day non-delinquency period for all other installment payments. Although we stated in the Second Report and Order that a shorter non-delinquency period was justified in light of the one-year payment suspension, we now believe that it is preferable to make

> the length of that non-delinquency period consistent with our rule for all other payments. . . . Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted. . . . Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period. Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the Part I Third Report and Order.[30]
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> 27. Under this plan, the Suspension Period (as defined in the Second Report and Order) will still end on March 31, 1998. All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. . . . In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

Second Restructuring Order at ¶¶ 25-27. The March 16 amendments to 47 C.F.R. § 1.2110, as articulated in the Guidance Notice, issued only well after the extended resumption date of July 31, 1998, once again changed the grace periods along with any applicable charges:

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[30] This refers to the March 16, 1998 amendments to 47 C.F.R. § 1.2110, 63 FR 2315.

The Commission recently amended 47 C.F.R. § 1.2110 to provide that licensees that do not make an installment payment on or before a due date are automatically granted a 90 day grace period ("non-delinquency period") and assessed a late fee equal to 5 percent of the missed installment payment ("late fee"). If remittance of the missed installment payment and the 5 percent late fee is not made on or before expiration of the non-delinquency period, a second 90 day period ("grace period") is automatically granted and an additional late fee equal to 10 percent of the missed installment payment is assessed. Licensees are not required to make an application to the Commission to receive the non-delinquency period or the grace period. Furthermore, licensees are not required to remit the 5 percent late fee prior to the expiration of the non-delinquency period to be eligible for the grace period. Late fees accrue on the first business day after a missed installment payment and upon the expiration of the non-delinquency period.

Specifically, under the revised rule, a licensee must pay the missed installment payment, the 5 percent late fee, the 10 percent late fee (if applicable) and any lender advances the licensee may be obligated to pay (including but not limited to Uniform Commercial Code filing fees and attorney fees for debt collection). This payment must be made in full, in one payment, before the expiration of the non-delinquency period or grace period. Payments made during a non-delinquency period or a grace period shall be applied in the following order of priorities: (i) lender advances (ii) late fees (iii) interest payable and (iv) principal owed.

Guidance Notice, *supra*. Moreover, the Guidance Notice stated:

> Licensees should be aware that the late payment provisions are calculated on a 90 calendar day basis, while installment payments are based on a quarterly payment schedule. Quarterly payments may cover up to 92 calendar days, depending upon the month in which the payment is due. In many instances, missed installment payments and accompanying late fees) may be due before the next quarterly installment payment.

Id. In other words, although suspension period interest was to be paid along with regular installment payments (when the obligation resumed, but upon which date is not altogether clear), *see* the quoted provisions of the Restructuring Orders, *supra*, the Guidance Notice appears to say that some payments may have been due before others.

Reading through this sequence of FCC pronouncements, one is unable to divine how to calculate what payment would have been due, even assuming that a default date could be determined, which is itself problematic. It is also unclear whether the statement in the Second Reconsideration Order (dated March 24, 1998) that "there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period" conflicts with the March 16 amendments to 47 C.F.R. § 1.2110 (*see* 63 FR 2315 at 2346), as announced in the September 18, 1998 Guidance Notice, providing for an second automatic grace period, particularly given that the resumption date was reset to July 31, 1998.

Moreover, and significantly, since the FCC cannot determine the amount due, then it can hardly satisfy the necessary precondition of 47 C.F.R. § 1.2110(f)(4)(iv) that "[a]ny eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period. . . ." There is no calculus of what amounts were due, and no way to determine on a given date whether any late fee, interest payment, interest or principal in fact was due, or whether the alleged default was attributable to late fees, interest or principal.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 99-5063

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., DEBTOR

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

NEXTWAVE PERSONAL COMMUNICATIONS, INC., APPELLEE

Argued: Nov. 1, 1999
Decided: Dec. 22, 1999

Before: MCLAUGHLIN, JACOBS and SACK, Circuit Judges.

PER CURIAM.

The Federal Communications Commission (the "FCC") appeals from an order of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*, *NewWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999), affirming five decisions and orders of the United States Bankruptcy Court for the Southern District of New

York (Adlai S. Hardin, Jr., *Bankruptcy Judge*)[1] On November 24, 1999, we issued an order reversing the judgment of the district court and remanding the case for further proceedings, with an opinion to follow. This is that opinion.

In pertinent part, the decisions and orders of the bankruptcy court, affirmed by the district court judgment from which the FCC appeals, held that the FCC's grant to NextWave Personal Communications, Inc. ("NextWave") of sixty-three radio spectrum licenses for which NextWave had been the high bidder at the FCC's 1995-96 "C-block" auction (the "Licenses") was a constructively fraudulent conveyance for purposes of 11 U.S.C. § 544 ("§ 544"). *See NextWave* IV.A, 235 B.R. at 304. The bankruptcy court therefore

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[1] *In re NextWave Personal Communications, Inc.*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) (June 16, 1999 decision denying motion to lift automatic stay) (*NextWave* V); (*NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 235 B.R. 277 (Bankr. S.D.N.Y. 1999) (May 12, 1999 decision on fraudulent conveyance claim) (*NextWave* IV.A) *as supplemented by NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 235 B.R. 305 (Bankr. S.D.N.Y. 1999) (June 22, 1999 decision on remedy (*NextWave* IV.B); *NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), No. 98-21529 (Bankr. S.D.N.Y. Apr. 2, 1999) (oral denial of FCC's motion to dismiss) (*NextWave* III); *NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 235 B.R. 272 (Bankr. S.D.N.Y. 1999) (Feb. 16, 1999 decision denying to FCC and granting to debtor partial summary judgment with regard to date upon which obligations were incurred) (*NextWave* II); *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.*), 235 B.R. 263 (Bankr. S.D.N.Y. 1998) (Dec. 7, 1998 decision granting in part and denying in part FCC's motion to dismiss) (*NextWave* I).

avoided $3.7 billion of NextWave's $4.74 billion obligation to the FCC, allowing NextWave to keep the Licenses while it reorganized in bankruptcy. *See NextWave* IV.B, 235 B.R. 305. We hold that the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses, and that in any event it wrongly concluded that the Licences were fraudulently conveyed by failing to defer to the FCC's interpretation of its own regulations when determining the point at which NextWave's obligations were incurred for § 544 purposes. We therefore reverse the judgment of the district court affirming the orders of the bankruptcy court and remand the case to the bankruptcy court for further proceedings consistent with this opinion, if any are necessary.

BACKGROUND

In 1993 Congress passed several amendments to the Federal Communications Act (the "FCA"), one of which added § 309(j). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j) authorized the FCC to conduct competitive bidding auctions for radio spectrum licenses. The FCC was instructed to ensure that as part of its auction plan certain blocks of spectrum would be reserved for qualified entities, including small businesses, and that deferred payment plans on favorable terms would be available to them. *See* 47 U.S.C. § 309(j)(3)(B), (j)(4)(D). Pursuant to these instructions, the FCC reserved a block of 493 licenses known as the "C-block licenses" for the use of qualified entities providing "personal communications services," an emerging form of wireless communications technology.

On May 6 and July 16, 1996, the FCC concluded two sets of C-block auctions, which produced some ninety successful bidders.[2] NextWave, a startup company established to take advantage of the opportunities created by § 309(j), was the high bidder for sixty-three C-block licenses. Its aggregate winning bids amounted to $4.74 billion.

Pursuant to the FCC regulations issued under § 309(j), winning bidders that were "small businesses" were required to pay only ten percent of their winning bids in cash; the remaining ninety percent could be paid in installments over a ten-year period at below market interest rates. 47 C.F.R. § 24.711(b)(3). NextWave made the required five percent down payment on the Licenses when it was announced as the high bidder on them in the summer of 1996,[3] and subsequently deposited another five percent with the FCC on January 9, 1997, immediately after its application for the Licenses was conditionally approved.

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[2] The C-block auctions ending July 16 involved licenses that became available when high bidders from the first auction defaulted on their initial down payments.

[3] As part of the FCC's auction rules, bidders were required to deposit "qualifying amounts" in order to participate in the auction. NextWave deposited qualifying amounts of $79,225,000 on December 1, 1995 and $6,984,244 on June 13, 1996. On May 6, 1996 it was declared the winner of 56 of the Licenses, for which it deposited an additional $130,834,333 with the FCC. On July 16 it was named the winner of an additional seven Licenses, for which it deposited $20,138,825 on July 23. At the close of the bidding process, it had therefore deposited a total of $237,182,402, or approximately five percent of its winning bids, with the FCC. *See NextWave* II, 235 B.R. at 273.

The four-month gap between those two dates resulted from the FCC's auction rules under which a winning bid did not automatically trigger the grant of the license or licenses in question. A winning bidder was required to submit a "long form" application, and the grant of a winning bidder's licenses was conditioned upon that bidder's ability to demonstrate through its application that it was in compliance with FCC regulations and statutory requirements. While over ninety percent of the winning bidders at the C-block auctions were granted their licenses on September 17, 1996, NextWave's ownership structure, specifically its allegedly impermissibly high percentage of foreign ownership, was challenged. The Licenses were conditionally granted to NextWave on January 3, 1997, after NextWave submitted to the FCC a plan to bring its capital structure into compliance with FCC regulations. On February 14, 1997, the FCC granted NextWave the Licenses conditioned upon NextWave issuing a series of promissory notes for the balance of its payments. On February 19, 1997, NextWave executed these promissory notes (the "Notes"), backdated to January 3. The Notes aggregated $4.27 billion, representing the remaining ninety percent of the bid price. By the time the Notes were executed, however, the market value of the Licenses, as later determined by the bankruptcy court, *see NextWave* IV.A, 235 B.R. at 303, had fallen to less than a quarter of the amount "that NextWave" had bid for them.

The C-block auctions were part of a series of auctions the FCC conducted to allocate spectrum for new technological uses. Prior to the C-block auctions, it had conducted the A and B-block auctions, and in June 1996 it announced that it would conduct the D, E and F-block

auctions starting on August 26, 1996. The winning bids at the A, B, D, E and F-block auctions were sharply lower than the winning bids at the C-block auctions when measured in dollars per MHz-Pop, a generally accepted industry measurement standard.[4]

Since they were obligated to pay what turned out to be much higher prices for their licenses than other licensees, most of the winning C-block bidders, including NextWave, had difficulty securing the financing necessary for them to meet their financial commitments. They thus faced the prospect of an early default on their installment payments to the FCC.

The winning C-block bidders therefore petitioned the FCC for relief. In response, the FCC suspended the C-block installment payments and initiated an elaborate administrative process looking toward a restructuring of the C-block licensees' obligations.

On October 16, 1997, at the culmination of this process, the FCC issued a restructuring order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal*

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[4] The MHz, or megahertz of radio frequency, in question determines the carrying capacity of a block of wireless spectrum. The A, B, and C-block licenses consisted of 30 MHz of spectrum; the D, E, and F-blocks of 10. One "Pop" represents 1000 persons within the geographic area covered by a particular licensing block. $/MHz-Pop therefore measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people. NextWave's winning bids averaged at least $1.43/MHz-Pop, whereas the D, E, and F-block winning bids averaged $.33/MHz-Pop. The F-block auction, which like the C-block auction was reserved for qualified entities, produced winning bids that averaged only $.246/MHZ-pops.

Communications Services (PCS) Licensees, Second Report and Order, FCC 97-342, 12 F.C.C.R. 16436 (Oct. 16, 1997), 1997 WL 643811 (F.C.C.) (the "Restructuring Order"), which offered troubled C-block license holders three mutually exclusive restructuring options, ranging from amnesty—return of the licenses in exchange for forgiveness of debt obligations—to a plan that allowed bidders to keep as many of their licenses as they could pay for by converting seventy percent of their down payment into a prepayment of the full bid price of a smaller number of licenses. The FCC decided that it would be contrary to the public interest to forgive a portion of the obligations, thereby allowing bidders to keep their licenses at a significantly reduced price, because the C-block auction had been designed to ensure that licenses were allocated to users who could demonstrate, through their ability to pay the highest price, that they possessed the most highly valued use for the licenses. *Id.* at ¶¶ 5, 19.

In response to the oppositions, petitions and replies that it received after the release of the Restructuring Order, the FCC issued a reconsideration order on March 24, 1998. *See In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Order on Reconsideration of the Second Report and Order*, F.C.C. 98-46, 13 F.C.C.R. 8345 (Mar. 24, 1998), 1998 WL 130176 (F.C.C.) (the "Reconsideration Order"). The Reconsideration Order offered licensees slightly more flexibility in their decision-making process than the Restructuring Order, but otherwise left the Restructuring Order's framework intact. In response to still further petitions from C-block licensees, the FCC conducted yet more pro-

ceedings and issued a second reconsideration order, *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Order on Reconsideration of the Second Report and Order*, F.C.C. 99-66, 14 F.C.C.R. 6571 (Apr. 5, 1999), 1999 WL 183822 (F.C.C.) (the "Second Reconsideration Order"), which essentially reaffirmed the determinations the FCC had made in its previous two orders.

NextWave actively participated in the administrative process that led to the promulgation of these orders, but it remained dissatisfied with the results. On May 29, 1998, NextWave filed a petition with the Court of Appeals for the District of Columbia Circuit asking for review of the orders. On June 8, 1998—the deadline for selecting from the menu of restructuring options provided by the orders—it asked both the FCC and the Court of Appeals for a stay of those orders so that it would have more time to consider its options. The FCC and the Court of Appeals each denied NextWave's request. *See NextWave Telecom Inc. v. FCC*, No. 98-1255 (D.C. Cir. June 11, 1998); *In the Matter of Petition of NextWave Telecom, Inc. for a Stay of the June 8, 1998, Personal Communications Services C Block Election Date*, FCC 98-104, 13 F.C.C.R. 11880 (June 1, 1998), 1998 WL 278735 (F.C.C.). The same day, NextWave filed a Chapter 11 petition and instituted an adversary proceeding against the FCC that sought to avoid the company's obligations resulting from its acquisition of the Licenses. *See NextWave I*, 235 B.R. at 267.

NextWave asserted two claims in the adversary proceeding. First, it argued that the transaction in which it acquired the Licenses was a fraudulent conveyance subject to avoidance under § 544 of the Bankruptcy Code (the "Code"). Second, it sought equitable subordination of the FCC's claim based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning the D, E and F-block licenses before approving NextWave's application for the C-block Licenses. The FCC moved to dismiss both claims.

The bankruptcy court dismissed the second claim for lack of subject matter jurisdiction, *see NextWave I*, 235 B.R. at 271; NextWave has not appealed from that order. Only the first claim is therefore before us. The FCC argued below that the bankruptcy court also lacked subject matter jurisdiction over this claim because jurisdiction over actions brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals pursuant to 28 U.S.C. § 2342 and 47 U.S.C. § 402. The FCC also argued that the FCA preempted state fraudulent conveyance law. The bankruptcy court rejected these arguments, holding that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. *See NextWave I*, 235 B.R. at 269-71. The court therefore concluded that it had jurisdiction over the claim, and further found that the FCA did not conflict with or preempt its application of fraudulent conveyance law under § 544.

Section 544(b) of the Code allows the avoidance of "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." Applicable law includes various

state fraudulent conveyance statutes, many based on the Uniform Fraudulent Transfer Act.[5] *See Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). In analyzing a fraudulent conveyance claim under the act, courts determine whether the debtor was engaged or about to engage in a transaction for which the remaining assets of the debtor were unreasonably small in relation to the size of the transaction. If so, and if the consideration provided by the debtor for the allegedly fraudulent transfer was not reasonably equivalent to what the debtor received in return on the effective date of the transfer, then the transfer is deemed constructively fraudulent and can be avoided.[6] *See NextWave IV.A*, 235 B.R. at 287-89. In NextWave's case, if there is a § 544 claim at all, its resolution turns on when NextWave's obligations to pay arose. If that is deemed to be the close of the C-block bidding, then the transfer could not be constructively fraudulent because NextWave paid exactly the market price for the Licenses as of that date, as determined by its own bid. *See NextWave* IV.A, 235 B.R. at 297 n.9. However, if the effective date is deemed to be January 3, the date on which the Licenses were conditionally granted, or February 19, 1997, the date on which they were finally granted in return for the executed Notes, then the obligation when it arose was for an amount far greater than what the

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[5] The bankruptcy court applied California, New York, and Washington, D.C. fraudulent conveyance law as the "applicable law," holding that there was no substantive difference between the laws of the three jurisdictions. *See NextWave IV.A*, 235 B.R. at 288-89.

[6] Avoidance differs considerably from rescission. Rescission unwinds the transaction and restores the status quo ante, whereas avoidance allows the debtor to retain the benefit of its bargain while rewriting the debtor's obligations under that same bargain.

bankruptcy court deemed to be the market price of the Licenses.

Hoping to resolve this issue quickly, the FCC moved for summary judgment on the question of when NextWave's $4.74 billion obligation was incurred. Despite the FCC's argument that under its regulations the entire obligation became due at the close of the C-block auction, the bankruptcy court found that the effective date of NextWave's obligations for the purposes of § 544(b) was January 3, 1997. *See NextWave II*, 235 B.R. at 276. The court acknowledged that, 47 C.F.R. § 1.2104 subjected a winning bidder to a penalty upon default based on the difference between its bid and the high bid on reauction of the licenses, but held that "[n]othing in this calculation explicitly or implicitly binds the winning bidder to the full amount of its bid." *Id.* at 275.

The FCC then moved to dismiss the complaint on the ground that the avoidance claim challenged a contractual relationship with the United States entered into pursuant to a national regulatory scheme, and that federal common law, rather than state fraudulent conveyance law, therefore was the "applicable law" under § 544. In an oral decision, *NextWave III*, tr. at 50-51, the bankruptcy court refused to create new federal common law to govern the situation, reasoning that fraudulent conveyance law did not abrogate the explicit terms or purposes of the regulatory scheme under § 309(j). *See id.* tr. at 53-54.

The parties then proceeded to trial. The bankruptcy court concluded under California law that NextWave's obligations were incurred on February 19, 1997; that on that date the Licenses were worth $1,023,211,000; and

that all obligations above that amount were constructively fraudulent and therefore avoided. Since NextWave had already paid $474,364,806, or ten percent of its original high bid, to the FCC as a down payment, the remaining obligation was reduced to $548,846,194. *See NextWave IV*.A, 235 B.R. at 304; *NextWave IV.A*, 235 B.R. at 306. The avoidance remedy allowed NextWave to keep the Licenses while obligating it to pay less than one-quarter of the amount it had bid for them.

The FCC appealed to the district court, which affirmed for substantially the reasons stated by the bankruptcy court. *NextWave Personal Communications, Inc. v. FCC* (*In re NextWave Personal Communications, Inc.*), 241 B.R. 311 (S.D.N.Y. 1999). This appeal, which we have heard on an expedited basis, followed.

DISCUSSION

I. Standard of Review

Our review of the district court's decision affirming the bankruptcy court orders is plenary. We therefore undertake an independent examination of the legal and factual findings of the bankruptcy court, reviewing its findings of law de novo and its findings of fact for clear error. *See Kabro Assocs. v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273 (2d Cir. 1997).

II. The Authority of the Bankruptcy and District Courts

The radio (or electromagnetic) spectrum belongs to no one. It is not property that the federal government can buy or sell. It is no more government-owned than

is the air in which Americans fly their airplanes or the territorial waters in which they sail their boats.

Although not owned by the federal government, the radio spectrum is subject to strict governmental regulation.

> Before 1927, the allocation of [radio] frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-76, 89 S. Ct. 1794, 23 L. Ed. 2d 371 (1969) (footnotes omitted). The scarcity of radio frequencies therefore required a regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to specific users. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 637-38, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); *see also National Broadcasting Co. v. United States*, 319 U.S. 190, 216, 63 S. Ct. 997, 87 L.Ed. 1344 (1943) ("The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply."). Since 1934, that mechanism has been the licensing of blocks of spectrum for the "public interest, convenience, or necessity," under the FCA, 47 U.S.C. § 307(a), by the FCC. *See generally FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 136-38, 60 S. Ct. 437, 84 L.Ed. 656 (1940).

A license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms. *See* 47 U.S.C. § 301 (stating the purpose of the FCA, "to provide for the use of [radio] channels, but not the ownership thereof"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S. Ct. 693, 84 L.Ed. 869 (1940) ("[N]o person is to have anything in the nature of a property right as a result of the granting of a license."). Licenses are revocable by the FCC, and the FCC can impose conditions upon them in the name of the public good. *See* 47 U.S.C. § 308(b).

Historically, the FCC assigned licenses through a system of comparative hearings, rating and ranking applicants under a public interest standard. *See* 47 U.S.C. § 309(a). Partially in response to the huge administrative burden that this method of allocation placed on the FCC, Congress amended the FCA in 1981 by adding § 309(i), which allowed the FCC to award licenses by randomly selecting licensees from the qualified applicant pool. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736 (codified at 47 U.S.C. § 309(i)).

The use of lotteries lessened the administrative burden, but encouraged speculation and, ultimately, failed to allocate licenses to those most likely to use them most efficiently or beneficially. Especially in light of the proliferation of new spectrum-dependent communications technologies, a method was needed that would direct licenses toward those entities and technologies that would put them to the best use. *See* H.R. Rep. No. 103-111, at 248 (1993) (the "Committee Report"), *reprinted in* 1993 U.S.C.C.A.N. 378, 575.

In its search for such a methodology, Congress came to the conclusion that using market forces to allocate spectrum could accomplish congressionally defined policy goals. As the House Committee on Energy and Commerce explained, "[A] carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves." *Id.* at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580. Congress therefore enacted 47 U.S.C. § 309(j) authorizing the FCC to develop a system for allocating spectrum through a competitive bidding process. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387 (1993). Section 309(j)(3) requires the FCC to design a system of competitive bidding that protects the public interest and promotes the following substantive objectives:

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

> (C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; [and]
>
> (D) efficient and intensive use of the electromagnetic spectrum. . . .

47 U.S.C. § 309(j)(3).

While the FCC was expected to "recover[ ] for the public a portion of the value of the public spectrum" and to avoid "unjust enrichment," the broader purpose of § 309(j) was to create an efficient regulatory regime based on the congressional determination that competitive bidding is the most effective way of allocating resources to their most productive uses. The FCC was not asked to sell off the spectrum (something it did not own) in an effort to raise as much money as possible; it was not asked to develop a free-market system to maximize revenue.[7] Instead, it was told to auction

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[7] Section 309(j)(7)(A) specifically limits the degree to which the FCC can designate the generation of revenue as a factor in the "public interest," demonstrating Congress's intent that satisfaction of the FCA's objectives not be equated with income maximization. "[T]he Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues." 47 U.S.C. § 309(j)(7)(A). "While Congress has charged [the FCC] to recover a portion of the value of the public spectrum made available via competitive bidding," the process "does not amount to maximizing revenue, nor is it [the FCC's] sole objective." *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 73 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.).

licenses to the highest bidder because such a system was thought likely to promote the development of new technologies and encourage efficient use of the spectrum while simultaneously recouping some of the value of the spectrum for the public. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580.

In implementing § 309(j), the FCC echoed the congressional rationale: "[A]uction designs that award licenses to the parties that value them most highly will best achieve" the goals set forth by Congress. *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order*, FCC 94-61, 9 F.C.C.R. 2348 ¶ 70 (Apr. 20, 1994), 1994 WL 412167 (F.C.C.) ("Second Order"). The FCC's views reflect a classical belief in the efficacy market forces:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to a bidder, an auction design that awards licenses to those bidders with highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.

Id. ¶ 71.

Starting from this premise—that "[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and efficiently than if handed out for free," Committee Report at 249, *reprinted in* 1993 U.S.C.C.A.N. at 576—the FCC made "full and timely payment of the winning bid" a regulatory condition for obtaining and

retaining a spectrum license acquired through a § 309(j) auction. *See* 47 C.F.R. § 24.708.

This "payment in full" requirement has a regulatory purpose related directly to the FCC's implementation of the spectrum auctions. The FCC gave considerable thought to the problem of how to "deter frivolous or insincere bidding." Second Order ¶ 171. It decided that it would be "critically important to the success of our system of competitive bidding . . . [to] provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and reauction." *Id.* ¶ 197.

Generally, bidders were required to obtain purely private financing and to pay up front for their licenses.[8] *See* 47 C.F.R. § 1.2109(a); Second Order ¶ 194. But "designated entities," such as NextWave—"designated" because they were less financially powerful than non-"designated" bidders and therefore presumably unable to pay up front—were allowed to pay in installments. *See* 47 C.F.R. § 24.711(b); Second Order ¶ 194. It was important for the functioning of the auction of licenses to "designated entities" that the FCC's default rules and penalties be enforceable, because the FCC relied upon them as a substitute for conducting the "detailed credit checks" and other forms of due diligence that otherwise would be necessary to ensure, within the framework of a competitive auction method of spectrum allocation, that the licenses would

[8] "Designated entities" include "small businesses, rural telephone companies and women and minority-owned firms." Order ¶ 6.

be awarded to the appropriate entities. *See* Second Order ¶¶ 194, 197-98.[9]

For entities like NextWave that chose to pay the balance of their winning bids in installments, payment of the installments in full was explicity made a condition of license retention. *See* 47 C.F.R. § 1.2110(f)(4)(iii). When this condition was challenged as a result of the precipitous decline in auction values following the C-block auction, the FCC conducted extensive administrative proceedings on the question and produced three orders declaring that C-block bidders could not keep their licenses without paying the full price for them. *See restructuring Order* ¶¶ 2, 5; *Reconsideration Order* ¶¶ 2, 10; *Second Reconsideration Order* ¶ 1. It sought in this manner to adhere to the fundamental rationale of the competitive scheme: Those qualified bidders who could pay the most were those who should be awarded the licenses. *See Restructuring Order* ¶ 19; *see also Second Order* ¶ 5. These rules and orders, which express the FCC's expert judgment as to the course that would best promote congressional objectives and serve the public interest, thus manifest substantive regulatory decisions about the allocation of spectrum.

Despite the new statutory scheme for allocating spectrum, the FCA draws no categorical distinctions among the three methods of license allocation—comparative hearing, lottery and auction. Each is pre-

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[9] The district court below held that the avoidance remedy requested by NextWave had "nothing to do with" the organization, execution, or implementation of the auctions. *NextWave Personal Communications, Inc. v. FCC (In re NextWave Personal Communications, Inc.)*, 241 B.R. 311 (S.D.N.Y. 1999). *See* infra at 36.

sumed to be a regulatory tool for ensuring that licenses are distributed in the way that fulfils the goals of the FCA. *See* 47 U.S.C. § 309(a). And each license, on whatever basis it is awarded, is not to "be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301.

A. The FCC and the Courts

The Supreme Court has emphasized that the FCA's "terms, purposes, and history all indicate that Congress formulated a unified and comprehensive regulatory system." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 (1968) (internal quotation marks and citation omitted). "Congress assigned to the Federal Communications Commission . . . exclusive authority to grant licenses" under the Act. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 553, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The FCC was "expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." *Southwestern Cable Co.*, 392 U.S. at 168, 88 S. Ct. 1994 (internal quotation marks and footnotes omitted). In this case, we are required to "enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of" radio transmissions. *Pottsville Broadcasting Co.*, 309 U.S. at 136-37, 60 S. Ct. 437.

For over fifty years the Supreme Court has recognized that under the FCA the division of authority

between these "spheres" requires that "no court can grant an applicant an authorization which the Commission has refused." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14, 62 S. Ct. 875, 86 L.Ed. 1229 (1942). Under the FCA, it is the FCC and not the courts that "must be satisfied that the public interest will be served by . . . the license." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S. Ct. 213, 91 L.Ed. 204 (1946).

The FCC's exclusive jurisdiction extends not only to the granting of licenses, but to the conditions that may be placed on their use:

> An FCC licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. Acceptance of a license constitutes accession to all such conditions. A licensee may not accept only the benefits of the license while rejecting the corresponding obligations.

P & R Temmer v. FCC, 743 F.2d 918, 927 (D.C. Cir. 1984).

If the conditions to which a license is subject are not met, the FCC may revoke the license. It is beyond the jurisdiction of a court in a collateral proceeding to mandate that a licensee be allowed to keep its license despite its failure to meet the conditions to which the license is subject.

When the FCC decise which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it therefore exercises the full extent of its regulatory capacity. Because jurisdiction over claims brought against the FCC in its regulatory capacity lies

exclusively in the federal courts of appeals, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses.

B. The Rulings of the Bankruptcy and District Courts

It is against this background that the inability and consequent failure of NextWave to pay for its C-block Lincenses must be considered. The FCC had not sold NextWave something that the FCC had owned; it had used the willingness and ability of NextWave to pay more than its competitors as the basis on which it decided to grant the Licenses to NextWave. Next-Wave's inability to follow through on its financial undertakings had more than financial implications. It indicated that under the predictive mechanism created by Congress to guide the FCC, NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public in whose interest they were granted. It meant, in regulatory terms, that NextWave was not entitled to the Licenses.

NextWave urged the bankruptcy and district courts to treat these proceedings as "a simple bankruptcy case." The courts apparently agreed. The bankruptcy court found that "the issues before [it] . . . concern[ed] solely the debtor-creditor relationship between the FCC and [NextWave]." *NextWave V*, 235 B.R. at 314. According to the district court, "[t]he claim ha[d] nothing to do with the FCC's 'organization, execution, or implementation' of the radio spectrum auction. Neither d[id] the claim implicate the FCC's

power to regulate the issuance or use of spectrum licenses." *NextWave*, 241 B.R. 311.

This approach was fundamentally mistaken. The FCC's auction rules promulgated under § 309(j) have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives. The fact that market forces are the technique used to achieve that regulatory purpose does not turn the FCC into a mere creditor, any more than it turns an FCC license won at auction into a property estate in spectrum. Nothing about putting spectrum licenses up for auction rendered them anything other than licenses, and the sole responsibility for the allocation of licenses lies with the FCC, with appeal to the courts of appeals, not the bankruptcy or district court.

By holding that for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion, the bankruptcy and district courts impaired the FCC's method for selecting licensees by effectively awarding the Licenses to an entity that the FCC determined was not entitled to them.[10] In so doing they exercised the FCC's radio-licensing function. *Cf. National Broadcasting Co.*, 319 U.S. at 224, 63 S. Ct. 997. "[T]he weighing of policies under the 'public

[10] The rules of construction included within § 309(j) reinforce this understanding. They say, "Nothing . . . in the use of competitive bidding shall . . . (C) diminish the authority of the Commission under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). In other words, even when they are *allocated* through the use of competitive bidding, spectrum licenses remain just that, *licenses* subject to regulation and reclamation by the FCC.

interest' standard is a task that Congress has delegated to the Commission in the first instance," *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596, 101 S. Ct. 1266, 67 L. Ed. 2d 521 (1981) (internal quotation marks and citation omitted), with deferential judicial review reserved to the courts of appeals. But even if the bankruptcy and district courts were right in concluding that granting the Licenses at a small fraction of NextWave's original successful bid price best effectuated the FCA's goals, *see NextWave III*, 241 B.R. 311; *NextWave IV.B*, 235 B.R. at 311-12, they were utterly without the power to order that NextWave be allowed to retain them for that reason or on that basis. *See Scripps-Howard Radio, Inc.*, 316 U.S. at 14, 62 S. Ct. 875.

This is not to say that these courts lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors. NextWave's arguments that the FCC seeks to frustrate the purposes of the bankruptcy laws are therefore misplaced. We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC.[11]

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[11] The bankruptcy court held: "The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors." *NextWave I*, 235 B.R. at 270. That is surely true. But as we have repeatedly stated, that analysis is misplaced if it allows the bankruptcy court to adjudicate claims against the FCC not as a creditor, but as an allocator of licenses. Such was the case here. As for NextWave's

As Justice Frankfurter noted nearly sixty years ago, "[t]he Communications Act . . . expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Pottsville Broadcasting Co.*, 309 U.S. at 138, 60 S. Ct. 437. In response to changing technological imperatives and policy preferences, Congress and the FCC have chosen to manage the "dynamic aspects" of spectrum allocation in a new way, by employing market forces in an attempt to ensure efficient and publicly beneficial resource allocation. Despite subsequent revolutions in technology, however, the observation of Justice Frankfurter still holds: In order for Congress's prescribed regulatory system to function properly in a dynamic environment, the FCC's allocative decisions must not be interfered with by other instrumentalities of the federal government acting beyond their statutory authority.

III. Constructive Fraud

While we reverse the district court's affirmance of the bankruptcy court orders issued in the adversary proceeding, and hold that these courts lacked jurisdiction to employ remedies that abrogate the FCC's licensing authority, we recognize that NextWave will remain a debtor in bankruptcy. If the Licenses are returned to the FCC, the bankruptcy court may resolve resulting financial claims that the FCC has against NextWave as it would the claims of any government agency seeking to recover a regulatory penalty or an obligation on a debt. In light of these possible further

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other creditors, jurisdiction in the bankruptcy and district courts is not created by any interest these creditors might have in NextWave retaining but avoiding payment on the Licenses.

proceedings, there remains for us the question of the nature of NextWave's obligation, which the bankruptcy court decided, *see NextWave IV.A*, 235 B.R. at 287-91, and which may on remand have substantial effect on the determination of the FCC's rights as creditor.[12] We hold, contrary to the rulings by the bankruptcy and district courts, that NextWave became obligated to the FCC for the full amount of its winning bids at the close of the C-block auction, and that the transaction in which the Licenses were issued was therefore not constructively fraudulent.

Under the avoidance provisions of the Code, a transfer or obligation is or is deemed to be a fraudulent conveyance—and therefore avoidable—if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. §§ 544, 548(a)(2)(A) (1993 & Supp. 1999).[13] It is uncontested that the question of reasonably equivalent value is determined by the "value of the consideration exchanged between the parties *at the time of the conveyance or incurrence of debt* which is challenged." *NextWave IV.A*, 235 B.R. at 290 (citing *In re Best Products Co.*, 168 B.R. 35, 54 (Bankr. S.D.N.Y. 1994)) (emphasis added).

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[12] Because the consequences of constructive fraud are not limited to 11 U.S.C. § 544, we believe appellate consideration of this holding is necessary.

[13] Both NextWave and the FCC concede that any choice-of-law questions as to the fraudulent conveyance issue are obviated by the coincidence of § 548, on the one hand, and the applicable New York, California, and Washington, DC laws, on the other. *See NextWave IV.A*, 235 B.R. at 289.

The date on which the payment obligation arose is therefore crucial to whether this obligation is avoidable. If NextWave incurred the obligation at the close of the auctions, then the value of the Licenses would by definition be $4.74 billion, since "the fair market values of the C block licenses were equivalent to the bids accepted by the FCC at the close of the auction and reauction." *NextWave IV.A*, 235 B.R. at 297 n.9 (noting NextWave's concession of this point). And if the fair market value was $4.74 billion, then there was no constructive fraud. On the other hand, if the obligation first arose on or about the date on which the Licenses were conditionally granted (following the fall-off in auction prices at the D, E and F-block auctions), then the $4.74 billion bid exceeded the fair market value as measured by the subsequent auction prices.

The bankruptcy court held that NextWave's payment obligation did not arise until the conditional grant of the Licenses on January 3, 1997. The court placed great weight on the idea that an obligation evidenced by a writing arises when the writing is delivered:

> Generally an obligation is incurred when a debtor becomes legally obligated to pay. *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983); *Barash v. Public Finance Corp.*, 658 F.2d 504, 511 (7th Cir. 1981); *see also In re G. Survivor Corp.*, 217 B.R. 433, 440 (Bankr. S.D.N.Y. 1998). While the Bankruptcy Code is silent on the question of when a debt or obligation is "incurred," courts have not questioned that an "obligation" to pay principal indebtedness under a promissory note is "incurred" on the date the note is executed and delivered. *E.g., In re Iowa Premium Service.*, 695 F.2d 1109, 1111-12 (8th Cir.

> 1982); *In re Smith-Douglass, Inc.*, 842 F.2d 729, 730 (4th Cir. 1988); *In re Pippin*, 46 B.R. 281, 283-84 (Bankr. W.D. La. 1984) (holding that, for preference purposes, debtor becomes legally obligated to pay under installment payment contract when contract is executed). The California [Uniform Fraudulent Transfer Act] provides that "[a]n obligation is incurred . . . if evidenced by a writing, when the writing executed by the obligor is delivered to, or for the benefit of, the obligee." Cal. Civ. Code § 3439.06(e)(2) [(1997)].

NextWave IV.A, 235 B.R. at 289 (ellipsis and second set of brackets in original).

The obligation to pay the *Notes* attached upon their delivery, as the writing rule confirms, but that observation begs the crucial question: When did NextWave take on the obligation to pay $4.74 billion for what it bid at auction? And that question suggests another: What did NextWave bid $4.74 billion to get?

We conclude that NextWave bid $4.74 billion for the right—excluding other bidders—to be the qualified licensee of the Licenses, and became obligated to assure payment of $4.74 billion for the Licenses either by cash and credit on delivery or by submitting to liability for the shortfall if NextWave—which knew the rules for qualification—failed to qualify.

Our ruling is based on the FCC's interpretation of its own regulations, to which courts owe deference, but to which the courts below refused deference on grounds we conclude are invalid. The FCC's interpretation is supported, in turn, by the auction law principle that an

obligation attaches when the seller no longer can reject the bidder's offer as a matter of discretion.[14]

A. FCC Regulations

The FCC's rules establish the close of the auction as the time of obligation. The FCC's formal interpretation of its own regulations, albeit issued after the auction, provides that the binding obligation to pay the full bid price attaches to the winning bidder "upon acceptance of the high bid." *In re Applications for Assignment of Broadband Personal Communications Services Licenses*, FCC 98-301 (Dec. 23, 1998), 1998 WL 889489

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[14] Because we believe there are adequate other grounds for reversing the courts below in this case, and because we think the FCC has provided us with a rational interpretation of its regulations that warrants our deference, we do not reach the question of whether federal common law governs auctions conducted pursuant to the FCA in the absence of satisfactory statutory or regulatory guidance. If we were to apply federal common law, it would not be "federal common law in the strictest sense, i.e., a rule of decision that amounts, not simply to an interpretation of a federal statute, but, rather, to the judicial 'creation' of a special federal rule of decision," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 2265, 141 L. Ed. 2d 633 (1998) (internal citations and ellipses omitted) (citing *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997)), and federal courts often employ federal common law "principles" in interpreting federal statutes. *See, e.g.*, *Burlington* at 2269-70 (agency); *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 1886 n.9, 141 L. Ed. 2d 43 (1998) (discussing veil piercing under CERCLA). In the present case, however, we content ourselves with reviewing and rejecting the conclusions that NextWave claims to draw from the principles of auction law. We refrain from engaging in the kind of "willful policymaking, pure and simple," *Burlington* at 2273 (Thomas, J., dissenting), that might result from drawing intuitively on purported common law "principles." *See Id.* at 2273 (decrying use of "agency principles" drawn entirely from Restatement (Second) of Agency).

(F.C.C.) ¶ 1. Other FCC publications clarify that the "acceptance of the high bid" occurs at the close of the auction: "Under the Commission's rules, [the winning bidder] became obligated for its winning bid amounts when the auction closed." *Public Notice, Auction of C, D, E, and F Block Broadband PCS Licenses*, DA-98-2604 (Dec. 23, 1998), 1998 WL 892962 (F.C.C.) at 4.

The FCC's interpretation enjoys a presumption of correctness: "We must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994); *accord New York v. Shalala*, 119 F.3d 175, 182 (2d Cir. 1997). It is not this Court's task to choose which among several competing interpretations best serves the stated regulatory purpose; "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S. Ct. 2381 (internal quotation marks omitted); *accord New York v. Shalala*, 119 F.3d at 182. This Court defers to the agency's interpretation unless a different reading is compelled by the plain meaning of the regulation or some other indicia of the agency's intent at the time of promulgation. *See Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S. Ct. 2381. Deference is especially appropriate where "the regulation concerns 'a complex and highly technical regulatory program.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991)).

In this case, the FCC interprets its regulation to mean that NextWave's obligation attached upon the close of the auction, and nothing justifies a departure

from that interpretation. At the close of the auction NextWave became obligated, if qualified, to pay the $4.74 billion bid price or, if unqualified, to pay a prescribed penalty. The FCC's penalty rules provide that default between the close of the auction and the grant of the Licenses exposes the winning bidder to liability for the amount it bid less the winning bid upon re-auction of the Licenses. *See* 47 C.F.R. § 1.2104(g)(1)-(2). This "penalty" is the functional analog of expectation damages; that is, the FCC must mitigate its harm by a re-auction, but the original winning bidder is liable for any shortfall between the subsequent winning bid and its own. So although labeled a "penalty," this remedy is fully consistent with the notion that the winning bidder becomes liable for full price of the winning bid upon the close of the auction.

The bankruptcy court, however, held that it owed no deference to the FCC's regulations or the Commission's interpretation thereof because (a) the FCC appears in bankruptcy court as a creditor rather than as a regulator, and so is due no more deference than other creditor; and (b) the deference ordinarily afforded the FCC's reading of its rules and the statute it administers is inappropriate (or at least not equally compelled) in this case by reason of the self-serving nature of the FCC's post hoc interpretation.

(a) *The FCC's Creditor Status.* The bankruptcy court treated the FCC as a creditor like any other, and thus refused to allow the FCC to construe its contractual rights (after the fact) in a way that would be binding in the bankruptcy proceeding:

> [T]he FCC's own regulations are entitled to no more nor less weight in the context of bankruptcy proceedings than the contractual notes, mortgages and similar documents required by other creditors in commercial transactions. . . . Stated simply, the FCC's regulations, *to the extent that they establish and govern the rights and obligations of the FCC and the licensee in their capacities as creditor and debtor*, are subject to modification under the Bankruptcy Code, just like the contractual rights and obligations of an ordinary creditor vis a vis its debtor.

NextWave V, 235 B.R. at 317 (emphasis added). This reasoning insufficiently accommodates the dual role that the FCC plays in this proceeding. *See supra* Part II. In granting licenses by auction, the FCC acts as creditor and regulator both. We need not decide what happens at each point of overlap, but the regulatory function is not ended by the bankruptcy of a licensee or license claimant, and as the function persists it must perforce be carried out.

True, the FCC's regulatory interpretation in this case favors the interests of the federal fisc over those of other NextWave creditors: It prevents the bankruptcy court from extinguishing approximately $3.7 billion of debt owed for the Licenses. It does not follow, however, that the FCC's regulatory interpretation is proffered by the FCC as creditor only and not as regulator in whole or part. The FCC's interpretation, which was rejected below as self-serving because it advances the FCC's interest as creditor, also advances important regulatory purposes. *See supra* Part II; *Second Order* ¶ 5; *Restructuring Order* ¶ 19.

The bankruptcy court's denial of deference to the FCC was premised on the understanding that the FCC was acting solely as a creditor in this action. Because the FCC was acting in part as a regulator as well as a creditor, we have no occasion to decide here whether the bankruptcy courts owe deference to the regulatory interpretations of agencies acting strictly as creditors. It is possible that in future proceedings the FCC may stand in a strict debtor/creditor relationship to NextWave. But since we do not know what steps the FCC will take vis-à-vis the obligations owed to it by NextWave, any issues created by the FCC's attempts to collect on those obligations are not yet ripe.[15] *Cf. Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512 (D.C. Cir.) (holding that a request for injunctive relief, made by a bidder at a spectrum auction, was not ripe when the actual order imposing default penalties had not yet issued). We limit ourselves here to finding that NextWave's obligations were incurred at the close of auction and that the transaction in which they were incurred was therefore not constructively fraudulent. Where the regulatory agency acts as both regulator and

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[15] This appeal stems from an adversary proceeding initiated preemptively by NextWave. Because of the ongoing litigation, the FCC has not yet sought to take any action vis-à-vis the Licenses. While it would probably be fair to assume that the FCC will seek to revoke the Licenses and collect on its debts, we cannot presume to know in advance the course that the agency will ultimately follow. We do not know, for example, the size of the penalty the FCC may seek to recover, or even whether it will seek to recover its regulatory penalty, recover on the Notes, or recover on both. It is possible that if the FCC chooses to pursue some of these options —say, collection on the Notes—it may find itself acting as a creditor.

creditor, we owe deference to its interpretation of its regulations.

(b) *The FCC's Self-Interest.* The courts below emphasized and relied on the self-serving nature of the FCC's interpretation and a perceived lack of connection between its interpretation and the original legislative purpose of the auction regime. We have already noted that the FCC's interpretation, though financially advantageous to the federal government, also furthers regulatory goals. The financial benefits of the FCC's post hoc interpretation do not extinguish the courts' duty to give deference.

The level of judicial deference depends in part on whether an agency interpretation is consistent or in conflict with the goals of the regulation as stated when it was adopted. *See Thomas Jefferson Univ.*, 512 U.S. at 512, 114 S. Ct. 2381. As counsel for NextWave agreed at oral argument before us, one congressional goal in authorizing the FCC to conduct auctions was to achieve fair and efficient allocation of spectrum licenses. *See* Committee Report at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580; *Second Order* ¶ 73. The auction mechanism can do so only if the bids constitute a reliable index of the bidders' commitments to exploit and make the most of the license at issue. And this goal is served only if the high bid entails the obligation to make good the amount bid, either by a qualified bidder's payment on delivery or by payment of any shortfall (upon re-auction) by a bidder who fails to qualify. If the transaction can be adjusted in bankruptcy proceedings so that the high bidder takes the license without paying the amount of the high bid, the auction as a mechanism for determining valuation is impaired.

The FCC's insistence on full payment is consistent with the goals of the auction.

B. Auction Law

The parties and the bankruptcy court make several arguments based on the principles of auction law. We do not think it is necessary to rely on or to appear to create a federal common law of auctions in order to resolve this appeal. We think that the principles of auction law are useful nonetheless, at least insofar as they confirm and reinforce the rationality of the FCC's interpretation of its regulations.

The bankruptcy court held that NextWave gained nothing at the close of the auction except the right to apply for the Licenses, relying upon the following colloquy with counsel for the FCC:

> THE COURT: Wait a second. You're asking for words, namely, "reasonably equivalent value" and that raises a question or value for what? And equivalent to what?
>
> [FCC]: To what they got.
>
> THE COURT: What did they get?
>
> [FCC]: What they got was the right to apply for these licenses that were essential to their business. And without those licenses, they would have no business.

NextWave II, 235 B.R. at 274. In summary of the court's reasoning below (which summary may not do the analysis full justice): Delivery of the Licenses, notwithstanding the auction and NextWave's high bid,

remained contingent upon the FCC's determination sometime later that NextWave's application should be granted; the auction was therefore of the kind conducted with a reserve; like such reserve auctions, the high bidder's obligation to pay did not arise when the hammer fell; the reserve in this case was not lifted until at least such time as the FCC decided to deliver the Licenses; and NextWave's obligation to pay the amount of the high bid therefore did not arise until the date on which the Licenses were delivered and the Notes delivered in exchange. We disagree. The close of the auction established the FCC's obligation to grant NextWave the Licenses if the company fulfilled statutory eligibility requirements, and NextWave became liable at that time for full payment on the Licenses at the stated price.

As in contract law more generally, a sale by auction is valid only upon offer and acceptance. *See Blossom v. Railroad Co.*, 70 U.S. (3 Wall) 196, 206, 18 L.Ed. 43 (1865); 7 *Am.Jur.2d Auctions and Auctioneering* § 20 (1997). As a baseline rule, the close of the auction—traditionally the drop of the hammer—signals acceptance of an offer and forms an enforceable contract. *See* 7 *Am.Jur.2d Auctions and Auctioneering* § 34; 7A *C.J.S. Auctions and Auctioneers* §§ 8, 12 (1980). A bidder has a right to withdraw the bid at any time before its acceptance. *See Blossom*, 70 U.S. at 206; 7 *Am.Jur.2d Auctions and Auctioneering* § 33; 7A *C.J.S. Auctions and Auctioneers* § 13. The timing of acceptance, and therefore of the creation of a contractual obligation, is different if the auction sale is conducted "with reserve": "Where the seller reserves the right to refuse to accept any bid made, a binding sale is not consummated between the seller and the bidder until

the seller accepts the bid." 7 *Am.Jur.2d Auctions and Auctioneering* § 20; *see also Blossom*, 70 U.S. at 206; 7A *C.J.S. Auctions and Auctioneers* § 11.

If by virtue of the required statutory approval, the FCC's spectrum-allocation process became an "auction with reserve," then (under the principles of auction law) NextWave's obligation to pay would not have arisen until the FCC approved the grant of the Licenses to NextWave, *after* the drop in market value reflected in (or precipitated by) the auction of the D, E and F-blocks. The finding of constructive fraud rests on that analysis. On the other hand, if the obligation to pay or make good the winning bid arose when the winning bid was announced, *before* the drop in market value, then the obligation NextWave seeks to avoid cannot be characterized as a constructive fraud.

We conclude that the obligations NextWave seeks to avoid arose no later than the announcement of the winning bid, even though the resulting contract had more terms than would be common at the auction of a saleable thing by a private seller. By conducting the auction, the FCC offered to deliver the Licenses to the qualified high bidder. By bidding, NextWave represented that it was qualified to receive the Licenses. By making the high bid, NextWave (a) assumed an obligation to pay a down-payment promptly, (b) assumed an obligation to pay in the future the amount of its bid upon receipt of the Licenses and (c) assumed the risk that it might prove unqualified, by binding itself in that event to pay the amount of any shortfall in a re-auction of the same Licenses.

The requisite statutory approval by the FCC was not a "reserve" that (until lifted) prevented any enforceable

obligation on the part of the high bidder. Auctions with reserve stand or fall as a matter of the seller's discretion, usually on the basis of the pecuniary sufficiency of the bids. *See* 7 *Am.Jur.2d Auctions and Auctioneering* § 23 (defining the phrase "without reserve" in terms of the seller's right to "withdraw[ ] the property from sale if he is not pleased with the bids"); *see also Drew v. John Deere Co.*, 19 A.D.2d 308, 241 N.Y.S.2d 267, 269-70 (1963); 7 *Am.Jur.2d Auctions and Auctioneering* § 21 ("[I]n an auction with a reserve, the auctioneer *may* withdraw the items for auction at any time until he announces completion of the sale." (emphasis added)).

The nature of the statutory approval requirement in this case is neither discretionary nor economic. The FCC's act of naming NextWave the winning bidder obligated the FCC to deliver the Licenses to NextWave, at the price determined by NextWave's winning bid, if NextWave fit certain non-economic qualifying criteria. *See In the Matter of the Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Fifth Report and Order*, FCC 94-178, 9 F.C.C.R. 5532 (July 15, 1994), 1994 WL 372170 (F.C.C.) ¶ 81 ("If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner."); 47 C.F.R. § 1.2108(d)(1) ("If the Commission determines that . . . an applicant is qualified . . . it will grant the application."). NextWave cites *Mobile Communications Commission v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), as demonstrating that the FCC has no obligation to grant the license at the bid-upon price. *MCC v. FCC*, however, dealt not with the FCC's decision that a bid price was insufficient but with the FCC's determination that the licensee was ineligible for a "pioneer's

preference" and thus had to pay for its license. *See id.* at 1408-09. The case is inapposite.

NextWave knew about the statutory criteria for approval before the bidding began. *See* 47 C.F.R. § 310(b)(4) (1991); 47 C.F.R. §§ 24.709, 24.712, 24.720 (1996). In the event, the only obstacle to closing encountered by NextWave was its own non-compliance with the foreign ownership requirements. NextWave's willingness to bid notwithstanding the undisputed fact that non-compliance would prevent delivery of the Licenses and compel NextWave to insure the government against a lower high bid at re-auction demonstrates that NextWave assumed the risk of its own non-compliance.

True, there appears to be an element of discretion in the FCC's decision to grant the Licenses conditionally, pending NextWave's compliance with statutory requirements. However, that conditional grant was temporary, *see In re Applications of NextWave Personal Communications, Inc. for various C-Block broadband PCS Licenses*, DA 97-328 (Feb. 14, 1997), at 2, and the FCC had no power to waive the statutory requirements permanently. Moreover, it was a temporary discretionary *approval;* the FCC had no authority to *reject* NextWave's bid as a matter of discretion.

Thus the FCC was obligated to deliver the Licenses at the agreed-upon price if NextWave could demonstrate that it met certain statutory and regulatory eligibility requirements, and NextWave assumed the risk of its failure to do so. The FCC was bound, and so was NextWave. After acceptance of the offer, "as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid." 7 *Am.Jur.2d Auc-*

tions and Auctioneering § 20 (1997); *see also Blossom*, 70 U.S. at 206.

The FCC's dual role in the licensing process—as offeror in the auction and as regulator thereafter—confers on the FCC prerogatives that are not enjoyed by the ordinary seller. The FCC thus retains the authority to reject a high bid for *regulatory* purposes. But NextWave knew, at the time of the auction, that the winning bidder would look to the FCC both as creditor and as regulator. If NextWave objected to the conditions imposed by the FCC or to the FCC's dual role in the transaction, NextWave could have refrained from participating in the auction.

The point is well illustrated in *United States v. Weisbrod*, 202 F.2d 629, 633 (7th Cir. 1953). In a surplus auction conducted near the end of World War II, the federal government reserved a unilateral right to withdraw from sale certain chemicals and drugs, even after accepting the winning bid. *See id.* at 630. When the government sued the winning bidder for default, the bidder defended on the ground that the contract was defective for failure of mutuality. *See id.* at 631. The Seventh Circuit affirmed the finding of liability for breach, *see id.* at 633, on the ground that a condition made known to the buyer—even the unilateral right of the seller to withdraw from the contract—did not abrogate the buyer's obligation to perform. *See id.* at 632-33. "If one does not wish to bid . . . with the conditions attached, his alternative is to make no bid." *Id.* at 633.[16]

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[16] Cases cited by NextWave to support the contrary argument, which concern auctions with reserve, are not on point. *See, e.g.*,

CONCLUSION

We hold that the bankruptcy and district courts had no power to interfere with the FCC's system for allocating spectrum licenses and that, in any event, the courts erred in determining that NextWave's payment obligation was constructively fraudulent. We therefore reverse the judgment of the district court affirming the five orders of the bankruptcy court and remand for further proceedings consistent with this opinion, if any are necessary. The mandate shall issue forthwith.

Erie Coal & Coke Corp. v. United States, 266 U.S. 518, 520-21, 60 Ct. Cl. 1022, 45 S. Ct. 181, 69 L.Ed. 417 (1925); *Ferry v. Udall*, 336 F.2d 706, 709 (9th Cir. 1964).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Nos. 99 Civ. 4439 (CLB)
Bankruptcy No. 98 B 21529 (ASH)
Adversay No. 98-5178A

IN RE NEXTWAVE PERSONAL COMMUNICATIONS, INC., ET AL., DEBTORS

NEXTWAVE PERSONAL COMMUNICATIONS, INC., PLAINTIFF-APPELLEE

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT-APPELLANT

July 27, 1999

MEMORANDUM & ORDER

BRIEANT, District Judge.

This appeal challenges five decisions and orders of the Bankruptcy Court, issued in a Chapter 11 Proceeding by the Honorable Adlai S. Hardin, United States Bankruptcy Judge, dated December 7, 1998, February 16, 1999, April 2, 1999, May 12, 1999 as supplemented on June 22, 1999, and June 16, 1999, rendered in the Adversary Proceeding of NextWave Personal Communications, Inc. ("NextWave") against the Federal Communications Commission (the "FCC")

(the "Adversary Proceeding"). On June 22, 1999, Defendant-Appellant FCC filed its brief; on July 2, 1999, Plaintiff-Appellee NextWave filed its brief; and on July 8, 1999, the FCC filed its reply brief. On July 15, 1999, this Court heard oral argument on the appeal and reserved decision. Thereafter, on July 20, 1999, NextWave submitted a letter brief addressing certain concerns raised by the Court at oral argument.

Familiarity of the reader with the decisions of Judge Hardin is assumed.

In an appeal of a Bankruptcy Court's decision and order, this Court reviews findings of fact for clear error, *see In re Artha Management, Inc.*, 91 F.3d 326, 328 (2d Cir. 1996), and conclusions of law *de novo*, *see In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d Cir. 1992).

FACTUAL BACKGROUND

The facts relevant to this appeal are not disputed significantly. In 1993, after investigation and discussion, the House Committee on Energy and Commerce (the "Committee"), concluded

> that a carefully designed system to obtain competitive bids from competing qualified applicants [for electromagnetic spectrum licenses] can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of public airwaves.

H.R. Rep. No. 103-111 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 580. In response, Congress passed

the 1993 amendments to the Federal Communications Act (the "FCA"), which added section 309(j). *See* 47 U.S.C. § 309(j). Section 309(j) granted the FCC the power to conduct competitive bidding auctions to sell the right to apply for "blocks" of airspace or radiobands. As part of the program, the FCC was to designate certain blocks for auction to small, emerging businesses and to provide flexible, deferred payment plans to such small businesses. *See* 47 U.S.C. § 309(j)(3)(B) and (4)(D). Pursuant to Congress' mandate, the FCC created a competitive bidding auction system and designated the "C Block" for auction to small businesses providing Personal Communication Services ("PCS"), a new form of wireless communication technology. Maximizing revenue was proscribed explicitly as an objective of such system.

On May 6 and July 16, 1996, the FCC ran auctions for C Block licenses at which NextWave won the right to apply for sixty-three C Block licenses by bidding $4.7 billion. NextWave put down the required deposit of $474 million (10% of the winning bid) and proposed a payment plan at below-market interest rates for the remaining $4.26 billion. NextWave submitted applications for the licenses for review and approval by the FCC. On January 3, 1997, the FCC approved NextWave's applications and soon thereafter sent to NextWave a series of promissory notes for a total of $4.26 billion, dated January 3, 1997. NextWave executed the notes on February 19, 1997.

Before approving the C Block licenses for NextWave, the FCC conducted auctions for "D, E & F Block" licenses, resulting in much lower bids for the rights to apply for the same or similar licenses. As a consequence

of the gross disparity between the bids on the C Block licenses and on the D, E and F Block licenses, 90% of the winning bidders from the C Block auction were unable to obtain financing for their payment plans. The FCC thereafter promulgated voluntarily two restructuring orders (the "Restructuring Orders") that offered the C Block license-holders four options to restructure their debt. NextWave informed the FCC that the four options were not commercially viable and on May 8, 1998, requested an alternative restructuring. The FCC refused and NextWave appealed that decision to the Circuit Court of Appeals of the District of Columbia and requested a stay of the June 8, 1998 deadline to elect one of the four options. The Court of Appeals denied the request for a stay.

On June 8, 1998, NextWave, unable to finance its enormous debt to the FCC and severely undercapitalized, declared Chapter 11 Bankruptcy and filed the Adversary Proceeding that is the subject of this appeal.

DISCUSSION

December 7, 1998 Decision Granting in Part and Denying in Part the FCC's Motion to Dismiss

The First Amended Complaint of NextWave contained two claims, the first for constructive fraudulent conveyance subject to avoidance under 11 U.S.C. § 544 and the second for equitable subordination based on the FCC's "inequitable, unconscionable and unfair conduct" in auctioning other licenses before approving all of the C Block licenses. The Bankruptcy Court dismissed NextWave's second claim for lack of subject matter jurisdiction and NextWave has not appealed. Thus, dismissal of that claim is not under review.

The Bankruptcy Court denied the FCC's motion to dismiss NextWave's claim for constructive fraudulent conveyance. The FCC asserted (1) that the Bankruptcy Court and District Court lack subject matter jurisdiction over NextWave's claim because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the Circuit Courts of Appeals, 28 U.S.C. § 2342; 47 U.S.C. § 402; and (2) that the FCA preempts state fraudulent conveyance claims. The Bankruptcy Court held that for purposes of the fraudulent conveyance claim, the FCC was acting in its capacity as creditor rather than as regulator. As to the preemption claim, the Bankruptcy Court concluded that nothing in the FCA conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to exclude licensees from access to the Bankruptcy Court.

The Bankruptcy Court reasoned, and this Court agrees, that the fraudulent conveyance claim does not seek to litigate any issue with respect to the regulatory power granted the FCC by Congress. The claim has nothing to do with the FCC's "organization, execution, or implementation" of the radio spectrum auction. Neither does the claim implicate the FCC's power to regulate the issuance or use of spectrum licenses. The claim seeks the equitable remedy of avoidance available under 11 U.S.C. § 544 for the benefit of other creditors and the debtor, and implicates regulations and orders relevant to the FCC only in its role as creditor.

Although Congress has granted the FCC the regulatory power to control the issuance and use of these licenses, it did not grant regulatory power to the FCC to make rules or orders with respect to its own status

as a creditor vis-a-vis its debtors or other creditors of its debtors. The FCA specifically directs that the mandate to the FCC is not to collect revenue, and as the FCC cites in its brief, section 309(j) "alters only the licensing process, and has no effect on the requirements, obligations or privileges of license holders." 1993 U.S.C.C.A.N. at 585. The FCC argues that its powers to direct a debtor to pay the full amount of its debt, regardless of whether the debtor is in bankruptcy, derives from other sections of the FCA. Section 309(j) states, "Nothing in this subjection, or in the use of competitive bidding, shall diminish the authority of the [FCC] under the other provisions of this chapter to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). But the FCA does not provide for the FCC's current method of "reclamation" wherein the FCC is attempting "to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws." (December 7, 1998 Bankruptcy Decision & Order).

The regulations outlining the steps to be taken by the FCC in the event of a default in payment of the installment notes are provisions of a contract between a creditor and debtor. As such, they are subject to revision and adjustment pursuant to the Bankruptcy Code, just as any similar debt. In any event, NextWave did not default, those steps were never taken, and no penalty was ever assessed.

The Restructuring Orders were the voluntary offers of a creditor to protect the solvency of its debtor in order to assure payment. Not only were these orders promulgated by the FCC in its capacity as a creditor,

but also NextWave is not challenging the propriety of those orders, which provide relief to those who find it commercially viable and desire to take the benefit of such orders. NextWave is challenging the right of the FCC as a creditor of a bankrupt entity to recover on a fraudulently incurred obligation. As the Supreme Court stated in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979),

> When the United States acts as a lender or guarantor, it does so voluntarily, with detailed knowledge of the borrower's financial status. The agencies evaluate the risks associated with each loan, examine the interests of other creditors, chose the security believed necessary to assure payment, and set the terms of every agreement. . . . The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judicially supports the view that it did not intend to confer special privileges on agencies that enter into the commercial field.

Id. at 736-37, 99 S. Ct. 1448. The regulations and orders noted above were the actions of a creditor who happens to be a federal agency. As a creditor and as a federal agency, the FCC is subject to the Bankruptcy Code. *See* 11 U.S.C. § 106(a) (providing that federal agencies are subject to § 544 claims). Congress could have exempted but did not exempt the FCC from the Bankruptcy Code.

The Bankruptcy Code confers upon the district courts 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. Specifically, 28 U.S.C. § 157(b)(2)(H) grants the Bankruptcy Court jurisdiction to determine "proceedings to determine, avoid, or recover fraudulent conveyances." The Bankruptcy Court therefore held that the constructive fraudulent conveyance dispute tendered by the Adversary Proceeding was within the subject matter jurisdiction of the Bankruptcy Court, and this Court agrees.

This Court also agrees that the FCA does not preempt the Bankruptcy Code or state fraudulent conveyance law. As this Court has already stated, Congress must expressly exempt federal agencies from application of the Bankruptcy Code and Congress has not exempted the FCC. In addition, the FCA makes absolutely no attempt to regulate debtor-creditor relations.

Section 544 of the Bankruptcy Code provides that the court should use "applicable law" in determining whether a constructive fraudulent conveyance has occurred. Applicable law is generally state law, unless state law is preempted by federal law or state law is found to be inappropriate because of the involvement of the federal government as creditor (*See infra*). With regard to preemption, the FCA provides:

> **State Preemption.** (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate *the entry of or the rates charged* by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3). This provision does not explicitly preempt state fraudulent conveyance law. Moreover, state fraudulent conveyance law does not actually conflict with the FCA. It may conflict with self-interested regulations promulgated by the FCC in its capacity as a creditor, but those regulations were not promulgated pursuant to the FCA and are not about "frequency allocation, over which federal control is clearly exclusive." *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424, 430 n.6, 83 S.Ct. 1759, 10 L. Ed. 2d 983 (1963).

February 16, 1999 Decision Determining the "Effective Date"

The FCC brought a motion for summary judgment to determine the "effective date" for purposes of § 544(b) of NextWave's $4.74 billion obligations. Under § 544(b), the "effective date" is the date that the "obligation [was] incurred," § 544(b). The Bankruptcy Court determined that the effective date was at the earliest January 3, 1997, which is the date the FCC approved NextWave's application for the sixty-three C Block licenses and the date of the promissory notes. The FCC argues, however, that the effective date is the date NextWave won the bids at auction on May 8 and July 23, 1996.

The obligation sought to be avoided is not any of the obligations incurred when the auction ended, but rather the obligation to pay the FCC the winning bid amount for the sixty-three licenses, which arose at the time the licenses were issued or the notes were executed. According to the FCC regulations, the winning bidder must apply for the license, which may or may not be granted because the public and other aspirants have the right to oppose the grant. Before the granting of

the application and issuing of the licenses, there is no property to be valued. If the bidder is disqualified or defaults in connection with the application, the FCC may assess a penalty in the amount of the difference between the price ultimately received on resale and the original bidder's bid. Thus, the obligations incurred at auction are the obligations to pay any penalties assessed by the FCC. No penalties were assessed, so that obligation was never incurred. The obligation to pay the total winning bid price is not incurred until the application is processed and granted, and the licenses are thereby transferred to the bidder. Based on this reasoning, the findings of fact by the Bankruptcy Judge that the obligation was not incurred until administrative approval or grant of the licenses, here no earlier than January 3, 1997, is at the very least not clearly erroneous.

April 2, 1999 Oral Decision Denying Dismissal

The FCC moved for judgment on the pleadings for failure to state a claim under federal common law as set out by the Ninth Circuit Court of Appeals in *Kupetz* v. *Wolf*, 845 F.2d 842 (9th Cir. 1988). The FCC argued that because the avoidance claim challenges NextWave's contractual obligation to the United States pursuant to a national statutory scheme for regulating the commercial use of radio spectrum, federal common law should apply. The FCC also argued that the court should apply the *Kupetz* rule of federal common law, that a claim for fraudulent conveyance will not lie if subsequent creditors were on notice of the risks of the conveyance.

On April 2, 1999, the Bankruptcy Court heard oral argument and ruled in an oral decision that it would not

invent federal common law or apply the version presented by the FCC. The Bankruptcy Court reasoned, and this Court agrees, that federal common law is applied where application of existing state or federal law would undermine a federal regulatory program. *See United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 604, 93 S. Ct. 2389, 37 L. Ed. 2d 187 (1973) ("[S]tate law may be found an acceptable choice, . . . even when the United States is a contracting party. However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program."). In this case, the application of 11 U.S.C. § 544(b) and thereby state fraudulent conveyance law will not abrogate the explicit terms or purposes of the regulatory scheme embodied in Section 309(j) or other sections of the FCA.

This Court also agrees that even if the Bankruptcy Court had concluded that the "applicable law" is federal common law, the rule articulated in *Kupetz* is not the proper federal common law to apply to this case. The great majority of the creditors in this case extended credit before the auction, and before the licenses were issued and the allegedly fraudulent obligation was incurred. Therefore, NextWave's other creditors are not subsequent creditors with notice comparable to the creditors in *Kupetz*.

May 12 and June 22, 1999 Findings of Fact and Conclusions of Law After Trial

In the May 12 opinion, the Bankruptcy Court determined that the material elements of a fraudulent conveyance claim are the same under any law which

could apply, that is, California law, New York law, District of Columbia law, and the Bankruptcy Code § 548. Applying those elements, the Bankruptcy Court found after trial that NextWave had proved its claim for constructive fraudulent conveyance. In the June 22 supplemental opinion, the Bankruptcy Court granted the remedy provided by § 544, that is, avoidance to the extent allowed under applicable law. The Bankruptcy Court determined under California law that the obligation was incurred on February 19, 1997, the date the notes were executed and went into effect. On that date, the C Block licenses were worth $1,023,211,000. All obligations beyond this amount were represented by the payments and notes held to be fraudulently conveyed. Thus, NextWave's non-fraudulent obligation was held to be $1,023,211,000. NextWave is thus currently obligated to pay $1,023,211,000 minus the amount paid as downpayment, $474,364,806, leaving a total current obligation of $548,846,194.

Other than its argument that the Bankruptcy Court should apply federal common law, which the Bankruptcy Court rejected in its April 2, 1999 Oral Decision, the FCC does not dispute the material elements of a fraudulent conveyance claim applied by the Bankruptcy Court to the facts determined at trial. This Court addressed and rejected this argument in its discussion of the April 2, 1999 Oral Decision and need not revisit it in the context of the Bankruptcy Court's Findings of Fact and Conclusions of Law after trial. The uncontested elements are as follows: NextWave must prove that (1) it incurred an obligation (2) at a time when it was engaged or was about to engage in a business or transaction for which the remaining assets of NextWave were unreasonably small in relation to the

business or transaction, or intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due (3) for which it did not receive reasonably equivalent value.

Other than its argument that the Bankruptcy Court should find that the effective date was the date of the auction, which the Bankruptcy Court rejected in its February 16, 1999 Summary Judgment Decision, the FCC does not contest the Bankruptcy Court's finding that NextWave incurred an obligation on February 19, 1997.[1] Again, this Court addressed and rejected this argument in its discussion of the February 16, 1999 Summary Judgment Decision and need not revisit it in the context of the Bankruptcy Court's Findings of Fact and Conclusions of Law after trial.

The FCC stipulated before trial to the second element of the claim that NextWave was insolvent on January 3 and February 14 and 19, 1997, and on June 8, 1998. The FCC does not contest the valuation of the licenses as of February 19, 1997, or the resultant conclusion that NextWave did not receive reasonably equivalent value for the obligation incurred. Thus, in challenging the Bankruptcy Court's Findings of Fact and Conclusions of Law, the FCC is really challenging only the remedy imposed by the Bankruptcy Court.

The FCC argues that the Bankruptcy Court in fashioning its remedy failed to harmonize the FCA with the Bankruptcy Code because it "failed to recognize that the potential benefits of allowing NextWave to

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[1] There seems to be no material difference in the value of the licenses if the date of January 3, 1997 were to be used.

reorganize pale in comparison with the negative ramifications that follow from permitting spectrum licensees to avoid critical provisions of their regulatory agreements with the FCC by declaring bankruptcy." (Brief of Defendant-Appellant). The FCC asserts that allowing NextWave to keep the sixty-three licenses for a reduced obligation undermines the integrity, reliability and purpose of the regulatory scheme for competitive bidding, creates perverse incentives for bidders to bid to win while never intending to pay the bid but rather intending to go into bankruptcy after the auction, and hurts those who bid for but did not win the licenses when they were willing to pay much more than NextWave is now obligated to pay.

It is true that the Bankruptcy Court was required to balance the two enactments and "give effect to both if possible." *Morton* v. *Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). It is also true that the Bankruptcy Court did just that. The Bankruptcy Court spent three pages of its opinion delineating how its chosen remedy would fulfill the objectives of the Bankruptcy Code and § 309(j) of the FCA. This Court agrees that the remedy that best balances the objectives of the Bankruptcy Code and the FCA is avoidance of so much of the obligation as was fraudulently conveyed.

Section 544 provides specifically for the remedy of avoidance for a fraudulent conveyance: "The trustee may avoid . . . any obligation incurred by the debtor that is voidable under applicable law." 11 U.S.C. § 544(b). Although the entire obligation is voidable, *In re Acequia, Inc.*, 34 F.3d 800, 809-10 (9th Cir. 1994), the good faith obligee has the right to assert a claim for the

value of the property transferred: "[T]o the extent a[n] . . . obligation is voidable under section 544 . . . a[n] obligee . . . that takes for value and in good faith . . . may enforce any obligation incurred . . . to the extent that such . . . obligee gave value to the debtor in exchange for such . . . obligation." 11 U.S.C. § 548(c). If NextWave were required to return the licenses, the Company would be forced into dissolution. The remedy of avoidance of only the portion of the obligation that was fraudulently incurred is the statutory remedy and such remedy promotes equitable distribution among creditors and other parties by returning fraudulently transferred property to the estate and fosters the overall bankruptcy policy favoring reorganization over dissolution. *See In re Chateaugay Corp.*, 89 F.3d 942, 949 (2d Cir. 1996) (noting policy favoring rehabilitation and reorganization evidenced by Bankruptcy Code and affirming 201 B.R. 48, 72 (Bankr. S.D.N.Y. 1996) ("Public Policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values.")); *see also In re Continental Airlines*, 91 F.3d 553, 565 (3d Cir. 1996) (noting same policy).

The objectives of Congress in enacting § 309(j) are the development and rapid deployment of new technology for the benefit of the public, the promotion of competition to ensure the efficient and intensive use of the spectrum, the provision of opportunity for small businesses to enter the field, and the recovery for the public of a portion of the value of the spectrum. *See* 47 U.S.C. § 309(j)(3). The remedy fashioned by the Bankruptcy Court supports these objectives. NextWave has invested millions of dollars in researching new

technology and preparing a network that can utilize best the licenses it has. It is a small, innovative business with employees and small creditors as well as large creditors like the FCC. Allowing NextWave to keep and use the licenses promotes rapid deployment of technology without the delay of reauction and development of a new network by another company. It promotes small business entering a field with high barriers to entry. It allows the public to recover more than a portion of the current value of the spectrum licenses; the public is recovering more than two times the current value of the spectrum licenses.

Also, Congress made clear that maximizing revenue cannot be an objective. The FCC is recovering more than the value of the spectrum and should not now be trying to maximize revenue by trying to recover the winning bid.

The remedy fashioned by the Bankruptcy Court at the same time does not undermine the objectives of § 309(j). The FCC's assertions to the contrary are not persuasive. First, a company generally does not intend to jump into bankruptcy as part of its business plan. Bankruptcy is bad business. It is a laborious process in which reorganization is not always possible and the company's reputation may be destroyed. When and if a hypothetical bidder that would bid without intending to perform comes on the scene, the Bankruptcy Court as a court of equity can deal with the problem. This is not such a case, and the wisdom and propriety of the remedy must be reviewed in light of the facts of the actual case before Judge Hardin.

Second, the Bankruptcy Court found, and the FCC does not contest, that

> NextWave was not the only C block licensee to find the public capital markets closed. Approximately $1.6 billion of public financing was sought by C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public market. To this date, nearly three years after the 1996 auction and reauction, less than 10% of the C block licenses awarded by the FCC have been placed in service.

(May 12, 1999 Bankruptcy Decision). Thus, the C Block auction was a disaster for every participant. Those who bid but did not win are lucky, not hurt. They had the opportunity to bid at the D, E and F Block auctions and receive equivalent licenses for a fraction of the price NextWave is paying, even after the decision reducing its obligation. And if they had won the bid at the C Block auction, likely they would be in bankruptcy right now. The integrity and reliability of the C Block auction is not undermined by an avoidance remedy; it was undermined by the fact that 90% of the winning bidders are now bankrupt and/or paying an outrageously inflated price. The FCC has not since run another auction like the C Block auction.

The Court thus agrees that the remedy fashioned by the Bankruptcy Court "is intuitively fair and equitable to both the government and the debtor's estate and implements both the letter and spirit of the Federal and state statutes and the case law governing debtor-creditor relations." (June 22, 1999 Bankruptcy Supplemental Decision). In addition, the remedy supports rather than

undermines the objectives of the FCA, particularly § 309(j).

June 16, 1999 Decision Denying Motion to Lift Automatic Stay

The Bankruptcy Court denied the FCC's motion to lift the automatic stay under 11 U.S.C. § 362(d)(1) for "cause." The FCC's asserted "cause" for a lift of the automatic stay was that by reason of the May 12 and June 22 opinions, NextWave would not be paying the full amount of its winning bids in the C Block auction, and thus would be defaulting. According to the FCC, the FCC therefore should be able to pursue the remedy set out in its regulations, that is, return of the licenses and foreclosure on the $4.26 billion allegedly outstanding. The FCC asserts that the automatic revocation of licenses and pursuit of debt collection procedures upon default are "mandated" by FCC regulations on the auction process and it should be allowed to proceed.

The FCC fails to present cause for a lift of the automatic stay. As this Court has stated previously, he FCC regulations on automatic revocation and pursuit of debt collection are not part of the auction process; they are the FCC's rules governing its status as a creditor of licensees. Congress did not exempt the FCC from the Bankruptcy Code or grant the FCC the power to determine debtor-creditor relations. As such, the FCC is to be treated in this context as any other creditor. At present, NextWave's obligation has been reduced and it is not in default on the reduced obligation. There is no reason to believe that it will default. Indeed, it is highly likely that the debtor will confirm a plan of reorganization and will stay in business, putting the sixty-three

licenses at issue in this case to good use for the benefit of creditors, employees, and the public at large. This fulfills the primary objective of the Bankruptcy Code to rehabilitate debtors for the benefit of all. *See In re Chateaugay Corp.*, 89 F.3d at 949, 201 B.R. at 72 ("Public Policy, as evidenced by chapter 11 of the Bankruptcy Code, strongly favors the reorganization and rehabilitation of troubled companies and concomitant preservation of jobs and going concern values.").

CONCLUSION

For the foregoing reasons, the decisions and orders of the Bankruptcy Court in the Adversary Proceeding are affirmed.

SO ORDERED.