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## DEBTOR REHABILITATION PREVAILS OVER “REGULATORY PURPOSE”: *NEXTWAVE PERSONAL COMMUNICATIONS, INC. V. FCC?*

The D.C. Circuit's decision in *NextWave Personal Communications, Inc. v. FCC*, \_\_\_ F.3d \_\_\_, 2001 WL 702069 (D.C. Cir. June 22, 2001) forms the latest installment in the long-running dispute between the FCC and NextWave. The dispute began in October 1998, when the FCC canceled NextWave's PCS licenses for failure to pay installments that were due.

Several former communications executives created *NextWave* in 1995 for the purpose of bidding on licenses and reselling services and air time to other carriers on the wholesale market. In May and July 1996, the FCC conducted C Block auctions in which NextWave was the successful bidder on 63 PCS licenses. The bid price for the licenses was \$4.74 billion, payable in installments. NextWave made a down payment of \$474 million. To secure the full payment, the FCC perfected UCC security interests in the licenses. Significantly, the licenses provided that they were conditioned on timely payment of each installment and subject to automatic cancellation for nonpayment.

After receiving the licenses, NextWave encountered business difficulties and eroding profits, leaving it unable to make the installment payments. In June 1998, NextWave filed a Chapter 11 petition in the Southern District of New York. Counting on the protections of bankruptcy, NextWave did not pay the installment due in October 1998. In 1999, NextWave prepared a new reorganization plan that provided for a single, lump-sum payment to satisfy its entire \$4.3 billion debt to the FCC. The FCC objected to the plan, however, arguing that NextWave's licenses were automatically canceled in October 1998 when NextWave missed its installment payment. The FCC further issued a public notice announcing that NextWave's licenses would be re-auctioned. The re-auction eventually generated \$15.7 billion in new treasury revenue.

NextWave responded by petitioning for reconsideration of the license cancellations before the FCC. But the FCC rejected NextWave's petition as untimely because the licenses were automatically canceled in October 1998, when NextWave failed to pay its installment.

NextWave appealed the FCC's ruling to the U.S. Court of Appeals for the D.C. Circuit, which exercised jurisdiction pursuant to 47 U.S.C. § 402(b) (permitting appeal by any holder of a station license that the FCC has revoked).

Various other telecommunications companies, including incumbent local exchange carriers, intervened on behalf of the FCC.

After overruling several threshold objections raised by the FCC, the court examined the merits under the Bankruptcy Code of the FCC's cancellation of NextWave's licenses. The court acted pursuant to § 706(2) of the Administrative Procedures Act (Title 5), under which the court may "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law [or] . . . in excess of statutory jurisdiction, authority, or limitations." The court construed this provision to permit it to set aside agency action inconsistent with any federal law, including law other than the agency's own enabling statute.

NextWave argued that the FCC's cancellation of NextWave's licenses breached sections 525 (protection against discriminatory treatment), 362 (automatic stay), and 1123 (regulating contents of plan) of the Bankruptcy Code. The court began by addressing § 525, which provides, in pertinent part, "[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 . . . a bankrupt or debtor solely because such bankrupt or debtor has not paid a debt that is dischargeable in the case under this title . . . ."

The FCC first argued that the court should interpret § 525 in light of § 362(b)(4), which exempts from the automatic stay any actions by a governmental unit in furtherance of its regulatory power. "[I]t would make little sense for Congress to exempt governmental 'regulatory' actions from the stay," argued the FCC, "but then flatly forbid them in section 525." The court rejected this argument as violating § 525's plain language. The court further noted that § 362(b)(4) applies more broadly than § 525 and exempts from the stay actions that are nonetheless barred by § 525.

The intervening parties also argued, in accordance with § 525, that the FCC did not cancel the spectrum licenses "solely because" of the nonpayment, but rather to protect the integrity of the auction and to select the applicant most likely to use the licenses for the public benefit. The court, however, remained "unconvinced." Although the FCC may have had a regulatory motive in canceling the licenses, NextWave's failure to pay its installment was the "sole" trigger of the cancellation, a violation of § 525.

The court concluded by stating that allowing NextWave to retain its licenses may have been "grossly unfair" to the losing bidders who perhaps would have made timely payments and complied with the FCC's requirements. Nevertheless, the court observed that this unfairness arose from the FCC's

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method of carrying out Congress' instructions to open the licensing process up to smaller businesses. That is, by allowing bidders to make installment payments and by taking a security interest in the licenses to secure those payments, the FCC put itself into a creditor-debtor relationship with the successful bidders and subjected itself to the requirements of the Bankruptcy Code.

*NextWave* may limit state and federal agencies in their efforts to recover valuable licenses and franchises held by telecommunications companies that have filed bankruptcies. These bankrupt companies' competitors—in many instances, the more financially stable incumbent local exchange carriers—now have less hope of gaining access to these licenses through re-auctions at the FCC. In some instances, the debtor will maintain an inviolable hold on licenses potentially worth billions of dollars.

- **Matthew T. Brown**

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

R. Patrick Vance  
Jones Walker  
201 St. Charles Ave., 49th Fl.  
New Orleans, LA 70170-5100  
ph. 504.582.8194  
fax 504.589.8194  
email pvance@joneswalker.com

### Bankruptcy, Restructuring, & Creditors-Debtors Rights Practice Group

BRAD J. AXELROD  
LAURA LEIGH BLACKSTON  
NAN ROBERTS EITEL  
ELIZABETH J. FUTRELL  
TARA RICHARD KEBODEAUX  
ROBIN D. MCGUIRE

R. LEWIS MCHENRY  
MICHAEL T. PERRY  
CARL D. ROSENBLUM  
CLAIBORNE P. TANNER  
R. PATRICK VANCE