

FHH Telecom Law

March 2003

Life After NextWave

*By: Lee G. Petro
703-812-0453
petro@fhhlaw.com*

The U.S. Supreme Court put an end to the long-running battle over the ownership of 90 PCS licenses that NextWave bought at auction in 1997. Having failed to make its installment payments, NextWave filed for bankruptcy -- and that, said the Court, prevented the FCC from canceling, recovering, and re-auctioning the licenses. The decision not only has an immediate impact on the wireless communications industry, but prompts the FCC to determine whether any modifications are needed to its auction process to protect the public interest.

The case required the Court to resolve a perceived conflict between the federal Bankruptcy Code (the "Code") and the Communications Act (the "Act"). The FCC had argued that the Act trumped the Code, so that the licenses automatically cancelled when NextWave failed to make its installment payments, even though NextWave had filed for bankruptcy protection under the Code. But the Court determined that provisions within the Code prohibit the revocation of licenses held by a licensee under bankruptcy protection. NextWave's failure to make installment payments after it filed for Chapter 11 protection could not serve as the basis for revoking the license.

In short, the Court found no conflict between the Code and the Act, since nothing in the Act required the FCC to issue licenses on credit. Instead, the Court noted, the Commission could merely require full payment of licenses at the close of the auction, or just accept the fact that it was a creditor that had to stand in line with the others. Since NextWave had prepared a plan of reorganization, which included the payment of its debts, the FCC could not revoke the licenses.

The most significant result of the case is the FCC's lack of any special position with respect to licensees making installment payments. The FCC is merely another creditor that runs the risk the licensee will not be able to meet its obligations.

Additionally, NextWave will now be able to implement its reorganization plan. That may involve the payment of debt to the FCC, or the sale of the licenses to a third party to satisfy creditors, including the FCC. If NextWave chooses to sell, many parties will be interested. Estimates put the total value somewhere between the \$4 billion bid by NextWave in the auction, and the \$17 billion previously bid by Verizon, Cingular and other parties in the subsequent 2001 auction for the same spectrum, which was later invalidated.

Finally, the Commission recently granted additional time for NextWave to complete construction of the system, acknowledging that the construction period should be tolled

during the long appellate process. The first set of facilities now must be completed by December 2003, with the final phase being constructed by May 2004. By extending the construction period, the Commission also extended the limitations that restrict the NextWave licenses to small businesses.