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Legacy of Lost Opportunity: Designated Entities and the Federal Communications Commission's Broadband PCS Spectrum Auction, A

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COMMENT

A LEGACY OF LOST OPPORTUNITY: DESIGNATED ENTITIES AND THE FEDERAL COMMUNICATIONS COMMISSION'S BROADBAND PCS SPECTRUM AUCTION

*Mark W. Munson**

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INTRODUCTION

The Federal Communications Commission's ("FCC") designated entity policy has challenged the efficiency of the use of auctions to allocate spectrum licenses. As an alternative to comparative hearings and lotteries, auctions provide an effective solution to the costs, administrative burdens, and delays associated with apportioning spectrum. Congress required the FCC to allow firms to participate in the auctions even if they had difficulty in obtaining financing. The FCC gave these firms, known as "designated entities," set-asides and other preferences to assist them in the competitive bidding process. In the broadband Personal Communications Services ("PCS") auctions, however, designated entities frequently were unable to pay for their winning bids. Some of these firms took advantage of programs offered by the FCC to help pay

for their licenses, while others surrendered their licenses to the Commission. Several firms also sought protection from the courts, which resulted in litigation costs and delays. Most importantly, some licenses sat dormant while these companies struggled to finance their bids, preventing customers from benefiting from their use. These factors combined to undermine the effectiveness of the auction process. Commissioner Harold Furchtgott-Roth claims the government's designated entity policies "doomed these licenses to failure," calling these blocks of licenses set aside for designated entities a "legacy of lost opportunity."¹

This article begins by explaining the history of FCC licensing authority in Part I. Next, Part II reviews the FCC's implementation of auction procedures and policies, including those for designated entities. Part III discusses some of the problems encountered by bidders who failed to pay for their winning bids at auctions, most notably NextWave. Part IV examines attempts by the government and industry to resolve the difficulties faced by these bidders. Lastly, Part V analyzes the FCC's ultimate decision to cancel NextWave's licenses and to include them in a reauction.

I. HISTORICAL DEVELOPMENT OF WIRELESS LICENSING

A. Development of the FCC's Licensing Authority

The Radio Act of 1912² prohibited "the operation of a radio apparatus without a license from the Secretary of Commerce and Labor."³ The Act limited the secretary's authority to "traffic control."⁴ The creation of the Federal Radio Commission in the Radio Act of 1927,⁵ however, greatly expanded the secretary's regulatory powers.⁶ The Radio Act of 1927 allowed the Federal Radio Commission to license

1. Press Release, Federal Communications Commission, Commissioner Harold Furchtgott-Roth Reacts to NextWave Decision, at http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/2000/sthfr003.html (Jan. 12, 2000).

2. Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927).

3. J. Roger Wollenberg, *Title III: The FCC as Arbiter of "The Public Interest, Convenience and Necessity,"* in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 61, 62 (Max D. Paglin ed., 1989).

4. *Id.* at 65; see generally *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923) (holding that the secretary lacked discretion to refuse radio licenses); *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926) (invalidating the secretary's attempt to issue regulations limiting radio licenses).

5. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed by the Communications Act of 1934, ch. 652, 48 Stat. 1064).

6. See Wollenberg, *supra* note 3, at 65.

stations in furtherance of public convenience, interest or necessity.⁷ The Federal Radio Commission used this standard to establish principles for granting licenses.⁸

The Communications Act of 1934⁹ replaced the Federal Radio Commission with the FCC. The FCC had essentially the same authority to grant licenses under the “public convenience, interest, or necessity” standard.¹⁰ The FCC interpreted the public interest in terms of efficiency¹¹ and used its licensing authority to determine the composition of the “traffic” on the airwaves.¹² Hence, the FCC’s task was to select which applicants would be granted licenses.

B. *The Use of Comparative Hearings to Resolve Competing Applications*

In 1945, the Supreme Court examined the allocation of spectrum among competing applicants. In *Ashbacker Radio Corp. v. FCC*, the Court concluded that when two mutually exclusive applicants apply for a license, they are entitled to a comparative hearing.¹³ The *Ashbacker* requirement of a comparative hearing provided license applicants a quasi-judicial forum to explain why their application for a license better served the public convenience, interest or necessity.¹⁴

In practice, comparative hearings for wireless licenses proved to be an imperfect and inefficient means of awarding licenses. The FCC described this process as “often time consuming and resource intensive from the perspective of both the applicants and the Commission.”¹⁵ One FCC commissioner even admonished comparative hearings as “the FCC’s equivalent of the Medieval trial by ordeal.”¹⁶ The comparative hearing process for the initial cellular licenses resulted in more than one thousand applications, some containing more than one thousand pages

7. Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163.

8. See Wollenberg, *supra* note 3, at 67; see generally *Great Lakes Broad. Co. v. Fed. Radio Comm’n*, 37 F.2d 993 (D.C. Cir. 1930) (holding that the public interest was vital due to the scarcity of the airwaves).

9. Communications Act of 1934, ch. 652, 48 Stat. 1064.

10. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137–38 (1940).

11. See *id.* at 138 n. 2.

12. See *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216 (1943).

13. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 330 (1945). But cf. *United States v. Storer Broad. Co.*, 351 U.S. 192, 205 (1956) (explaining that if an applicant does not meet the FCC’s threshold requirements it is not entitled to a hearing).

14. See FCC Report to Congress on Spectrum Auctions, *Report*, 13 F.C.C.R. 9601, 9608 (1997) [hereinafter *Report to Congress*].

15. *Id.*

16. Nicholas W. Allard, *The New Spectrum Auction Law*, 18 SETON HALL LEGIS. J. 13, 58 n. 40 (1993) (quoting dissenting statement of Commissioner Glen O. Robinson, *Cowles Fla. Broad., Inc.*, 60 F.C.C.2d 372 (1976)).

of detailed arguments and documentation.¹⁷ Likewise, members of the telecommunications industry encouraged switching from comparative hearings to a procedure based upon random selection.¹⁸ They expected that a lottery system would reduce costs and provide a faster allocation of licenses.¹⁹

C. The Use of Lotteries to Efficiently Allocate Spectrum Provided Only Marginal Improvement Over the Comparative Hearings

In 1981, Congress granted the FCC authority to use a system of random selection, or lotteries, to award spectrum licenses under 47 U.S.C. § 309(i).²⁰ That same year, the FCC concluded that the public interest would be served best with two competing cellular systems in each geographic area.²¹ Each geographic market was divided between the local exchange service (e.g., one of the Bell operating companies) and a non-wireline applicant.²² To resolve the heavy demand for cellular service and to accommodate the numerous firms eager to provide it, the FCC replaced the comparative hearing process with a hybrid comparative “paper hearing” and lottery.²³

The lottery system, however, proved to have its faults as well. Even the Commission’s minimal initial screening of applicants severely taxed its resources.²⁴ After the FCC assigned licenses through the lottery, many went through a lengthy resale process as licensees looked for windfall profits.²⁵ This unwanted resale market and delayed service again led Congress to attempt to reduce the administrative burdens²⁶ on

17. See *Report to Congress*, *supra* note 14, at 9608–09.

18. See Amendment of the Commissions Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C.2d 175, ¶ 5 (1983) [hereinafter *Report and Order*].

19. See *id.* ¶ 4 (one cellular provider estimates a lottery will save between \$160,000 and \$414,000 per applicant per market).

20. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1242, 95 Stat. 357, 736–37, amended by Communications Amendment Act of 1982, Pub. L. No. 97-259 § 115, 96 Stat. 1087, 1094–95.

21. An Inquiry Into the Use of the Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, ¶ 26 (1981).

22. *Id.* ¶ 29; see also *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1556 (D.C. Cir. 1987).

23. *Maxcell Telecom*, 815 F.2d at 1554; see also *Report and Order*, *supra* note 18, ¶ 9.

24. See *Report to Congress*, *supra* note 14, at 9609.

25. See *id.*

26. Because the fee required to participate in a lottery was minimal, the deluge of “speculators” applying for licenses presented a serious strain on FCC resources. This undermined one of the primary purposes of the lottery system—to reduce the FCC’s administrative burdens. The numerous applications also strained the industry’s resources, with an estimated \$300 million spent on producing cellular applications for the lotteries. See

the FCC and allow winning applicants to provide service to consumers more expeditiously.²⁷

*D. The Enactment of Competitive Bidding as a More
Efficient System than Lotteries*

Congress revisited spectrum licensing with a focus on the use of competitive bidding systems to address the problems of both comparative hearings and lotteries.²⁸ Congress believed competitive bidding would correct the problems associated with the prior systems: the cost of acquiring a license would dissuade speculation, the public (rather than speculators) would receive value, and firms who most valued the licenses would implement services quickly.²⁹

The 1993 Omnibus Budget Reconciliation Act³⁰ amended the Communications Act of 1934 to allow the use of competitive bidding³¹ to issue licenses and restrict the use of lotteries.³² The House Report noted the problems of the lottery system³³ and issued several findings supporting an auction system for licensing spectrum.³⁴ The auction procedure was reserved for situations involving mutually exclusive applications for a license, where the "principal use" of the license is determined by the FCC to be "in return for compensation from subscribers."³⁵

Section 309(j)(3) set forth the requirements for the competitive bidding system.³⁶ After determining which licenses are to be issued, the FCC is required to establish, by regulation, the methodology of the auction and eligibility to bid for those licenses.³⁷ In doing so, the FCC must "safeguard to protect the public interest."³⁸ When establishing the

id. at 9610 (citing EVAN R. KWEREL & ALEX FELKER, USING AUCTIONS TO SELECT FCC LICENSES (FCC Office of Plans and Policy, Working Paper No. 16, 1995)).

27. *See Report to Congress, supra* note 14, at 9609–10.

28. *Id.* at 9610.

29. *Id.* at 9610–11.

30. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 388–92.

31. The terms "competitive bidding system" and "auction" are used interchangeably in this article.

32. 47 U.S.C. § 309(i)(5) (1994).

33. *See supra* Part II.C.

34. H.R. REP. NO. 103-111, at 253 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 580 [hereinafter *House Report*].

35. H.R. CONF. REP. NO. 103-213, at 481 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1170 [hereinafter *Conference Report*].

36. 47 U.S.C. § 309(j)(3).

37. *See id.*

38. *Id.*

auction methodology, the FCC must consider several objectives.³⁹ These include the original broad purposes listed in section 1 of the Communications Act.⁴⁰ The Omnibus Budget Reconciliation Act of 1993 also added four specific 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.⁴¹

The House Report explained the second objective in further detail. First, the committee intended the FCC to use a common sense approach

39. *See id.*

40. 47 U.S.C. § 1 (repealed 1947).

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, sex, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges; for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies . . .

Id.

41. 47 U.S.C. § 309(j)(3), *amended by* Pub. L. No. 105-33, § 3002, 111 Stat. 251, 258 (1997) (adding a fifth objective to be considered in Section 309(j)(3): “(E) ensure that, in scheduling of any competitive bidding under this section, an adequate period is allowed—(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and (ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.”).

to avoid concentration of licenses, not any particular test.⁴² Rather, the FCC should consider, for example, whether a single licensee dominates any service or significant group of services.⁴³ The committee's concern in disseminating licenses among small businesses was to prevent a significant increase in the concentration of the telecommunications industries, while recognizing that "the characteristics of some services are inherently national in scope, and therefore ill-suited for small business."⁴⁴ The committee observed that those services with *local* characteristics could "provide new opportunities for small business participation."⁴⁵ In those cases, the committee anticipated that the FCC would ensure that small businesses would not be excluded due to the competitive bidding system.⁴⁶ Finally, the committee included minority groups and women in order to ensure that such individuals would not be excluded by the competitive bidding system.⁴⁷ The Conference Report added rural telephone companies to those Congress sought to protect from exclusion due to competitive bidding.⁴⁸

After setting the methodology for a particular competitive bidding system, the FCC then must establish the requirements to participate pursuant to section 309(j)(4). Congress set forth five factors the FCC must consider when prescribing its regulations for participation in an auction:

- (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;
- (B) include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services;
- (C) consistent with the public interest, convenience, and necessity, the purposes of this chapter, and the characteristics of

42. See *House Report*, *supra* note 34, at 254, reprinted in 1993 U.S.C.C.A.N. at 581.

43. See *id.*

44. *Id.*

45. *Id.*

46. See *id.* at 254–55, reprinted in 1993 U.S.C.C.A.N. at 581–82.

47. See *id.* at 255, reprinted in 1993 U.S.C.C.A.N. at 582.

48. See *Conference Report*, *supra* note 35, at 482, reprinted in 1993 U.S.C.C.A.N. at 1171.

the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii) investment in and rapid deployment of new technologies and services;

- (D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates,⁴⁹ bidding preferences, and other procedures; and
- (E) require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits.⁵⁰

Subsection (4)(A), regarding alternative payment schedules, was debated in the conference committee regarding the types of future payment structures that could be made available.⁵¹ The conference committee sought to ensure that the Commission would not have to evaluate bids and speculate on the amount of money that each would generate, for fear of litigation and delay arising from such determinations.⁵²

The intent of subsection (4)(B) was to prevent applicants from acquiring licenses for purposes other than delivering a service to the public.⁵³ For example, the House Report noted, “an incumbent service provider could submit a bid for a license for a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring” and delay service to the consumer.⁵⁴

49. The use of tax certificates was eliminated by Pub. L. No. 104-7 (1995) (in favor of a deduction for the health insurance costs of self-employed individuals instead).

50. 47 U.S.C. § 309(j)(4), amended by Pub. L. No. 105-33, § 3002, 111 Stat. 251, 259 (1997).

51. See *Conference Report*, *supra* note 35, at 482–84, reprinted in 1993 U.S.C.C.A.N. at 1171–73.

52. See *id.* at 483, reprinted in 1993 U.S.C.C.A.N. at 1172.

53. See *House Report*, *supra* note 34, at 256, reprinted in 1993 U.S.C.C.A.N. at 583.

54. *Id.*

Finally, the conference committee amended subsection (4)(C) of the House bill by adopting a Senate provision requiring the FCC to provide opportunities to rural telephone companies in addition to small businesses and businesses owned by minorities and women.⁵⁵ This amendment to subsection (4)(C) reflected the Senate's desire to "establish at least one license per market as a 'rural program license' for any service that will compete with telephone exchange service provided by a qualified common carrier." The value of such a "rural program license" would be set at an amount equal to comparable auctioned licenses.⁵⁶

II. THE FCC'S IMPLEMENTATION OF SECTION 309(J)

Congress required the FCC to implement the new competitive bidding system by March 8, 1994.⁵⁷ On October 22, 1993, the FCC issued its Second Report and Order to auction PCS spectrum.⁵⁸ Its purpose was to foster new mobile services and technologies and to increase competition among PCS providers and between PCS providers and cellular operators.⁵⁹ The FCC acknowledged that these auctions would constitute the largest auction in American history and expected to recover billions of dollars for the United States Treasury, while introducing "an array of new telecommunications products and services that are expected to fuel our nation's economic growth and revolutionize the way in which Americans communicate."⁶⁰

As of September 30, 1997, the FCC had conducted fourteen auctions and had awarded over 4,300 spectrum licenses.⁶¹ In its Report to Congress on the effectiveness of spectrum auctions, the FCC declared the auction process "a more efficient mechanism to assign spectrum in cases of mutual exclusivity than any previously employed methods."⁶² The total amount of winning bids in these fourteen auctions was nearly \$23 billion dollars.⁶³ Analysis of the broadband PCS auctions, however,

55. See *Conference Report*, *supra* note 35, at 482-84, reprinted in 1993 U.S.C.C.A.N. at 1171-73.

56. *Id.* at 483, reprinted in 1993 U.S.C.C.A.N. at 1172.

57. See *Report to Congress*, *supra* note 14, at 9611.

58. See Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 F.C.C.R. 7700 (1993).

59. See *id.* ¶ 2.

60. Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fifth Report and Order*, 9 F.C.C.R. 5532, ¶ 1 (1994) [hereinafter *Fifth Report and Order*].

61. *Report to Congress*, *supra* note 14, at 9611.

62. *Id.* at 9612.

63. See *id.* at 9613 tbl. 1.

reveals some problems associated with the auction system and procedures.

*A. The FCC's Determination to Auction
Broadband PCS Licenses*

The FCC adopted its first regulations to implement section 309(j) on March 8, 1994.⁶⁴ The Commission specifically selected broadband PCS as appropriate for competitive bidding in the occurrence of mutually exclusive applications because the principal use of licensed PCS spectrum was to be subscription-based for compensation.⁶⁵

Broadband PCS falls within the class of mobile telephony known as commercial mobile radio service ("CMRS"), which also includes cellular and specialized mobile radio ("SMR") service.⁶⁶ PCS systems differ from these other services in that PCS formats are digital. Narrowband PCS primarily has been used for paging and messaging services, while broadband has been used for voice communications.⁶⁷ Broadband PCS also is used for new wireless Internet services.⁶⁸

Cellular services are considered the "grand daddy" of CMRS.⁶⁹ There are several cellular providers in most markets and service extends across the nation.⁷⁰ As technology advanced, PCS provided higher quality and added features, such as voice mail, by utilizing digital technology to condense frequency requirements.⁷¹ In 1998, cellular still dominated CMRS subscribership (estimated at 86%),⁷² but PCS gained subscribers at the expense of cellular.⁷³ Because cellular providers were established, PCS providers were forced to deploy comparable coverage in order to attract new customers.⁷⁴ Although of better quality, PCS is

64. See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Report and Order*, 9 F.C.C.R. 2348 (1994) [hereinafter *Second Report and Order*].

65. See *id.* at 2356–58 (also selecting Interactive Video Data Services and Common Carrier and Commercial Radio Services as competitive bidding in the occurrence of mutually exclusive applications).

66. See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, *Fourth Report*, 14 F.C.C.R. 10145, 10145 nn. 6–7, 10201 (1999) [hereinafter *Annual Report*].

67. See *id.* at 10174.

68. See *id.* at 10174 nn. 6–7.

69. Michele C. Farquhar & Lawrence J. Movshin, *Developments in Wireless Telecommunications Policy and Regulation: A Review of the Past Year and Insights Into the Year Ahead*, 16 ANN. INST. ON TELECOMM. POL'Y & REG. 145, 149 (1998).

70. See *id.*

71. See *id.* at 150.

72. See *Annual Report*, *supra* note 66, at 10154.

73. See *id.* at 10173–74.

74. See *id.* at 10175.

not as extensive as cellular geographically and is limited mainly to major urban markets.⁷⁵

B. FCC Implementation of the Competitive Bidding System for Broadband PCS Spectrum Licenses

The FCC established extensive procedures and regulations for conducting the broadband PCS auctions.⁷⁶ The FCC rules applied to all bidders, with certain exceptions for designated entities. Generally, the FCC considered procedural and policy concerns in establishing auction rules. Procedural rules included the form of applications, upfront payments, down payments, lump sum payments, and defaults for winning bidders.⁷⁷ Separate procedural rules for designated entities included set-asides, reduced upfront payments, bidding credits, reduced down payments, and installment payments for the remainder of the bid price.⁷⁸ Other auction regulations focused on broader policy concerns such as foreign ownership, collusion among bidders, and eligibility rules for designated entities.⁷⁹

The FCC established preferences for designated entities in furtherance of section 309(j)(4), with the intent of assisting firms facing obstacles (such as access to capital) in the telecommunications industry.⁸⁰ The preferences were meant to allow entrepreneurs to participate in the auction, resulting in increased services and competition.⁸¹

1. Size of Spectrum and Geographic Coverage

The PCS spectrum to be auctioned was separated into six blocks: three 30 MHz blocks and three 10 MHz blocks. The three 30 MHz blocks would compete with cellular service, while the three 10 MHz blocks would be used in a variety of ways including "niche services," or as a complement to larger blocks of PCS or cellular service.⁸² The FCC originally had set aside a 20 MHz block for the designated entities, but reversed this "handicap" (compared to 30 MHz blocks) when the in-

75. See *id.*; see also Farquhar & Movshin, *supra* note 69, at 151.

76. See generally *Second Report and Order*, *supra* note 64; *Fifth Report and Order*, *supra* note 60.

77. See generally *Second Report and Order*, *supra* note 64, ¶¶ 160–209.

78. See generally *Fifth Report and Order*, *supra* note 60, ¶¶ 58–87.

79. See generally *Second Report and Order*, *supra* note 64; *Fifth Report and Order*, *supra* note 60.

80. See generally *Second Report and Order*, *supra* note 64, ¶ 230.

81. See *id.*

82. Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 F.C.C.R. 4957, ¶ 12 (1994) [hereinafter *PCS Memorandum Opinion and Order*].

vestment community responded that financing “would be much more difficult to obtain for the licensees on the 20 MHz block than on the other blocks.”⁸³ Thus, Blocks A, B, and C would be 30 MHz, while Blocks D, E, and F would be 10 MHz.⁸⁴ Further, Blocks A and B would be divided into 47 geographic regions, or Major Trading Areas (“MTA’s”), plus Alaska and Puerto Rico, while Blocks C, D, E, F, and G would be divided among 487 smaller Basic Trading Areas (“BTA’s”) plus Puerto Rico.⁸⁵ The FCC found that this would allow licensees “to aggregate varying amounts of spectrum in different geographic areas depending on their individual business plans,” providing flexibility in their service to consumers.⁸⁶

2. Provisions for Designated Entities

The FCC determined that setting aside certain blocks solely for bidding by designated entities for each auction might be necessary to ensure their opportunity to acquire licenses.⁸⁷ For the broadband PCS auction, the FCC found that set-asides would be necessary for designated entities due to the ability of large competitors with extensive financial capabilities to outbid those without sufficient access to capital.⁸⁸ Blocks C and F were set aside as the “entrepreneurs’ blocks.”⁸⁹

The FCC established general procedures for its auctions in its Second Report and Order,⁹⁰ modified in part by its Second Memorandum Opinion and Order,⁹¹ and specific procedures for the broadband PCS auction in its Fifth Report and Order.⁹² In establishing qualification standards, the FCC noted it may require bidders’ applications to include “all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules . . .”⁹³ Prospective bidders would be required to file short-form applications within the

83. *Id.* ¶ 57 (citing comments made by members of the investment community at an April, 1994 FCC public forum on PCS rules).

84. *Id.* ¶ 17.

85. See Amendment of the Commission’s Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 F.C.C.R. 7700, ¶¶ 56, 64, 76–77 (1993).

86. *PCS Memorandum Opinion and Order*, *supra* note 82, ¶ 27.

87. See *Second Report and Order*, *supra* note 64, ¶¶ 245–47.

88. See *Fifth Report and Order*, *supra* note 60, ¶ 121.

89. *Id.*

90. See generally *Second Report and Order*, *supra* note 64.

91. See Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Second Memorandum Opinion and Order*, 9 F.C.C.R. 7245 (1994) [hereinafter *Second Memorandum Opinion and Order*].

92. See generally *Fifth Report and Order*, *supra* note 60.

93. *Id.* ¶¶ 59–60.

stated filing period.⁹⁴ The FCC determined that short-form applications and any applicable filing fees would reduce the administrative encumbrances on bidders and the FCC and minimize the potential for delay.⁹⁵

Short-form applications would include certifications “that the applicant is legally, technically, financially and otherwise qualified . . . and in compliance with foreign ownership provisions . . . and any other service-specific qualification rules.”⁹⁶ Designated entities would be required to declare under penalty of perjury that they have met the Commission’s specific qualifications for such status.⁹⁷ Applicants would have to identify all partnerships, joint ventures, consortia, or other arrangements for the licenses, including post-auction plans.⁹⁸ Short-form applications would not be held to a perfect-letter standard for minor defects, but could not make “any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia.”⁹⁹ After allowing minor errors to be corrected, the FCC would accept the applications for filing.¹⁰⁰

After filing short-form applications, bidders would be required to submit an upfront payment, aimed at discouraging frivolous or deceitful bidding.¹⁰¹ In determining the amount of the upfront payments, the FCC would balance its need to deter insincere bids with the goal of minimizing the bidders’ implementation costs.¹⁰² Because of the varying nature of the different licenses to be auctioned, the FCC would set the amount of the upfront payment on an auction-by-auction basis, requiring bidders to pay a percentage of the expected population covered by a

94. See *Second Report and Order*, *supra* note 64, ¶ 164; *Fifth Report and Order*, *supra* note 60, ¶ 164.

95. See *Second Report and Order*, *supra* note 64, ¶ 165 (noting that if only one application is received within the time period, mutual exclusivity would be lacking and competitive bidding would be inappropriate.); *Fifth Report and Order*, *supra* note 60, ¶ 62 (requiring compliance with FCC “PCS-cellular and PCS-PCS cross-ownership limitations”).

96. See *Second Report and Order*, *supra* note 64, ¶¶ 165–66.

97. See *id.* ¶ 166.

98. See *id.* Subsequently, the FCC decided to allow applicants to amend their short-form applications to “provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change.” *Second Memorandum Opinion and Order*, *supra* note 91, ¶ 52. In response to concerns that “the formation of reasonable and efficient alliances would be discouraged by the mandate to expose the details of the alliance to competitors,” the FCC allowed parties to “request confidential treatment of competitively sensitive information.” *Id.* ¶¶ 55–57.

99. See *Second Report and Order*, *supra* note 64, ¶ 167.

100. See *id.* ¶ 168; *Fifth Report and Order*, *supra* note 60, ¶¶ 63–64.

101. See *Second Report and Order*, *supra* note 64, ¶¶ 171–88; *Fifth Report and Order*, *supra* note 60, ¶¶ 65–71 (generally within two weeks of a scheduled auction).

102. See *Second Report and Order*, *supra* note 64, ¶ 171.

license.¹⁰³ The upfront payment would define the upper limit for bidding within a round, while allowing participants to bid flexibly and change strategy during the auction.¹⁰⁴ Finally, the upfront payments would ensure that bid withdrawals or default penalties would be collectible.¹⁰⁵ The FCC reduced the amount of the upfront payment for designated entities by twenty-five percent because of their lack of access to capital combined with other expenses in the licensing process.¹⁰⁶ This upfront payment amount was nonetheless deemed sufficient to deter insincere bidding.¹⁰⁷

Further, the FCC determined that bidding credits would be necessary for designated entities due to the “extremely capital intensive nature of broadband PCS.”¹⁰⁸ The FCC originally established bidding credits in three categories: small businesses, businesses owned by women or minorities, and small businesses owned by women or minorities.¹⁰⁹ But before the FCC could conduct the broadband PCS auction, the Supreme Court held that federal affirmative action programs must be narrowly tailored to further compelling government interests.¹¹⁰ As a result, the FCC voted to “eliminate all race- and gender-based provisions from its C Block auction rules in order to reduce legal uncertainties and prevent further delay of the auction,”¹¹¹ thereby making all small businesses eligible for a twenty-five percent bidding credit.¹¹²

The FCC determined that winning bidders must submit a down payment of twenty percent of the bid price.¹¹³ The remaining eighty percent of the bid price would be due within five business days after the FCC granted the license, with full payment as a condition.¹¹⁴ For

103. See *id.* ¶¶ 171–72.

104. See *id.* ¶¶ 172–73 n. 135.

105. See *id.* ¶ 176; *Second Memorandum Opinion and Order*, *supra* note 91, ¶ 125; *Fifth Report and Order*, *supra* note 60, ¶ 65.

106. See *Fifth Report and Order*, *supra* note 60, ¶¶ 154–55.

107. See *id.* ¶ 155.

108. See *id.* ¶¶ 130–34.

109. See *Fifth Report and Order*, *supra* note 60, ¶ 130.

110. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (raising federal preference programs to the Supreme Court’s strict scrutiny standard).

111. See Commission Modifies “C Block” Auction Rules for Broadband PCS, Report No. WT 95-12, available at 1995 WL 422112 (July 18, 1995).

112. See *In re Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, *Sixth Report and Order*, 11 F.C.C.R. 136, ¶ 47 (1995) [hereinafter *Sixth Report and Order*].

113. See *Second Report and Order*, *supra* note 64, ¶¶ 189–94 (explaining the FCC’s determination that a substantial down payment would ensure the bidders’ financial capability to deploy service quickly and protect against possible default, while not hindering their growth); *Fifth Report and Order*, *supra* note 60, ¶¶ 72–74.

114. See *Fifth Report and Order*, *supra* note 60, ¶ 73.

designated entities, the FCC determined it was fair to require a down payment of only ten percent, thereby providing room for other post-auction costs.¹¹⁵ Designated entities also were allowed to pay in installments.¹¹⁶ This installment plan gave designated entities a low interest rate. They also had the opportunity to structure payments to cover interest for the first six years and repay the remaining principal and interest over the next four years.¹¹⁷

Finally, the FCC set substantial default penalties so potential bidders would ensure that their qualifications and financial capabilities would allow them to build their systems rapidly.¹¹⁸ Specifically, the FCC sought to avoid any delays arising from litigation, disqualifications, or reauctions.¹¹⁹ The rules for designated entities echoed this concern for unqualified or defaulting bidders.¹²⁰ While the FCC sought to substantially penalize withdrawn bids, defaulting bidders were penalized even more, due to the difficulty of reauctioning defaulted bids.¹²¹

C. The Broadband PCS Auctions Result in Significantly Higher Bids in the Designated Entity Set-Aside Blocks

1. A & B Block Auctions

The FCC conducted the first PCS auction between December 5, 1994 and March 13, 1995, awarding ninety-nine licenses in the A and B Blocks.¹²² This was the fourth spectrum auction conducted by the FCC ("Auction #4").¹²³ Two licenses were auctioned in each of the fifty-one MTA's (with the exception of three "pioneer's preference" licenses being assigned) in 112 rounds of bidding over the course of ninety-eight days. The licenses were won by eighteen bidders for \$7.721 billion. Bid prices are appraised by dividing the total amount of the bid by the population within that bid's MTA. The average bid in the A and B Blocks equaled between \$15 to \$16 per person in each market. To ac-

115. See *Second Report and Order*, *supra* note 64, ¶ 238; *Fifth Report and Order*, *supra* note 60, ¶¶ 135–38.

116. See *Second Report and Order*, *supra* note 64, ¶¶ 231–240; *Second Memorandum Opinion and Order*, *supra* note 91, ¶¶ 127–28; *Fifth Report and Order*, *supra* note 60, ¶¶ 135–41; *Sixth Report and Order*, *supra* note 112, ¶¶ 39–40 (establishing all small businesses, not just those owned by minorities or women, as eligible for the most favorable installment plan in the wake of the decision in *Adarand*).

117. See *Sixth Report and Order*, *supra* note 112, ¶¶ 39–40.

118. See *Second Report and Order*, *supra* note 64, ¶ 197.

119. *Id.*

120. See *Fifth Report and Order*, *supra* note 60, ¶ 75.

121. See *id.* ¶ 76.

122. See *Annual Report*, *supra* note 66, apps. A-2, A-4.

123. See *id.*

count for the different amount of frequencies available in the A and B Blocks (30 MHz) from the smaller Blocks (10 MHz), the valuation of a license is quantified best by dollars per MHz per population, or "MHz-Pops."¹²⁴ The A and B Block licenses were therefore valued at \$0.52/MHz-Pops.¹²⁵

2. C Block Auction

The first C Block PCS auction ("Auction #5") was limited to designated entities. The auction began on December 18, 1995, lasting 184 rounds over the course of 140 days. For the 493 licenses bid upon, there were eighty-nine winning bidders for a total of \$10.071 billion.¹²⁶ After adjusting for MHz-Pops, the licenses were valued at \$1.33/MHz-Pops.¹²⁷ To date, not all of the licenses have been granted, but the one hundred days it took for the A and B Block licenses to be granted has been long surpassed.

3. C Block Reauction of Defaulted Licenses

After two winning bidders from Auction #5 failed to pay the required down payment on time, their licenses were reauctioned ("Auction #10") beginning on July 3, 1996. The reauction was again limited to designated entities, lasted twenty-five rounds until July 16, 1996, and resulted in seven winning bidders for a total of \$904 million.¹²⁸ The licenses were valued at \$1.94/MHz-Pops.¹²⁹

4. D, E, & F Block Auctions

The auction for the D, E, and F Blocks ("Auction #11") was held from August 26, 1996 to January 14, 1997.¹³⁰ Blocks D and E were open to all qualified bidders, while Block F was limited to designated entities.¹³¹ The auction took 276 rounds of bidding, resulting in 125 winning

124. *Id.*; see also *NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.)*, 235 B.R. 277, 284 (Bankr. S.D.N.Y. 1999) [hereinafter *NextWave IV*].

125. See *Annual Report*, *supra* note 66, apps A-2, A-4.

126. See *id.*

127. See *id.* See also *NextWave IV*, 235 B.R. at 284.

128. See *Annual Report*, *supra* note 66, apps. A-2, A-4.

129. See *id.* See also *NextWave IV*, 235 B.R. at 284.

130. See *Annual Report*, *supra* note 66, apps. A-2, A-4. See also *NextWave IV*, 235 B.R. at 283.

131. See *Annual Report*, *supra* note 66, apps. A-2, A-4. See also *NextWave IV*, 235 B.R. at 282.

bidders for a total of \$2.517 billion.¹³² The licenses were valued at \$0.10/MHz-Pops.¹³³

5. C, D, E, & F Block Reauction of Defaulted Licenses

As a result of difficulties faced by many C and F Block winning bidders, the FCC held another reauction ("Auction #22") between March 23, 1999 and April 15, 1999. Auction #22 was necessary to reauction 347 licenses, including those returned to the FCC due to default, disaggregation, or amnesty.¹³⁴ Auction #22 resulted in winning bids for 302 licenses for a net total of approximately \$413 million.¹³⁵

III. INABILITY OF SOME DESIGNATED ENTITIES TO PAY FOR LICENSES WON AT AUCTION

The FCC expected broadband PCS to be highly capital intensive, "requiring bidders to expend tens of millions of dollars to acquire a license and construct a system even in the smaller broadband PCS markets."¹³⁶ The primary obstacle to designated entities was their lack of access to capital.¹³⁷ In its Report to Congress, the FCC noted several PCS operators made capital expenditures exceeding one billion dollars between 1995 and 1998.¹³⁸ The designated entity preferences were meant to lessen the difficulties in acquiring sufficient capital to win licenses and build the service.¹³⁹

Surprisingly, a handful of designated entities bid extremely high prices for PCS licenses in major markets, even in comparison to the large A and B Block bidders.¹⁴⁰ Several C Block licensees subsequently

132. See *Annual Report*, *supra* note 66, apps. A-2, A-4.

133. See *id.*

134. See *infra* text accompanying notes 145-156.

135. See C, D, E, and F Block Broadband PCS License Auction Closes, *Public Notice*, 14 F.C.C.R. 6688, 6688 (1999).

136. See *Fifth Report and Order*, *supra* note 60, ¶ 174.

137. See *Annual Report*, *supra* note 66, ¶ 96; *Omnipoint Corp. v. FCC*, 78 F.3d 620, 626 (D.C. Cir. 1996).

138. See *Annual Report*, *supra* note 66, app. B-17 (detailing cumulative capital expenditures from 1995 to 1998 (e.g., Aerial, \$1.024 billion; AT&T, \$2.948 billion; Omnipoint (a designated entity) \$1.174 billion; Sprint PCS, \$6.633 billion)).

139. See *Second Report and Order*, *supra* note 64, ¶ 230. The FCC has since suspended the use of installment payments for designated entities, while retaining bidding credits. See 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 F.C.C.R. 374, ¶¶ 38-48 (1997).

140. Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, *Second Report and Order and*

contacted the bureau seeking to modify their installment payments.¹⁴¹ As a result, the Wireless Telecommunications Bureau suspended the installment payment deadlines for all C and F Block licensees in March, 1997,¹⁴² and a FCC task force was assembled to resolve proposed alternative payment schedules.¹⁴³ Nearly a year later, the FCC ordered the C and F Block licensees to resume their payments on March 31, 1998. They also were required to pay a "suspension interest" over a two-year period.¹⁴⁴

To alleviate the licensees' burdens, the FCC allowed licensees to disaggregate a portion of their license and surrender it to the Commission for reauction.¹⁴⁵ Those choosing to return a portion of their licenses were prohibited from selectively disaggregating spectrum within an MTA (referred to as "cherry picking") in order "to facilitate attempts by new bidders to aggregate spectrum and initiate service."¹⁴⁶ The FCC then would reduce the amount owed by the licensee pro-rata based on the amount of spectrum returned to the Commission.¹⁴⁷ The licensee was prohibited from bidding on the license in the reauction or from reacquiring that license through a secondary market transaction.¹⁴⁸

Another option was amnesty. If a licensee chose this option, it would have to surrender the license "in exchange for relief from its outstanding debt" and the FCC would "waive any applicable default payments."¹⁴⁹ Amnesty also was intended to facilitate an expeditious reauction.¹⁵⁰ Finally, the licensees could opt for "prepayment," which would allow the licensee to choose which licenses it wished to keep.¹⁵¹

Further Notice of Proposed Rule Making, 12 F.C.C.R. 16,436, ¶ 10 (1997) [hereinafter *Financing Second Report and Order*].

141. *Id.* ¶ 11.

142. *Id.* ¶ 6.

143. *Id.* ¶ 16.

144. *Id.* ¶ 21.

145. *Id.* ¶ 38.

146. *Id.*

147. *Id.* ¶ 40.

148. *Id.* ¶ 42.

149. *Id.* ¶ 53.

150. *Id.* ¶ 54.

151. *Id.* ¶ 64 (explaining that C Block licensees could prepay selective licenses subject to restrictions and all other licenses were to be surrendered to the FCC in exchange for forgiveness of the corresponding debt and any penalties).

*A. Some Designated Entities Turn to the Courts
to Retain Their Licenses*

Rather than accepting one of the FCC's alternatives, several licensees brought suits in order to retain their licenses, or at least to avoid penalties for failing to comply with auction regulations.

In *Mountain Solutions, Ltd., Inc. v. FCC*, a winning bidder for ten C Block PCS licenses made its first required down payment, but requested a waiver due to its inability to make a timely second down payment.¹⁵² Within one month, the bidder reported that its financing issues had been resolved successfully.¹⁵³ The FCC denied the waiver and the bidder brought suit alleging the FCC's denial was arbitrary and capricious and an abuse of discretion.¹⁵⁴ The D.C. Circuit determined that the FCC's response was not arbitrary and capricious nor was it an abuse of discretion, despite the fact that it had granted similar waivers to other firms.¹⁵⁵ Those situations were distinguished in that the firms did have financing available on the date it was due, but missed the payment date inadvertently because of a miscalculation or administrative complications.¹⁵⁶ If the bidder was not financially viable at the time the second down payment was due, it was in default.¹⁵⁷ The D.C. Circuit emphasized the fact that the bidder's situation was distinguished from those who were granted waivers and those who were later given the three alternative payment options: that the bidder was in default once it missed its second down payment.¹⁵⁸

Other winning bidders for C Block licenses also sought the protection of the courts after experiencing financial problems with their bids. DCR PCS, a wholly owned subsidiary of Pocket Communications, Inc., won forty-three C Block PCS licenses. On March 31, 1997, DCR PCS and Pocket filed voluntary petitions for bankruptcy under Chapter 11 of

152. *Mountain Solutions, Ltd. v. FCC*, 197 F.3d 512, 514 (D.C. Cir. 1999).

153. *Id.* at 514-16.

154. *Id.* at 516-17; *see also* *Mountain Solutions, Ltd.*, 13 F.C.C.R. 21,983, ¶ 14 (1998) (denying *Mountain Solutions* an emergency waiver of § 24.711(a)(2) of the Commission's Rules since there was no firm evidence that it had sufficient funding to make the second payment at the time it was due); *Public Notice*, 61 Fed. Reg. 16914, 16914 (Apr. 18, 1996) (stating that the Commission's Rules on default payments will be strictly enforced).

155. *See Mountain Solutions*, 197 F.3d at 516-22.

156. *Id.* at 516 (denying *Mountain Solutions* a waiver of § 24.711(a)(2) of the Commission's Rules since the payment schedule was crucial to insuring the sincerity of the bidder and preventing disruption to the auction process) (*citing* *Mountain Solutions, Ltd.*, 12 F.C.C.R. 5904, ¶ 7 (1997)).

157. *Id.* at 517-18.

158. *Id.* at 519.

the Bankruptcy Code.¹⁵⁹ The FCC agreed to a waiver in the interest of settling the bankruptcy litigation to prevent the “tremendous expense and potential delay in providing service to the public that continued litigation causes.”¹⁶⁰

B. *NextWave Personal Communications, Inc. v. FCC*

NextWave Personal Communications, Inc. (“NextWave”) was at the center of the most illuminating case of a designated entity seeking bankruptcy court protection due to financial difficulties after winning PCS licenses. NextWave was formed in 1995 to build and operate PCS networks, providing third-generation wireless broadband Internet access and digital voice services coast-to-coast primarily as a wholesaler.¹⁶¹

1. Bankruptcy Proceedings

NextWave won fifty-six C Block licenses at Auction #5 and seven reaucted C Block licenses at Auction #10. These bids totaled approximately \$4.7 billion.¹⁶² As required, NextWave made its five percent down payment and submitted applications for the sixty-three licenses. After NextWave submitted its applications, two rival bidders, Antigone Communications, L.P. and PCS Devco, Inc., submitted petitions to deny NextWave’s applications. The FCC found that NextWave violated foreign ownership regulations, requiring NextWave to restructure. The FCC conditionally granted approval for NextWave’s licenses on January 3, 1997, subject to the restructuring. NextWave deposited its second down payment on January 9, 1997, then executed a series of promissory notes for the remainder owed for the licenses (90%) on February 19, 1997.¹⁶³

On June 26, 1996, the FCC announced that Auction #11, for D, E, and F Blocks, would commence on August 26, 1996.¹⁶⁴ The winning bids for Auction #11 were a fraction of the C Block auctions,¹⁶⁵ which

159. See *In re Pocket Communications, Inc.*, Waiver of C Block Option Election Requirements, FCC 98-103, available at 1998 WL 278742 (1998).

160. See *id.* ¶ 9.

161. See NextWave Personal Communications, Inc., Company Information Overview, available at <http://www.nextwavetel.com/company/index.html> (last visited September 4, 2000).

162. NextWave Pers. Communications, Inc. v. FCC (*In re NextWave Pers. Communications*), 235 B.R. 272, 273 (Bankr. S.D.N.Y. 1998) [hereinafter *NextWave II*].

163. *Id.*

164. NextWave Pers. Communications, Inc. v. FCC (*In re NextWave Pers. Communications, Inc.*), 235 B.R. 263, 266 (Bankr. S.D.N.Y. 1999) [hereinafter *NextWave I*].

165. See *Annual Report*, *supra* note 66, at 10212 (valuations in terms of Pops: \$1.33 and \$1.94 for Auctions #5 and 10; \$0.33 for Auction #11).

allegedly devalued the C Block licenses.¹⁶⁶ NextWave petitioned for further reconsideration of the alternative payment plans established by the FCC and later filed a petition for review of the FCC's alternatives in the D.C. Circuit, which were both denied. The FCC and D.C. Circuit also denied NextWave's request for a stay of the June 8, 1998 deadline to elect one of the FCC's options.¹⁶⁷

On June 8, 1998, NextWave sought protection under Chapter 11 of the Bankruptcy Code, with claims of constructive fraudulent conveyance and "inequitable, unconscionable, and unfair conduct" by the FCC.¹⁶⁸ The bankruptcy court found jurisdiction under 28 U.S.C. § 1334(a) and (b):

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings under title 11, or arising in or related to cases under title 11.¹⁶⁹

The bankruptcy court further explained its jurisdiction for "core proceedings" arising under Title 11:

- (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
- (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
- (2) Core proceedings include, but are not limited to—
 - (A) matters concerning the administration of the estate;

* * *

166. *NextWave I*, 235 B.R. at 267.

167. *Id.*

168. *Id.* at 267, 271.

169. 28 U.S.C. § 1334 (1998).

- (H) proceedings to determine, avoid, or recover fraudulent conveyances;¹⁷⁰

Therefore, the bankruptcy court found exclusive jurisdiction to administer the Bankruptcy Code and all claims, adversary proceedings, and contested matters.¹⁷¹ The bankruptcy court further found that NextWave's claims against the FCC were asserted in its capacity as a creditor, not as a regulator, and that the FCC's regulatory power did not affect its status vis-a-vis other creditors.¹⁷² Finally, the bankruptcy court found that nothing in the Communications Act "conflicts with a fraudulent conveyance claim or manifests an intent to legislate with respect to debtor-creditor relations or to authorize the FCC to dictate for itself a preferred creditor status."¹⁷³

The bankruptcy court issued four subsequent decisions to resolve NextWave's fraudulent conveyance claim.¹⁷⁴ The February 16, 1999 decision found that NextWave's obligation was incurred on January 3, 1997, the date the FCC conditionally granted the licenses.¹⁷⁵ The May 12, 1999 decision found that the licenses did not represent their "reasonably equivalent value," and instead found their fair market value to be \$908,146,000, thereby allowing NextWave to avoid \$3,720,437,000 (seventy-eight percent) of their bid.¹⁷⁶ The June 16, 1999 decision held that NextWave's avoidance did not constitute a default, thereby disallowing the FCC from canceling the licensees.¹⁷⁷ Finally, the June 22, 1999 decision allowed NextWave to avoid \$3,720,437,000 of its winning bids.¹⁷⁸

170. 28 U.S.C. § 157 (1999).

171. *NextWave I*, 235 B.R. at 269 (holding that a federal agency, in its capacity as a creditor, is subject to the Bankruptcy Code including the automatic stay) (citing *NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992)).

172. See *NextWave I*, 235 B.R. at 269-70 (finding that the claim of fraudulent conveyance sought equitable remedies for avoidance for the benefit of other creditors and the debtor under the Bankruptcy Code, implicating no regulatory conduct by the FCC).

173. *Id.* at 271.

174. The bankruptcy court dismissed NextWave's claim that the FCC should be equitably subordinated to the claims of other creditors. Specifically, NextWave alleged the FCC's failure to inform NextWave that it would commence Auction #11 before granting NextWave's licenses, the devaluation of NextWave's licenses after Auction #11, and the FCC's delay in granting NextWave's licenses constituted inequitable, unconscionable and unfair conduct. The bankruptcy court held that it lacked jurisdiction over this claim because the FCC's actions were within its regulatory capacity, made pursuant to its statutory authority. See *id.* at 271-72.

175. *NextWave II*, 235 B.R. at 276.

176. *NextWave IV*, 235 B.R. at 304.

177. *NextWave*, 235 B.R. 314 (Bankr. S.D.N.Y. 1999) [hereinafter *NextWave V*].

178. *NextWave IV*, 235 B.R. at 305.

On July 27, 1999, the U.S. District Court for the Southern District of New York upheld each of the bankruptcy court's five decisions.¹⁷⁹ In supporting the bankruptcy court's jurisdiction, the district court found that Congress "did not grant regulatory power to the FCC to make rules or orders with respect to its own status as a creditor vis-à-vis its debtors or other creditors of its debtors."¹⁸⁰ Furthermore, the district court found that payment of the installment notes were "provisions of a contract between a creditor and debtor . . . subject to revision and adjustment pursuant to the Bankruptcy Code, just as any similar debt."¹⁸¹ Additionally, the district court deemed the FCC's restructuring orders to be "voluntary offers of a creditor to protect the solvency of the debtor in order to ensure payment."¹⁸²

2. NextWave's Bankruptcy Case on Appeal to the Court of Appeals for the Second Circuit

The FCC appealed the district court's affirmance of the bankruptcy court to the Court of Appeals for the Second Circuit. On November 24, 1999, the Second Circuit reversed the judgment of the district court and remanded the case for further proceedings.¹⁸³ The Second Circuit issued its opinion on December 22, 1999, holding that "the bankruptcy court had no authority thus to interfere with the FCC's system for allocating spectrum licenses"¹⁸⁴

The Second Circuit noted the four-month gap between NextWave's second deposit after winning the right to the licenses, the conditional grant of the licenses, and the FCC's requirement that winning bidders were required to submit long form applications to confirm that bidder's compliance with FCC regulations and statutory requirements.¹⁸⁵ The Second Circuit then focused on two arguments raised by the FCC: that the bankruptcy court lacked subject matter jurisdiction and that the Communications Act preempted the fraudulent conveyance claim.¹⁸⁶

179. *NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications)*, 241 B.R. 311, 321 (S.D.N.Y. 1999) [hereinafter *NextWave VI*].

180. *Id.* at 315–16 (stating that the Communications Act precludes the FCC from collecting revenue and that section 309(j) "has no effect on the requirements, obligations, or privileges of license holders").

181. *Id.* at 316.

182. *Id.* (relying on *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), that when the United States acts as a lender, it is substantially in the same position as a private lender).

183. *See FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.)*, 200 F.3d 43, 46 (2d Cir. 1999) [hereinafter *NextWave VII*].

184. *Id.*

185. *Id.* at 47.

186. *Id.* at 49.

The Second Circuit's opinion began, "The . . . spectrum belongs to no one. It is not property that the federal government can buy or sell." Rather, the "spectrum is subject to strict governmental regulation."¹⁸⁷

The Second Circuit continued by examining the legislative history of section 309(j) to determine Congress' rationale in authorizing the FCC to use auctions to license spectrum.¹⁸⁸ It found "the broader purpose of [section] 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 users."¹⁸⁹ Likewise, when the FCC implemented the auction authority, its goal was to put the spectrum licenses in the hands of those who had the ability "to introduce valuable new services and to deploy them quickly, intensively, and efficiently" so as to "promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum."¹⁹⁰

The Second Circuit then focused on the importance of full and timely payment for the winning bids, noting the FCC's concern of deterring "frivolous or insincere bidding."¹⁹¹ It determined the FCC's default rules and penalties were important as a substitute for the various forms of due diligence necessary to ensure "that the licenses would be awarded to the appropriate entities."¹⁹² Therefore, payment by installments in full was made an explicit condition to retention of the licenses.¹⁹³

Next, the Second Circuit found that the FCC's alternatives offered to those designated entities facing financial difficulties were "the FCC's expert judgment as to the course that would best promote congressional objectives and serve the public interest, thus manifest[ing] *substantive regulatory decisions* about the allocation of spectrum."¹⁹⁴ Therefore, the Second Circuit found that the FCC's auction system is "presumed to be a regulatory tool for ensuring that licenses are distributed" to fulfill the goals of the Communications Act and the licenses themselves are not to

187. *Id.* at 50.

188. *Id.* at 51–52.

189. *NextWave VII*, 200 F.3d at 52 (noting that Congress chose the auction policy not for maximization of revenue, but rather because it was the most "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").

190. *Id.*, quoting *Second Report and Order*, *supra* note 64, ¶ 71.

191. *Id.*, quoting *Second Report and Order*, *supra* note 64, ¶ 171.

192. *Id.* at 53.

193. *See id.*

194. *Id.* (emphasis added).

“be construed to create any right beyond the terms, conditions, and periods of the license.”¹⁹⁵

The history of the FCC’s relationship with the courts then was examined,¹⁹⁶ revealing that it was “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.”¹⁹⁷ Furthermore, the Second Circuit 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*.”¹⁹⁸ Examined in this context, the Second Circuit reasoned that the FCC had the authority to determine that “NextWave was not the applicant most likely to use the Licenses efficiently for the benefit of the public” and “in regulatory terms, that NextWave was not entitled to the Licenses.”¹⁹⁹

Lastly, the Second Circuit disputed the bankruptcy and district courts’ treatment of the case as mere bankruptcy proceedings. The fact that licenses are awarded according to market forces did not make the FCC a mere creditor.²⁰⁰ Allowing NextWave to retain the licenses for \$1.023 billion when it had bid \$4.70 billion 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.”²⁰¹ Finding that the bankruptcy and district courts had essentially exercised the FCC’s spectrum licensing function, the Second Circuit held that “they were utterly without the power to order that NextWave be allowed to retain them.”²⁰² The court also disagreed with the bankruptcy court’s

195. *NextWave VII*, 200 F.3d at 53.

196. *Id.* at 53–54, *quoting* *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (“Congress formulated a unified and comprehensive regulatory system”); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 553 (1990) (“Congress assigned to the [FCC] . . . exclusive authority to grant licenses”); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 136–37 (1940) (that the Supreme Court is required to “enforce the spheres of authority which Congress has given to the [FCC] and the courts, respectively, through its scheme for the regulation of” radio transmissions); *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942) (that the division of authority between these “spheres” requires that “no court can grant an authorization which the [FCC] has refused”); *FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946) (holding the FCC, not the courts “must be satisfied that the public interest will be served by . . . the licensee”); *P & R Temmer v. FCC*, 743 F.2d 918, 927 (D.C. Cir. 1984) (that the FCC has exclusive jurisdiction over granting licenses and placing conditions on their use).

197. *See NextWave VII*, 200 F.3d at 54.

198. *Id.* (emphasis added).

199. *Id.*

200. *Id.* at 54–55.

201. *Id.* at 55.

202. *Id.* (citing *Scripps-Howard Radio, Inc.*, 316 U.S. at 14).

determination that the FCC was acting as a creditor.²⁰³ The Second Circuit concluded, “[i]n order for Congress’ 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.”²⁰⁴ The bankruptcy and district courts’ decisions were reversed and the case was remanded for further proceedings consistent with the circuit court’s decision.²⁰⁵

C. Legal Developments Since NextWave v. FCC

1. In re GWI PCS

GWI won fourteen licenses in the C Block auction, but in October 1997 opted for bankruptcy rather than the alternative payment plans offered by the FCC.²⁰⁶ On June 4, 1998, the bankruptcy court voided GWI’s remaining payment obligations, approximately \$894 million.²⁰⁷ The bankruptcy court then proceeded to confirm a reorganization plan for GWI consisting of two alternatives: continuing with the original objective of offering PCS service or returning the licenses to the FCC and pursuing a return of their down payments.²⁰⁸

A stay was issued upon the bankruptcy court’s orders while on appeal to the District Court for the Northern District of Texas until October 7, 1998.²⁰⁹ Shortly after the stay ended, GWI sought to have the FCC’s appeals dismissed because it had begun to effectuate the reorganization plan.²¹⁰ The district court accordingly held that the FCC’s appeals were “equitably moot” because the business reorganization plan was “substantially consummated.”²¹¹

203. *Id.* at 55 n. 11 (stating that the bankruptcy court may not “adjudicate claims against the FCC not as a creditor, but as an “allocator of licenses”).

204. *Id.* at 55–56 (referring to *Pottsville Broad. Co.*, 309 U.S. at 138).

205. For fraudulent conveyance purposes (since NextWave remained a debtor in bankruptcy) the circuit court also determined, according to FCC regulations and auction law, that NextWave’s payment obligation arose no later than the announcement of their winning bid. *See id.* at 56–60.

206. *See In re GWI PCS*, 230 F.3d 788, 793–94 (5th Cir. 2000). The parties in the case included General Wireless, Inc., GWI PCS, Inc., and 14 subsidiaries, each holding one of the C Block licenses. Because all the entities were consolidated in the case (and to avoid confusion), they will be collectively referred to as “GWI PCS.”

207. *Id.* at 795.

208. *Id.* at 796–97.

209. *Id.* at 798.

210. *Id.* (citing GWI’s claim that the reorganization plan has having been “substantially consummated” and listed numerous financial transactions).

211. *Id.* at 799.

On appeal, the Fifth Circuit upheld the district court's decision on three grounds. First, the Fifth Circuit held that the equitable mootness determination was correct because the FCC had failed to maintain a stay on the licenses, because the reorganization plan had been substantially consummated, and because parties not before the court would be adversely affected.²¹² Next, the Fifth Circuit acknowledged that "the bankruptcy court possibly *erred* in permitting avoidance and enjoining the FCC from revoking the subsidiary debtors' licenses for failing to remit the full bid price, thereby taking onto itself a quasi-regulatory function held by the FCC"²¹³ Despite this acknowledgment, the Fifth Circuit upheld the equitable mootness claim, an issue that the Second Circuit did not need to consider in *NextWave*.²¹⁴ Finally, the Fifth Circuit held that the FCC was not entitled to deference because it had not determined the obligation was incurred until after the bankruptcy proceeding and disagreed with the *NextWave* decision regarding the timing of obligation according to auction principles.²¹⁵ This portion of the opinion appears to openly clash with that of the Second Circuit in *NextWave*. This could present a split among the circuits sufficient to draw the Supreme Court's attention, but may not be considered an open divergence given the distinction over equitable mootness.

2. *In re* Kansas Personal Communications Service

Kansas Personal Communications Service ("KPCS") was the winning bidder for three C Block licenses, but the company experienced difficulties meeting the payment requirements in early 1999.²¹⁶ FCC regulations allowed KPCS a grace period until July 30, 1999 before its licenses would be cancelled, but on July 19, 1999, an involuntary petition for bankruptcy was filed against KPCS.²¹⁷ The bankruptcy court concluded the automatic stay would protect KPCS's licenses from any post-petition "act to exercise control over the Licenses, which are property of the estate" and examined whether the default clause was an "act" by the FCC.²¹⁸ The FCC argued that the cancellation of the licenses did not constitute an "act" because they were automatically cancelled, yet

212. *In re* GWI PCS, 230 F.3d 788, 800–803 (5th Cir. 2000).

213. *Id.* at 804 (emphasis added).

214. *Id.* at 804–05.

215. *Id.* at 806–07.

216. See *In re* Kan. Pers. Communications Serv., 252 B.R. 179, 182–83 (Bankr. D. Kan. 2000). KPCS had continued to make payments under the installment plan, but missed a payment due date in early 1999. *Id.*

217. *Id.*

218. *Id.* at 185–86.

the bankruptcy court held that the FCC must “declare” a licensee to be in default, thus constituting an affirmative act.²¹⁹

On appeal, the U.S. District Court for the District of Kansas reviewed the bankruptcy court’s interpretation of whether the cancellation of a license is an automatic act or whether the FCC has discretion in the cancellation of licenses.²²⁰ The court found the FCC’s determination “that licenses automatically cancel without any act” must be given “controlling weight.”²²¹ Therefore, the court held that the automatic cancellation did not constitute an affirmative act by the FCC and, thus, “the filing of the bankruptcy petition does not preserve a licensee’s limited property interest in a license.”²²²

IV. ATTEMPTS TO RESOLVE DESIGNATED ENTITIES’ FINANCIAL DIFFICULTIES

As detailed above, some licensees found litigation more attractive than the FCC’s disaggregation and amnesty alternatives. A negative effect of this litigation was the delay in competitive service to the consumers. There were two major attempts to restore the licenses that were held up in litigation: one by the government and one within the industry.

A. FCC Requests Congress To Enact Legislation Prohibiting the Bankruptcy Code From Interfering With FCC’s Licensing Authority

In order to clarify that high bidders could not seek bankruptcy protection from their winning bid amounts, the FCC requested Congress to pass legislation to prevent such evasion. The Senate fiscal year 2000 Commerce, Justice, State, and related agencies appropriations bill included such a provision.²²³ Congressman Dick Armey, the House Majority Leader, however, was successful in keeping the provision out of the corresponding House bill; thus, the provision did not emerge from

219. *Id.* at 185–87. The bankruptcy court held that “[l]icenses do not automatically cancel unless the FCC decides to utilize that remedy.” *Id.*

220. *See* *United States v. Kan. Pers. Communications Serv.*, 256 B.R. 807, 810–11 (D. Kan. 2000).

221. *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

222. *Id.*

223. *See* Departments Of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Bill, Fiscal Year 2000, H.R. REP. 106-283, 128 (Aug. 2, 1999).

the House-Senate conference committee in the final version of the bill.²²⁴ Senator Judd Gregg, chairman of the U.S. Senate Appropriations Subcommittee on Commerce, Justice, State, and the Judiciary, unsuccessfully implored the inclusion of the provision in the bill.²²⁵ At a February 2000 Senate Budget Committee hearing, Senator Gregg stated, "I am concerned whether the taxpayers are going to end up holding the bag here The taxpayers own the spectrum and there is no way the taxpayers should get shortchanged in this process."²²⁶ His comment suggests that Congress may revisit this issue. At this hearing, then-Chairman William Kennard argued for legislation to prohibit bankruptcy courts from modifying spectrum licenses.²²⁷

B. Large Firms Attempt to Acquire Licenses Originally Reserved for Designated Entities to Expand Networks

Meanwhile, industry competitors sought to acquire these valuable licenses for their own use. Nextel, the nation's largest Specialized Mobile Radio operator, sought to purchase NextWave's licenses and ultimately announced a hostile takeover bid valued at \$8.3 billion.²²⁸ Nextel abandoned the takeover bid,²²⁹ but later sought to acquire these licenses at the reauction.²³⁰

224. See *Appropriators Determined to File Spending Plan Tonight*, CONGRESS DAILY, Nov. 16, 1996, available at 1999 WL 28417311 (citing Congressman Arney's support of the bankruptcy court's decision); Peter S. Goodman, *Who Gets Airwaves When Good Sale Goes Bad? Budget Negotiators Try to Resolve Issue*, WASHINGTON POST, Nov. 17, 1999, at E1, available at 1999 WL 23315289.

225. See 145 CONG. REC. S12899, S12902 (1999) (statement of Senator Judd Gregg), available at 1999 WL 957926.

226. See Heather Forsgren Weaver, *NextWave Loses In Court, Gets Skewered By Senator*, RCR RADIO COMMUNICATIONS REPORT, Feb. 14, 2000, available at 2000 WL 9540082.

227. See Testimony of FCC Chairman William Kennard, *Senate Budget Committee Hearing: February 10, 2000*, available at <http://www.senate.gov/~budget/republican/about/hearing2000/kennard.htm>.

228. See Nicole Harris, *Nextel Reaches Pact With Government To Buy NextWave Wireless Licenses*, WALL ST. J., Aug. 20, 1999, at B3 (explaining Nextel's acquisition would collect significantly more than the amount proposed in NextWave's bankruptcy plan); Kathy Chen and Nicole Harris, *Nextel is Eager to Buy NextWave Radio Spectrum*, WALL ST. J., Nov. 1, 1999, at B7 (noting the FCC's interest in freeing the spectrum and recovering a fair amount of the licenses' worth); Nicole Harris, *Nextel Communications to Launch \$8.3 Billion Hostile Bid for NextWave*, WALL ST. J., Dec. 22, 1999, at B6.

229. See Nicole Harris, *Nextel Withdraws Its \$8.3 Billion Hostile Offer for NextWave*, WALL ST. J., Dec. 27, 1999, at B2 (noting that Nextel withdrew its bid when it realized it may be able to acquire the licenses directly from the FCC).

230. See *Petition For Expedited Rulemaking or, In the Alternative, Waiver of the Commission's Rules*, 15 F.C.C.R. 2106, 2112 (2000) [hereinafter *Nextel Petition*]; Letter from SBC Communications, Inc. to Magalie Salas, Secretary, FCC (Jan. 21, 2000) [hereinafter *SBC Petition*], available at 2000 WL 96926.

V. FCC'S RESPONSE TO SECOND CIRCUIT DECISION

A. Cancellation of NextWave's Licenses

Before the Second Circuit's decision, NextWave offered to pay the remainder of its balance in full in order to retain the licenses.²³¹ Following its victory on appeal, however, the FCC cancelled NextWave's licenses for default and assigned them, along with other C and F Block cancelled licenses, for reauction.²³² The bankruptcy court found the FCC's action in canceling the licenses to be in violation of bankruptcy law and voided the cancellation.²³³ Within two weeks, the Second Circuit again reversed the bankruptcy court.²³⁴ The FCC quickly filed a writ of mandamus requesting the Second Circuit to order the bankruptcy court to vacate its decision in order to enforce the Second Circuit's December 22, 1999 decision and the FCC's cancellation of NextWave's licenses.²³⁵ NextWave argued that this extraordinary request would override the Bankruptcy Code.²³⁶ The Second Circuit granted the writ of mandamus, ordering the bankruptcy court to vacate its order and to deny NextWave an automatic stay.²³⁷

B. Reauction of NextWave's and Other PCS Licenses

The FCC reaucted NextWave's cancelled licenses in an auction ending January 26, 2001 for almost \$17 billion.²³⁸ Licenses that were formerly 30 MHz in size were reconfigured into three 10 MHz blocks.²³⁹ The FCC also decided to retain set-aside blocks for designated entities

231. See *In re NextWave Pers. Communications, Inc.*, 244 B.R. 253, 262 (Bankr. S.D.N.Y. 2000) [hereinafter *NextWave VIII*].

232. See *id.* at 262–63.

233. See *id.* at 268.

234. See *Appeals Court Again Backs FCC In Battle for Bankrupt's Licenses*, COMMUNICATIONS DAILY, Feb. 11, 2000, at 1.

235. See *Telephony*, COMMUNICATIONS DAILY, Feb. 24, 2000, at 6–7.

236. See *Telephony*, COMMUNICATIONS DAILY, Mar. 1, 2000, at 10–11.

237. See *In re FCC*, 217 F.3d 125, 141 (2d Cir. 2000).

238. Press Release, Federal Communications Commission, C and F Block Broadband PCS Spectrum Auction Raises Nearly \$17 Billion For U.S. Treasury (Jan. 26, 2001), available at http://www.fcc.gov/Bureaus/Wireless/News_Releases/2001/nrw10104.html.

239. See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Sixth Report and Order and Order on Reconsideration*, 15 F.C.C.R. 16266, ¶¶ 14–15 (2000) (stating that 10 MHz licenses are likely to provide smaller or new applicants an opportunity to acquire a license that may not be available if the licenses were 20 or 30 MHz, while allowing larger applicants to aggregate these licenses).

based upon a “tier” system according to population.²⁴⁰ This approach intended to “make relatively more spectrum available for ‘open’ bidding in the most populous markets where the demand for spectrum by existing CMRS carriers is the greatest and the prospects of a spectrum shortage for these carriers is the most acute.”²⁴¹ Under this system, non-designated entities were able to participate in two of the three blocks in tier one and one of the three blocks in tier two.²⁴² Finally, designated entities lost the use of bidding credits for set-aside blocks.²⁴³ While this reauction brought in \$10 billion more to the U.S. Treasury than the original auction, it must be remembered that these licenses have been inaccessible for consumers, and symbolize what Commissioner Furchtgott-Roth termed a legacy of lost opportunity.

CONCLUSION

The FCC must structure future auctions to ensure that licenses are allocated to those who value the licenses most and are most capable of providing service to consumers. The FCC should lower upfront payments offered to designated entities. As discussed above, lower upfront payments for designated entities were implemented due to obstacles in accessing capital. The FCC, however, must consider other issues, including: rapid deployment of services without administrative and judicial delays, recovery of value for commercial use of the spectrum, and efficient and intensive use of the spectrum. Upfront payments equal to those for non-designated entities would further deter insincere or financially deficient bidders.

The FCC should consider limiting designated entity set-asides to less capital-intensive services, such as analog cellular, analog dispatch, or fixed wireless. Congress realized that many small businesses would be improper providers for services that are national in scope. Broadband PCS is clearly a national service, with the largest industry members offering coast-to-coast availability. Because the nature of the broadband PCS industry demands large upfront capital, firms with difficulty in acquiring capital may be simply unsuitable for acquiring and developing a nationwide network.

240. *See id.* ¶¶ 18–19 (dividing each BTA into two tiers, with BTA’s containing populations of greater than 2.5 million in tier one and BTA’s with less than 2.5 million in tier two).

241. *See id.* ¶ 19.

242. *See id.* ¶ 20 (removing the set-aside for all 15 MHz C Block licenses, F Block licenses, and any unsold 30 MHz C Block licenses from Auction #22).

243. *See id.* ¶ 44.

The FCC should continue to open future auctions to all bidders. Allowing non-designated entities to compete for the licenses dramatically increases the likelihood that the licenses will be put into service quickly. The FCC should replace its tier system with open auctions, granting designated entities full use of bidding credits.

A more fundamental alternative would be to value winning bids in proportion to the bidder's financial capability rather than by dollar amount. For instance, if a small business' bid, in proportion to its revenues, was larger than that of a highly capitalized company, such as AT&T Wireless, the small business would win because it valued the license more. This would allow the FCC to eliminate all discounts, credits and tiers, and instead focus on which bidder "values" the license the most in relation to its financial capacity. Still, a bid floor would be necessary to ensure the bidder is able to deploy the service for consumers.

To complement FCC changes in designated entity policy, Congress should enact legislation to prohibit firms from seeking the sanctuary of the bankruptcy courts with regard to the FCC's auction process. Such legislation would prevent those firms that do not have sufficient finances from overbidding in order to win licenses. Allowing firms to use this business strategy would frustrate the policy of the auction process to disseminate licenses efficiently. If a bankruptcy court were to allow a bidder to avoid a large portion of their bid, the purpose of distributing licenses to those who value the licenses most is destroyed. Congress certainly has major interests in protecting the treasury while maintaining the efficient purposes of auctions. Such legislation would allow Congress to maintain the fiscal health of the treasury, and indeed ensure an influx of funds from future auctions, while promoting the sound market-based principles of the auction system.