

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

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)	File Nos. 00341CWL96, et. al.
For Various Broadband PCS C Block Licenses)	

ORDER ON RECONSIDERATION

Adopted: August 31, 2000

Released: September 6, 2000

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 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

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, 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).

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

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 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

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

response, the Commission suspended C and F block installment payments temporarily¹⁰ and initiated a rulemaking proceeding in order to consider whether to provide relief, and if so, 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, 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

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).

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).

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).

Government¹⁹ asking the bankruptcy 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 NextWave 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 (Continued from previous page) _____

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.

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 voidable 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].”

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).

Circuit (“Second Circuit”) reversed on November 24, 1999, and followed with an opinion on December 22, 1999 (“December 22nd 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 *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 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”).

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 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).

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 condition 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 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

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.

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).

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 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-making⁴⁰ because the Commission has violated its own 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

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 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 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.

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.

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 license⁴⁵ and referenced in the Notes and Security Agreements that memorialized the payment terms and obligations applicable to each license.⁴⁶ The *First Reconsideration 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

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).

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 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, 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* (continued....)

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 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.

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

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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.

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.

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.

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 to include the spectrum previously licensed to SouthEast 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

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

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.

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 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).

default, its licenses will automatically cancel, and will be subject to debt collection procedures.”⁵⁸ This rule does not require a distinct, 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.

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

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 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.

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.

the rule interpretation it urges, was to avoid a default by making full and timely payment on or before the 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 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

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 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).

measures the Commission 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) licensees⁷² and reinstated its license on the grounds that 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 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

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

⁶⁹ See *First Reconsideration Order*, 8345 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; *SouthEast Telephone MO & O*, *supra* at note 36.

⁷² See 47 C.F.R. § 90.149(a)(1998).

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*.

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 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 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

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 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).

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 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 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

⁷⁸ 47 U.S.C. § 309(j)(3).

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).

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.

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 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 government⁸⁴ that goes beyond mere negligence, delay, inaction or failure to follow internal agency guidelines⁸⁵; 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 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

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 *Drozdz 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).

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 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 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 non-payment and in announcing an auction of PCS C and F block licenses, including those NextWave previously held, are not

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).

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.

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).

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.

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

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

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 progress 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.

The NextWave litigation has not yet ended. The litigation for other C-block licensees rages as well. Yet the Commission seeks now to reactivate 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

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?

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.