The court as a spectrum regulator: will there be a European analogue to U.S. cases NextWave and GWI?

By Patrick S. Ryan[*]

Abstract
The January, 27, 2003 U.S. Supreme Court decision, FCC v. NextWave was, on the surface, nothing more than the high court's statutory interpretation of a single provision of the Bankruptcy Code. Deep down, however, NextWave tells an important spectrum management and regulatory story which is relevant in both the U.S. and European contexts. It is the story of a company which paid too much for wireless licenses at auction, and a story about a battle – political as well as legal – between government and industry for retention of the license. This same struggle is presently taking place in Europe in the wake of the 3G auctions. This Article reviews the recent NextWave decision and makes propositions about similarities in the European context.

1. Spectrum auctions in the courts

It has been said that common law systems and civil law systems often borrow from each other: civil law courts now pay more respect to precedent than they have in the past, and common law systems are enacting and relying more upon uniform legal codes and statutes.[1] True, civil law and common law systems are different, but they are not incompatible. Perhaps the United States has indeed reached the "age of statutes" as one commentator has suggested,[2] and conversely many Europeans are, to some extent, importing common law principles and legal doctrine back to Europe for use in the European Court of Justice's emerging common law rulemaking process.

The January, 27, 2003 decision *Federal Communications Commission v. NextWave* (NextWave) is an example of the United States coming to terms with its "age of

[*] Research Associate and Ph.D. Candidate, Katholieke Universiteit Leuven. JD, University of Texas at Austin; BA, MBA, Monterey Institute of International Studies.

[1] Robert Christensen, Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court, 6 UCLA J. INT'L L. & FOREIGN AFF. 391 (2001-2002)
[2] Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 35 TEXAS INT'L L.J. 333 (Summer 1999) at 356 (citing Calabrese)

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

statutes" and the interpretation of them. Here, a 1996 spectrum allocation raised $4.7 billion dollars at auction; when the company could not pay the amount that it bid, it filed for bankruptcy. Hung up on a statutory interpretation – partially due to a basic struggle between strict interpretation, teleological interpretation, and liberal interpretation – the United States Federal Courts split on the how to interpret the words "debt" and "creditor." The U.S. Supreme Court was called to resolve the matter, which, overall, took seven years.

Meanwhile, in Europe, government regulators were amazed at the success of the mid 1990's U.S. PCS auctions. These were the very same auctions that created NextWave (the company) and which drove NextWave (the case) to court. Europeans were in awe with the perceived success of the 1990's PCS auctions, so much so that many government regulators, including Germany, decided to change their previous allocation policies in favor of a similar system.

In the mid 1990's auctions represented a new way to allocate spectrum. Previously, the FCC used comparative hearings (aka "beauty contests") to assign licenses for spectrum. With the exception of an unsuccessful "lottery detour" which ended in disaster,[3] comparative hearings were the principal allocation methodology used from 1934 through the mid 1990's. Under modern law, it is essentially a requirement that all new wireless licenses be assigned by open auction.[4] Comparative hearings are no longer legal. In the past, there were special considerations for racial minorities and for women,[5] and many believe that government also regulated to special interests.[6] NextWave, a special interest set up for "entrepreneurs," is to some extent part of that legacy system, which dates "way back" to 1996.

In relative terms, government spectrum licensing via auction in the United States is brand new. Consequently, there is very little common law in the U.S. which deals squarely with the appropriation and expropriation by the government of wireless licenses. This is also the case in Europe, where licensing by auction is an even newer phenomenon, dating back to 1998. In this area, it is therefore natural, and logical, that Europe would look to the United States for (non-binding) legal

---

[3] *See* Andrea Settanni, *Competitive Bidding for the Airwaves: Meeting the Budget and Maintaining Policy Goals in a Wireless World*, 2 COMMLAW CONSPECTUS 117 (1994).
[4] BENJAMIN, LICHTMAN & SHELANSKI, TELECOMMUNICATIONS LAW AND POLICY, Carolina Academic Press (2001) at 81 ff.
[5] *Id.* at 90, also noting the 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 FCC 2d 979, and the U.S. Supreme Court case *Metro* Broadcasting Inc. v. FCC, 497 U.S. 547 (1990) *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[6] *Id.*, at 42.

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

precedent, even though the U.S. may have only a couple more years of license auctioning experience.

The European 3G auctions raised nearly $90 billion dollars in Germany and England alone. They were a screaming success, explained former Finanzminister Eichel, producing "unexpected revenues for the repayment of [national] debt."[7] Just as the Europeans were amazed at the American success at the PCS auctions, the Americans were equally amazed at the values from the European 3G auctions. Former FCC Chairman William Kennard enthusiastically stated that Europe has "unleashed the economic potential of 3G and the wireless web, we in America will have to move quickly to stay ahead in the New Economy."[8] Shortly after the auctions, however, it became clear that the debt taken on by these companies may be too much for them to bear.[9] Some commentators have predicted numerous bankruptcies[10], particularly in the case of German operator MobilCom,[11] although there are others such as Sonera & Quam.[12]

Bankruptcy is a nearly taboo concept in Europe, particularly Germany, where CEO's carry much more personal liability than in the U.S., including criminal sanctions.[13] Indeed, bankruptcy -- at least Chapter 11 "reorganizational" bankruptcy – has not yet made its way over to Europe, but it is trying: in Germany, one (yes just one!) company (Herlitz) [14] has completed a German procedure similar to U.S. Chapter 11, called a Planverfahren zur Sanierung von Unternehmen.[15] The author's view is that the German changes in law related to bankruptcy are yet another example of an importation of an American concept to Europe. Likewise, as is demonstrated in the recent Enron and WorldCom cases, Americans are tightening up their codes and statutes – similar to long existent European models – to create more criminal liability for egregious corporate conduct.[16]

---

[7] *Eichel: So viel Geld nicht erwartet*, Frankfurter Allgemeine Zeitung, August 18, 2000, Vol. 191, at 15.
[8] *Remarks by FCC Chariman William E. Kennard at the Museum of Television and Radio*, FCC Speech, October 10, 2000. Available: www.fcc.gov.
[9] Axel Schnorbus, *Das Schicksal der Mobilcom ist wieder ungewiss*, FRANKFURTER ALLGEMEINE ZEITUNG, January 10, 2003, Volume 8, P. 22.
[10] Almar Latour and Kevin J. Delaney, *Companies: MobilCom May Fail in Germany*, WALL STREET JOURNAL EUROPE, September 16, 2002 at A9.
[11] *Rhine or Shine*, THE ECONOMIST, March 7, 2002.
[12] Almar Latour and buster Kantrow, *Sonera Pushes Back 3G Launch Until the First Quarter of 2003*, WALL STREET JOURNAL EUROPE, September 2, 2002 at A7.
[13] §64 Para 1, GmbHG (Sanctions for not reporting certain bankruptcy events on time); §283 StGB (Certain conditions in the Criminal Code which create personal criminal liability for CEOs).
[14] *Insolvenzantrag muss kein Todesurteil sein*, FRANKFURTER ALLGEMEINE ZEITUNG, January 15, 2003, Vol. 12, P.19.
[15] § 217 ff. InsO; Details: http://www.bmz.de/infothek/fachinformationen/spezial/spezial038/a5.html
[16] *See generally*, *Out to catch the big fish*, THE ECONOMIST, September 12, 2002.

2. Spectrum management as a comparative law & policy topic

Spectrum management, while closely guarded as a domestic policy topic, has traditionally enjoyed much international collaboration and observation over the years. There are perhaps few other areas in law and politics where European and U.S. governments have so overtly learned from and reacted to each other's activities. Nobel Laureate Ronald Coase, born and educated in Europe, authored one of the most influential U.S. spectrum policy papers ever written.[17] U.S. spectrum allocation committees have invited European academic and policy maker Martin Cave to U.S. regulatory public workshops.[18] German RegTP Chairman Matthias Kurth has delivered speeches to U.S. law students and policymakers at Columbia University, demonstrating intimate knowledge of the FCC's policy agenda.[19]

It is unlikely a coincidence that the FCC and the European Union have each set up, within weeks of each other, separate committees to study spectrum management issues: on March 7, 2002 the European Parliament and the European Council signed the Radio Spectrum Decision,[20] which mandates the creation of a Radio Spectrum Committee.[21] Less than 90 days later, the FCC announced the creation of a similar Spectrum Policy Task Force.[22] While the analysis and decisions of the committees are certainly related to domestic affairs, they will inevitably study and review from each other's experiences.

2.1. NextWave: a matter of law, policy, or both?

The ramifications of the NextWave decision have, in the author's view, little to do with law and much more to do with policy; these policies are shared by both American and European governments. This article will discuss how Europe may learn from the U.S. NextWave experience. Reading through the lines, NextWave tells a story which is very similar to what is happening in Europe today in the aftermath of the 3G auctions.

---

[17] R. H. Coase, *The Federal Communications Commission*, J.L. & ECON. 1, 12-13 (1959).
[18] Spectrum Rights and Responsibilities Protection Public Workshop, *Minutes of Meeting*, August 9, 2002. Accessible: http://wireless.fcc.gov/
[19] Matthias Kurth, *Columbia University April 12th 2002 Speech.* Accessible: http://www.citi.columbia.edu/conferences/kurth/kurth_current_abstract.pdf
[20] Decision No.676/2002/EC of the European Parliament and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision).
[21] *Id.*, Article 4.
[22] FCC Press Release, *FCC Chairman Michael K. Powell Announces Formation Of Spectrum Policy Task Force*, June 6, 2002.

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

NextWave is the story of a company that bid too much for a license right before a market dip. When the government tried to repossess the license, markets turned around. NextWave fought to retain the license, and ultimately "won" although the frequencies were not able to be deployed and consumers were harmed during the seven year battle. First, the Article will describe the facts and circumstances surrounding NextWave and a sister case, GWI. Second, the Supreme Court Decision will be analyzed. Finally, the European 3G licensing situation will be reviewed and conclusions will be drawn.

3. The NextWave basics

In the January 27, 2003 decision in FCC v. NextWave[23] (NextWave), the Supreme Court was asked to determine what is a "debt" and who is a "creditor" under the Bankruptcy Code. In an 8-1 decision, the court used a simple off-the-shelf strict interpretation of a statute. In the words of Justice Scalia, who wrote the majority opinion, "[i]n short, a debt is a debt."[24] The court then took a three step approach to further clarify and apply its plain-language interpretation. "We think Congress meant what it said:" wrote Justice Scalia, "The government is not to revoke a bankruptcy debtor's license solely because of a failure to pay debts."[25]

3.1. Why was the Supreme Court called to interpret a statute?

Spectrum allocation in the United States is a task which is principally carried out by the Federal Communications Commission (FCC), however, like all administrative agencies, it is subject to the checks-and-balances of the court system. The courts can exert a powerful back-end effect on spectrum allocation. To illustrate, the NextWave case will be discussed here together with its sister case *GWI*[26] (a company is now known as Metro PCS[27]). Together, these cases provide examples of how conflicts of laws (here, administrative law and bankruptcy law, and deference to regulatory agencies) can delay the release of spectrum into the market and create uncertainty in markets.

---

[23] In Re NextWave, 200 F.3d 43 (C.A.D.C. 2001), At the time of writing this article (January 28, 2003), the official citation for the U.S. Supreme Court case was not yet available. Federal Communications Commission v. NextWave Personal Communications Inc., et al., Nos 01-653 and 01-657 (Jan 27, 2003), 2003 WL 166615. (Hereinafter "NextWave S. Ct. Decision.")
[24] NextWave S. Ct. Decision at - - (Last sentence, Part B).
[25] NextWave S. Ct. Decision at - -
[26] FCC v. General Wireless, Inc., 230 F.3d 788 (5th Cir. 2000).
[27] www.metropcs.com

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

In reviewing the NextWave and GWI cases described in this article, the reader is asked to take note of the parenthetical dates provided in the titles, as these are relevant to conclusions which can be made regarding the efficiency of the full-functioning of the frequency allocation process.

3.2. Administrative Law and the Communications Act (1927 to 1996)

Prior to 1927 there was very little administration of spectrum and frequencies in the United States. This led to a "broadcasting crisis," where many operators were broadcasting simultaneously, creating radio interference with each other, thereby threatening to render all use of the radio spectrum useless.[28] Congress therefore passed the Radio Act of 1927 and undertook to manage the spectrum through an administrative procedure directed by the Federal Radio Commission. Initially, the Federal Radio Commission was set up to regulate spectrum for one year, at which point the Secretary of Commerce was supposed to take over.[29] This did not happen; the authority of the Federal Radio Commission was extended for several years, and ultimately, the Radio Act of 1927 was absorbed into the Communications Act of 1934. The Federal Radio Commission became the Federal Communications Commission (FCC), and was charged with the administration and distribution of radio frequencies.[30] The FCC was set up to be an independent administrative agency charged with carrying out its functions serving "public convenience, interest, or necessity."[31] This loosly-worded statute has been the subject of much debate and controversy over the years. Literally volumes of books have been written attempting to bring meaning to the term "public interest."

The FCC administrative process starts with *rule-making procedure* under the Administrative Procedure Act ("APA").[32] The Act sets forth due process requirements for the enactment of an administrative rule and provides for various steps which require public comment and input on the rulemaking function. Once the FCC has made frequency allocation decisions under the rulemaking procedure (this allocation is also referred to as the "band plan")[33], the FCC continues to exercise the important additional administrative law functions of license transfer and renewal among operators, and the operation of its own Administrative Court. The FCC also has many other functions with regard to content regulation of

---

[28] *See Generally*, Thomas W. Hazlett, *The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's 'Big Joke'*, WORKING PAPER 01-02, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES (January, 2001).

[29] BENJAMIN, S., LICHTMAN, D., & SHELANSKI, H. (2001). TELECOMMUNICATIONS LAW AND POLICY, DURHAM, NC: CAROLINA ACADEMIC PRESS, at 58. (Herinafter "TELECOMMUNICATIONS LAW AND POLICY")

[30] 47 U.S.C. § 303

[31] Communications Act of 1934, Section 303.

[32] 5 U.S.C. § 553

[33] TELECOMMUNICATIONS LAW AND POLICY at 64.

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

broadcasting, and other media functions, although they are not relevant for purposes of this article.

Conflicts of law often arise from FCC action. The Administrative Procedure Act itself, in §706, requires federal courts to set aside any federal agency action which is found by the federal courts "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Although the FCC is the court of first instance for all matters related to matters under FCC jurisdiction (which includes all wireless licenses), appeal from FCC decisions to Federal District Courts, the Federal Courts of Appeal, and the U.S. Supreme Court is available to the parties.

3.3. Chapter 11 Bankruptcy

The NextWave and GWI decisions involve complicated in-depth discussions of the U.S. Bankruptcy Code. In order to understand the decisions and the impact of them, a simplified presentation of bankruptcy law is in order, particularly for European readers. The purpose of this section will be to present a simplified view of bankruptcy code and to discuss relevant aspects of the decisions at the various instances. The discussion of U.S. bankruptcy law in this section is by no means exhaustive.

In the U.S., Chapter 11 bankruptcy[34] is known as "reorganization" or "restructuring" bankruptcy. The policy of Chapter 11 bankruptcy protection is to allow the business to put a freeze on all debt payments while it negotiates with its creditors on a reorganization of their business; this is viewed by many as preferential to forcing liquidation of a debt-laden company. It gives the company a "fresh start."[35] During the restructuring period, the Bankruptcy Court grants what is known as an "automatic stay" under § 362.[36] During the automatic stay assets of the company in question may not be repossessed, liquidated or resold without the express consent of the supervising Bankruptcy Court.

If, during the reorganization process, it turns out that creditors are not willing to negotiate with the debtor, the Bankruptcy Court may either (a) "cram down," (force) a plan upon the creditors, or (b) the Court may force liquidation of the

[34] 11 U.S.C. § 101 ff.
[35] *See Generally*, Richard Maloy, *Comparative Bankruptcy*, 24, SUFFOLK TRANSNATIONAL LAW REVIEW, 1 (2000)
[36] 11 U.S.C. Section 362 (a)(3) will provide "stay" to "any act to obtain possession of property of [an] estate . . . or to exercise control over property of the estate," but Subsection 362(b)(4) provides an exception to 362 (a)(3) for "governmental unit[s]" acting to "enforce" their "regulatory power." In Re NextWave, 200 F.3d 43 (C.A.D.C. 2001).

company's assets. Generally, the company is able to arise from bankruptcy and retain the core assets and real estate that it owns, if it can show that the assets and real estate are required for it to operate as an ongoing concern. There are multiple provisions and statutes which deal with the disposition of property. With respect to NextWave and GWI, it is noteworthy that revocation of licenses is expressly dealt with under Section 525 of the Bankruptcy Code: "…a governmental unit may not deny, revoke, suspend, or refuse to renew a license, … [of] a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act ..."

The bankruptcy process is supervised and controlled by a specialized branch of the U.S. Justice Department, known as the U.S. Trustee. The U.S. Trustee reviews the reorganization plan and attempts to secure voluntary acceptance by creditors and other interested parties for the reorganization plan. Reorganization plans often include the repayment of debt at pennies on the dollar. Under U.S. bankruptcy laws, a special Bankruptcy court is empowered to force creditors to accept certain plans if it finds – in its own judgment – that the plan treats creditors and stockholders fairly. Like an FCC administrative court proceeding, a U.S. Bankruptcy Court proceeding takes place in a court of unique jurisdiction. Appeal to Bankruptcy Court decisions are generally first routed to a Bankruptcy Appellate Panel[37] although they may in some cases go directly to Federal District Courts.[38] Ultimately, cases may then be appealed to the Federal Courts of Appeal and the U.S. Supreme Court.

3.4. The PCS "C Block" Licensing Philosophy (1989-1996)

The PCS auctions (PCS is an acronym for Personal Communications Services) were the first digital spectrum auctions in the United States. The PCS rulemaking procedure began in 1989,[39] and formally culminated in 1993 with the PCS First Report and Order, [40] which provided for the operation of narrowband PCS in specific frequency blocks. Through a series of additional rulemaking procedures and subsequent orders,[41] the FCC divided the Narrowband PCS spectrum into six spectrum blocks designated A through F. The FCC then auctioned separate licenses in each block.

---

[37] 28 U.S.C. § 158(a)(1)
[38] 28 U.S.C. § 158(c)(1)
[39] General Docket 90-314 (September 22, 1989)
[40] 8 FCC Rcd 7162 (1993)
[41] The full rulemaking history can be found on the dedicated PCS section of the FCC website, http://wireless.fcc.gov/services/narrowbandpcs/

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

Frequency blocks C and F were designated by the FCC as "entrepreneurs' blocks," and participation in auctions of C and F block licenses was limited to specific entities. The FCC set up a qualifying procedure, and defined an "entrepreneur" for purposes of C and F block auctions as an entity which had gross revenues of less than $125 million and total assets of less than $500 million at the time of the auction.[42] The FCC determined that in order to help these small "entrepreneur" firms compete, that they would allow the winners to pay for their licenses in installments and allow them to raise capital over time.

C Block license winners NextWave Communications ("NextWave") and General Wireless Inc. (GWI), were small communications companies that had purchased licenses in 1995-1996 from the FCC as small "entrepreneurs." NextWave had bid nearly Five Billion Dollars ($4.74 B) for their licenses, the single largest C Block winner. GWI had bid approximately One Billion Dollars ($954 M) for their licenses. These high-dollar bids were criticized by industry pundits at the time as extremely high, and many questioned if it would be possible for a company to make the licenses work.[43] NextWave, after all, was started only nine months prior to the auctions, and had fewer than 15 employees.[44] But, then again, that was the point of the "entrepreneur" block, to give new companies an opportunity.

Shortly after the win, the market value of the licenses declined dramatically during a 1995-1997 telecommunications market dip.[45] It was not long until in 1998-1999 these licenses rapidly gained perceived value during the runway towards the U.K. and German 3G auctions. Almost suddenly, the 1996 C-Block prices seemed relatively *under*valued. It turns out that new start-up licensees GWI and Nextwave were not able to outlast the 1995-1996 market slump and profit from the 1998-1999 market upturn; as "entrepreneurs," they did not have other businesses to support their activity. In turn, PCS auction winners were forced by creditors to either liquidate their assets or to seek bankruptcy protection.

Both NextWave and GWI sought Chapter 11 bankruptcy protection. The outcome of these two cases created a divergence, a "split" between the U.S. Second and Fifth Circuits. [46] In particular, the courts demonstrated two very different approaches of

---

[42] See WT Docket No. 99-87, available at www.fcc.gov.
[43] Gautam Naik and Bryan Gruley, *NextWave Is Under Fire For Tactics at Auction*, WALL STREET JOURNAL, May 6, 1996.
[44] *Id.*
[45] Scott Ritter, *Business Brief: FCC Says Many Wireless Bidders, Short of Cash, to Return Licenses*, WALL STREET JOURNAL, June 18, 1998, at B12.
[46] Nicholas J. Patterson, *The Nature and Scope of the FCC's Regulatory Power in the Wake of the NextWave and GWI PCS Cases*, 69 U. CHI. L. REV. 1373 (Summer 2002) (Hereinafter "Patterson, *Nature and Scope …*".

deference to the FCC as a licensor:[47] the Second Circuit (the NextWave case) first granted extreme deference to the FCC licensing procedure, and held in favor of the FCC. This decision was, however, reversed by the Court of Appeals, holding in favor of Nextwave; this was recently affirmed by the U.S. Supreme Court. The Fifth Circuit PCS case (the GWI case) granted virtually no deference to the FCC and dismissed the FCC's case. This created a circuit split.

3.5. What is a circuit "split"?

The United States federal court system is divided into eleven geographical areas, called "circuits". A separate circuit also exists for the District of Columbia. In each circuit, a Federal Court of Appeals hears virtually all appeals from all the United States District Courts in the states (and territories) which are assigned to that circuit. Although each federal circuit is required to apply federal common law, the various circuits are not bound by precedent from other circuits. Therefore it is possible to have divergence between circuits on certain matters, known as "splits," where the highest court in one circuit develops legally-binding jurisprudence for its lower courts which is different from the law developed in another circuit. The U.S. Supreme Court is the final arbitrator in such matters.

The result of a U.S. Supreme Court decision is a legally-binding precedent for *all* lower courts in the nation. This process of reconciliation through the U.S. Supreme Court can take many years; indeed, the U.S. Supreme Court is not *required* to resolve circuit splits, although it will consider a split as a good reason to hear a case.[48] This revision process, from start to finish, can be a slow one. In the case of NextWave, the splits began in 1998 at the bankruptcy court level and remained unresolved until the January 27, 2003 Supreme Court Decision, i.e. a total of five years.

4. GWI: the Fifth Circuit decides in favor of the Licensee (1996 – 2001)

The GWI[49] decision by the United States Court of Appeals for the Fifth Circuit affirmed its lower court's judgment regarding the GWI Chapter 11 reorganization plan.[50] The company's reorganization plan included an order allowing the GWI to retain the radio spectrum licenses they had purchased at the auction at a significant

---

[47] Steven Lipin, *Two Opposite Court Rulings Raise Questions About FCC's Next Move on NextWave Licenses*, WALL STREET JOURNAL, November 2, 2000, at C17.

[48] Rules of the Supreme Court of the United States, Rule 10(a). Accessible: http://www.supremecourtus.gov/ctrules/rules.pdf

[49] Note that GWI is now known as Metro PCS

[50] In re GWI, 230 F.3d 788.

discount. The order permitted GWI to avoid approximately $894 million of the debtors' $954 million obligation to the FCC for the purchase of the licenses.

The Fifth Circuit said that the bankruptcy court can not take on a FCC regulatory function. The court observed that the bankruptcy court may have erred in reducing the payment obligations and enjoining the FCC from revoking the licenses, by taking onto itself a quasi-regulatory function held by the FCC. Still, the Fifth Circuit decision was based not on the regulatory function, but instead on a matter of federal civil procedure: The court noted that the FCC did not object to the bankruptcy court's jurisdiction to enter the orders. By the time the FCC became active on the point, GWI's reorganization plan was nearly complete, and that the FCC's appeal was determined to be "equitably moot." [51] This resulted in the authorization for GWI to retain the licenses and to avoid $894 million of their obligation to the FCC. The FCC attempted to appeal the case to the U.S. Supreme Court, however in July, 2001 the Supreme Court refused to hear the case, letting the Bankruptcy Court decision stand. Including the payment of the initial deposit, this resulted in GWI having to pay only about 20% of its full debt to the FCC. [52] In spite of the court's comment to the contrary, the question remained open as to whether or not the recalculation of value was a bankruptcy court function, or whether it was a regulatory function.

5. NextWave: More cracks appear. Bankruptcy decisions (1996-1999)

After the 1996 C-Block auction win, Nextwave parked its licenses for nearly two years while it sought funding. The first bankruptcy hearings began in 1998, and there were many Bankruptcy Court decisions over the approximate 24 months thereafter from the beginning of 1998 to the end of 1999. [53] In the spirit of simplification, the author will not cite each bankruptcy case separately. The bankruptcy decisions when viewed as a whole are far more relevant for telecommunication policy than the individual outcomes.

The Bankruptcy Court reviewed NextWave's licenses as assets, just like any other asset (such as real property) under § 548 of the Bankruptcy code. Under § 548, a debtor in possession of property may avoid payment of, or obtain a reduction for payments on that property if: (a) the property was acquired within one year of the commencement of bankruptcy; and (b) the debtor received less than reasonably equivalent value for the transfer and the debtor was at the time, or (c) the debtor subsequently became insolvent as a result of the purchase. During the automatic

[51] *See generally*, David A. Montoya, *The FCC v. Powers of the Bankruptcy Courts -- A Closer Look at NextWave and the Other C-Block Cases*, AMERICAN BANKRUPTCY INSTITUTE JOURNAL, April, 2001, at 14.
[52] *See,* Yochai J. Dreazen, *High Court Deals Blow to FCC Side in Spectrum Cases*, WALL STREET JOURNAL, July 2, 2001, at B9.

stay period, NextWave stopped making payments to the FCC. This is allowed under Bankruptcy rules.

The Bankruptcy Court determined that the NextWave bid exceeded fair market value by a total of $3.72 billion. In applying § 548, The Bankruptcy Court determined that the retention value of the licenses, therefore, was $1.02 billion, i.e. about 25% of NextWave's original bid. As can be seen, the Bankruptcy Court decision was similar to the outcome of the Bankruptcy Court for GWI, where the Court determined that the licenses retained about 20% of the value of their original bid.

5.1. The Second Circuit Appeal of the Bankruptcy Decisions (1999)

The FCC appealed the case from the Bankruptcy Court to the Second Circuit, where, this time, the FCC won. The Second Circuit decided that the FCC was not a creditor, but instead a licensor, a distinguishing factor which took the matter out of the Bankruptcy Court's jurisdiction. The Second Circuit explained that (i) the FCC made a ruling to recover the licenses, and that ruling was fully within it's regulatory authority; (ii) that the Bankruptcy Court had interfered with the FCC's regulatory purpose by reducing the bid price; (iii) that the Bankruptcy Court had exceeded its own jurisdiction and had unlawfully carried out a regulatory rather than a bankruptcy function. The Second Circuit reversed the Bankruptcy Court's decision citing unfairness to auctions if values of licenses are later reduced by a Bankruptcy Court determination.

5.2. NextWave comes up with the money (1999)

Based on the Second Circuit's reversal, and coinciding with better investor timing,[54] NextWave then found investors to support the original $4.74 billion fee. NextWave then offered to pay the FCC the remaining $4.3 billion outstanding for the license. In spite of the original pay-over-time license commitments, now NextWave offered to pay the FCC for the full value of the licenses (i.e. $4.3 billion), up-front and in cash.

---

[53] *See* In re NextWave, 235 B.R. 263 (Bankr. S.D.N.Y. 1998); In re NextWave, 235 B.R. 277 (Bankr. S.D.N.Y 1999); In re NextWave, 235 B.R. 305 (Bankr. S.D.N.Y. 1999); In re NextWave, 235 B.R. 314 (Bankr. S.D.N.Y. 1999).

[54] It is noteworthy to keep in mind the time context here. This was towards the end of 1999 and early 2000, when 3G licenses were being sold in Europe for several billion dollars. Based on the European numbers, the NextWave license fees seemed extremely cheap, and NextWave had no problem finding investors for their operation.

5.3. The FCC claims victory, tells NextWave "no" and makes a bold move (1999-2000)

Surprisingly, the FCC *rejected* NextWave's offer to pay the remaining $4.3 billion, claiming that NextWave had already lost their license, and that they could not recover it with a late promise to pay. The FCC called for a re-auction of the licenses, believing that the present market situation could bring much more than the original $4.74 billion.[55] However, NextWave petitioned the FCC to reconsider its cancellation of its licenses. The FCC refused the petition, and NextWave then petitioned for review by the Court of Appeals. When that failed, NextWave submitted a petition to the U.S. Supreme Court; the petition was rejected.[56] The FCC pressed on: then FCC Chairman William Kennard stated in a published comment on the Supreme Court denial that "[t]his is another chapter closed."[57] Kennard would be wrong; in the meantime, however, confident that NextWave had exhausted it's appeals, the FCC went ahead and re-auctioned the NextWave licenses, this time, raising $16.86 Billion.[58]

After the auctions, and in spite of NextWave's continued litigation activity, a United States Senate budget publication boldly stated that the "spectrum saga ends," noting that "federal taxpayers are better off by about $10 billion. … [c]ontinued vigilance will make sure that taxpayers do not lose it."[59] The document goes on to provide a historical of NextWave; losses incurred by the taxpayer for loss of use and enjoyment of the spectrum are not mentioned. Government was euphoric that they were able to turn the failed PCS "entrepreneur" block licenses and sell them to "real" companies such as Verizon, and that they were able to reap benefits from the market highs present during the European 3G auctions.

5.4. The D.C. Court of Appeals Decision in favor of NextWave (2001)

NextWave pressed their case to the next Court, the DC Court of Appeals, this time focusing on an appeal to the bankruptcy claims. The D.C. Court of Appeals ruled that the Second Circuit had not sufficiently addressed NextWave's bankruptcy claims and that NextWave was entitled to a review on those points. The Court also wrote in its opinion that the FCC is prevented from canceling the spectrum licenses

---

[55] Steven Lipin, *FCC Move in Bankruptcy Case Sparks Ire*, WALL STREET JOURNAL, April 10, 2000, at C1.
[56] CNET NEWS.COM, *NextWave asks court to stop wireless auctions*, September 22, 2000.
[57] *Press Statement of Chairman William E. Kennard on Supreme Court Decision to Deny NextWave's Request for Review*, FCC News (October 20, 2000). Accessible: www.fcc.gov.
[58] Jill Carroll, *U.S. Airwaves Auction Pulls in $16.86 Billion*, WALL STREET JOURNAL, January 29, 2001.
[59] *Informed Budgeteer*, 107th Congress, 1st Session: No. 2 (January 29, 2001). Accessible: www.senate.gov.

by §525 of the Bankruptcy Code. As stated earlier, this is the provision of the Bankruptcy Code that prohibits governmental entities from revoking debtors' licenses solely for failure to pay debts dischargeable in bankruptcy. The Court held that the FCC chose to create standard debt obligations as part of its licensing scheme, and was consequently bound by the usual rules governing the treatment of such obligations in bankruptcy.[60] This decision from the D.C. Court of Appeals created a third split among U.S. Federal courts.

5.5. The FCC pays for its mistake (2001-2002)

By the time that the Court of Appeals made it's ruling, the FCC had already completed the re-auctioning procedure. Through the re-auctioning it raised $16 billion in commitments from the auction winners,[61] over three times the amount that NextWave had originally bid. Verizon Wireless, for example, bid over $8 billion for their share of the re-auctioned licenses.[62] The auction rules required that the winning bidders pay deposits for their licenses – amounting to nearly $3 billion -- and the FCC retained those deposits even after the NextWave case was overturned by the Court of Appeals. In March 2002 the FCC agreed to return 85% of the money,[63] but held on to the rest until late 2002. [64] In the meantime, consumers were harmed because the NextWave network's deployment continued to be delayed.

6. The Supreme Court ultimately decides for NextWave (2002-2003)

The question that the Supreme Court reviewed was limited to whether § 525 of the Bankruptcy Code "prohibits the FCC from revoking licenses held by a debtor in bankruptcy upon the debtor's failure to make timely payments owed to the Commission for purchase of the licenses."[65] In a relatively concise opinion, Justice Scalia analyzed various statutes applying strict constructionism to each of three points.

First, the Court applied strict construction to interpret § 525 and thereby dismissed the FCC's argument that it had a *valid regulatory motive* for the license revocation.

---

[60] NextWave Personal Communications Inc. v. FCC, 254 F.3d 130 (D.C. Cir. 2001).
[61] Yochai J. Dreazen, *FCC Ends Obligations from NextWave Auction*, WALL STREET JOURNAL, November 15, 2002, at B2.
[62] Yochai J. Dreazen & Jesse Drucker, *FCC to Ease Spectrum - Auction Snarl*, WALL STREET JOURNAL, September 12, 2003, at A3.
[63] Kathy Chen, *FCC to Return 85% of Deposits in Wireless Sale*, WALL STREET JOURNAL, March 28, 2002, at A3.
[64] Yochai J. Dreazen, *FCC Ends Obligations from NextWave Auction*, WALL STREET JOURNAL, November 15, 2002, at B2.
[65] NextWave S. Ct. Decision at - - (1st paragraph).

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

Justice Scalia pointed out that the wording of § 525 strictly stated that a license can not be cancelled "solely because" of indebtedness, and Scalia noted that a failure to pay debt as a "sole cause" of cancellation "cannot reasonably be understood to include … the governmental unit's *motive* in effecting the cancellation." [emphasis in original][66] In order to further drive home his point, Scalia summarily dismissed a teleological interpretation of the Bankruptcy Code, stating that it does not matter if "[s]ome may think (and opponents of § 525 undoubtedly thought) that there *ought* to be an exception for cancellations that have a valid regulatory purpose." [emphasis in orginal][67] Scalia showed no interest in the FCC "motive" argument since "motive" was nowhere in the code.

Second, the Court again applied strict construction to interpret § 525, and in so doing, it dismissed the FCC's alternative argument that the installment plan did not constitute *payment conditions*, but instead constituted *regulatory conditions*. The FCC's alternative argument was that the FCC regulatory conditions (although requiring payment) are not to be classified as "debts" under the Bankruptcy Code. To this, Scalia reviewed the definitions section of the Bankruptcy code at 11 U.S.C. § 101. Here, at § 101(10), Scalia noted that "debt" expressly means "liability on a claim." Scalia then cited several cases supporting "plain meaning" interpretation and concluded that "… a debt is a debt, even when the obligation to pay is also a regulatory condition."[68]

Third, the Court applied strict construction to interpret § 525 as having no conflict with Administrative Law rules which govern the FCC. Here Scalia offered little explanation, noting simply that § 525 of the Bankruptcy code "circumscribes the Commission's permissible action, [and] the Revocation of NextWave's licenses is not in accordance with the law."[69] Justice Scalia added that the auction provisions granted to the FCC under Administrative Laws are "capable of coexistence," and as such, "it is the duty of the courts … to regard each as effective."[70]

Indeed, the question of whether or not FCC's re-possession and re-auctioning of the licenses was a *regulatory* decision or an *economic* decision was probably a major factor in the Supreme Court decision. At the oral argument of the case before the Supreme Court, Justice David Souter told lawyers representing the FCC that: "[t]he

[66] *Id.*, at - - (Paragraph "A")
[67] *Id.*, at - - (Paragraph "A")
[68] *Id.*, at - - (Paragraph "B")
[69] *Id.*, at - - (Paragraph "C")
[70] *Id.*, at - - (Paragraph "C")

FCC made an economic decision, not a regulatory decision." Souter continued, "[w]hen the value [of the licenses] went up, the FCC wanted to reauction them."[71]

In the remainder of the decision, Justice Scalia reviews the arguments advanced by Justice Souter in the sole dissent. Here, Scalia again uses strict construction and plain language arguments in an attempt to discredit Souter's proposed teleological interpretation methodology which would grant greater deference to the FCC. .

6.1. The lone concurrence, the lone dissenter

It is not uncommon in Supreme Court opinions for justices to write variations on their view of the case. The majority opinion is the prevailing opinion and judgment and justices have the option to join the majority. Or, in the alternative, justices may write a "concurring" opinion, where they agree with the judgment but use different reasoning or rationale. There are other variations of concurrence and dissent.

Justice Stevens wrote a concurring opinion. Although Stevens agreed with the majority judgment, he suggested that it may be possible to use a more teleological interpretation of the statute. In Stevens view, however, a teleological interpretation of the statute does not produce the correct answer, so he therefore voted in favor of NextWave's retention of the licenses.

Justice Breyer was the lone dissenter. In his opinion, Breyer cautioned against strict interpretation, stating that "[i]t is dangerous … in any actual case of interpretive difficulty to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose."[72] Breyer then reviewed the Bankruptcy statute's history, including the House Report and other government documents available at the time it was passed.[73] In Souter's view, the statute's authors "expected courts to look for interpretations that would conform the statute's language to its purposes."[74] Unlike Stevens, Breyer would have been satisfied with the result from a teleological interpretation. Breyer would have held for the FCC.

7. Ramifications of NextWave in the European Context?

NextWave shows that the shortened time-to-market that auctions appear to provide may be a facade. Although detailed empirical research is out of the scope of this

---

[71] Tom Mauro, *Supreme Court Appears Receptive to NextWave's License Claim*, AMERICAN LAWYER MEDIA, 9 Oct. 2002.
[72] NextWave S. Ct. Decision at - - (Dissent, 2nd Paragraph)
[73] *Id.*, (Dissent, Section II)
[74] *Id.*, (Dissent, Section III)

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

article (please note that the author is not suggesting a return to the past allocation methodologies), it is worth questioning the efficiency of auctions as applied in the NextWave and European UMTS cases. One could argue that these auctions, as they emerged, may in fact have resulted in a slower time-to-market than a beauty contest or other allocation method. Indeed, although the licenses were awarded, the statistics should reflect the shift of market selectors. In 1996 the licenses went from the state to private industry (the auction), but ultimately they ended up back in the state's control (either the courts, or through administrative re-allocation), for many years, resulting in little net gain for the consumer.

As stated in the Introduction, the 3G auctions in Europe were inspired by the success of the same U.S. PCS auctions which created NextWave. "Success" of the PCS auctions can been measured by both the financial intake arising from the auctions, as well as the shortened time-to-market that auctions theoretically provide over a comparative hearing (aka "beauty contest") procedure. Indeed, since the debt is secured by private third parties, either private shareholders or private investors, theoretically, government could close its eyes and let the market system work. But it probably will not; Germany has already brokered bailout deals for MobilCom AG.[75] If market forces were allowed to operate, MobilCom would probably be forced to bankruptcy. Finnish 3G investor Sonera has already liquidated its joint venture in Norway with Enitel.[76] After a failed attempt to find a buyer, Sonera returned their 3G license to the government[77]. In Germany, Sonera's joint venture with Spanish Telefonica, a company called QUAM, has already resulted in liquidation.[78]

8. In search of candidates for the European NextWave analog

The fact that the German Government has chosen to bail out MobilCom, but to let QUAM fail has sparked both controversy and litigation. Tapio Hintikkam, Sonera's chairman, has said that he finds the differential treatment to MobilCom to be mind-boggling. "The authorities in control told us there was no chance to change the 3G regulations. Now politicians have decided otherwise."[79] The EU has launched an official investigation:

---

[75] Almar Latour, *Plan to Bail Out MobilCom Angers Rivals, Piques EU*, WALL STREET JOURNAL EUROPE, September 19, 2002 at A1.
[76] *Would-Be 3G Operator Goes Bankrupt*, INDUSTRY STANDARD, August 13, 2001
[77] Kimberly Hill, *Sonera Snuffs Norwegian 3G Hopes*, WWW.WIRELESSNEWSFACTOR.COM, August 13, 2001.
[78] Almar Latour, *'Dunno Group' Does Know a Thing About Phones*, WALL STREET JOURNAL EUROPE, November 22, 2002 at R1.
[79] Almar Latour, *Plan to Bail Out MobilCom Angers Rivals, Piques EU*, WALL STREET JOURNAL EUROPE, September 19, 2002 at A1.

> *While the Commission considers that the initial loan of EUR 50 million is indeed necessary to keep MobilCom afloat for a transitory period, the German authorities have, at this stage, not been able to demonstrate that the second loan of EUR 112 million is indispensable in this respect. Accordingly, the Commission has open ed formal investigation proceedings on this second loan.*[80]

There are a number of parallels to NextWave and MobilCom. To be sure, on the surface, it may be easier to distinguish the cases than to draw parallels: the time is different; MobilCom has many operating businesses, NextWave did not. NextWave was a bankruptcy case. MobilCom is a governmental bail-out case. Does these aspects make them similar or different? The author believes the bankruptcy/bailout aspects lead to more similarities than differences.

Indeed, like the German government's financial injections into MobilCom, Chapter 11 bankruptcy is a form of state-led bailout. As explained in the earlier overview on Bankruptcy, Chapter 11 is a state-run operation, with deals that are brokered and enforced by the U.S. Trustee, a government official. Sure, the state does not write a check (as the German government has for MobilCom), but in the case of NextWave, the state was a creditor, and it was the taxpayer (who is also the nominal spectrum owner) who paid the social cost. For NextWave, it was the government – through the state-run bankruptcy procedure – which reduced the value of NextWave's (and GWI's) licenses, and who prevented deployment of the network by repossessing the licenses. Likewise, for MobilCom, it was the government – by offering state loans and brokering bail out deals – who is presently providing support for the ailing company.

Second, the MobilCom bail-out procedure is likely to keep the allocated spectrum from being used for an extended period of time. Reorganizational bankruptcy is not yet a viable option in Germany. Therefore, the reorganization of MobilCom, as well as the deployment and/or redistribution of its 3G frequencies will probably take an ad-hoc path. This will take time.

In the case of NextWave, it was demonstrated that the network deployment was shelved for a total of seven years while the company went through bankruptcy and through the various appeals and court proceedings. Investors could have taken the risk and developed the network in spite of the uncertainty, but this did not happen.

---

[80] DN IP/03/92, *EUR 50 million rescue aid for MobilCom cleard in-depth probe into additional aid of EUR 112 million*, January 21, 2003.

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press

Likewise, in the case of MobilCom the network development will be on hold. The MobilCom 3G frequencies have already essentially been "parked," in spite of some limited initial development, and the MobilCom board has already announced that the UMTS development is frozen and has written off the value of the licenses to zero.[81]

Third, the European governments, like the United States, do not have a clearly established policy and procedure for the repossession and reauctioning of frequencies.

In the author's view, the factors that led to the NextWave litigation were: (i) Wireless licenses which were viewed by many to be over-valued at auction (NextWave paid $4.7 billion); (ii) fluctuating market conditions (the 1997 market slump); (iii) a tug-of-war between regulatory and private interests (FCC's desire to take the frequencies back and NextWave's assertions of rights to retain); and (iv) conflicts of laws (regulatory vs. administrative) led to long drawn-out litigation (bankruptcy court, federal court, U.S. Supreme Court).

All of these factors above-listed also present in the MobilCom situation. It is not a direct analogy, but very close. Specifically, (i) It is axiomatic that the 3G licenses were way overvalued (MobilCom paid about $7.5 billion)[82], (ii) it is generally undisputed that the world is in a major telecom market slump;[83] (iii) there is a tug-of-war between regulatory and private interests (RegTP's desire to make sure that the frequencies are used vs. other carriers who have gone bankrupt and did not receive state aid); (iv) Conflicts of laws (MobilCom is presently under investigation by the EU and other litigation may arise out of competition law grounds).

In the end, it is – in both NextWave and MobilCom cases – the consumer who will be harmed. It is of course way too early to predict the outcome of the MobilCom situation, although it is highly likely that the situation will take several months, and perhaps several years, to resolve.

---

[81] MobilCom Press Release, *Q3/2002: MobilCom writes off UMTS assets completely / Operative losses narrowed down*, Accessible: www.mobilcom.de.
[82] Source: www.3gnewsroom.com
[83] *Too many debts; too few calls*, THE ECONOMIST, July 18, 2002.

https://doi.org/10.1017/S2071832200015820 Published online by Cambridge University Press