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## Value Of Radio Wave Spectrum Is On The Rise Again As Competing Carriers Bid For Licenses

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In a story that has more twists and turns than the most convoluted reality television show, NextWave, a company with big dreams, big dollars, big legal bills, and no product, has recently resurfaced in the bidding wars over wireless spectrum. Late in February, in fact, the FCC gave final approval to Cingular to purchase \$1.4 billion worth of spectrum licenses held by NextWave for portions of spectrum that were secured at a highly controversial auction in 1996.

Other competing carriers complained that by approving this sale and transfer of licenses, the government gave up an additional \$700 million dollars which could have been earned had the licenses been re-auctioned and sold to the highest bidder. Nonetheless, NextWave has prevailed, and has provided at least some return to its investors who have been in bankruptcy limbo for more time than they'd care to admit.

Although radio wave spectrum is certainly increasingly valuable as it becomes increasingly scarce, it remains, at least for rookies, a bit like the infamous emperor's new clothes. After all, wireless spectrum is a commodity that's impossible to see or touch. But boy can it deliver! And that's the reason that it's such a hot button for wireless providers, both large and small. And now back to our story...

In 1996, NextWave, a relatively new and small company, participated in an FCC auction of available spectrum from the C and F blocks. For those of you who are not spectrumistas, this is very valuable virtual real estate. Ordinarily a small low profile carrier wouldn't have had this opportunity, but because the FCC had specifically set aside some of this spectrum for small(er) businesses, NextWave was able to bid on, and win licenses. It initially secured 63 licenses in the C Block at a cost of \$4.7 billion, as well as 27 licenses in the F-Block at a cost of \$123 million.

The purchase price could be paid in installments, which represented a significant change in policy. The FCC was granted a security interest in the licenses, and the licenses themselves were conditioned upon timely payment of the balances due. Further, the license agreements provided that in the event of non-payment, the licenses would automatically be cancelled.

This particular spectrum auction in 1996 generated record amounts of revenue. NextWave, like many of the other small successful bidders at the auction, defaulted on an installment payment and filed for Chapter 11 bankruptcy in 1998. Shortly after making its Chapter 11 filing, NextWave filed an adversary proceeding in the bankruptcy court, claiming a fraudulent conveyance because, it claimed, the value of the licenses had dropped significantly between the date of the auction and the actual date of conveyance. Further, at a subsequent FCC spectrum license auction, licenses were secured by other bidders at rates much below what NextWave had paid.

The bankruptcy court agreed with NextWave and determined that NextWave could retain its licenses for a reduced price of \$1.02 billion. *NextWave Personal Communications, Inc. v. FCC*, 241, BR 311, 318-319

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(SDNY 1999). The Second Circuit Court of Appeals reversed, claiming that while the bankruptcy court had jurisdiction over the debts incurred by NextWave to the FCC, that the court could not change the terms or conditions attached to the licenses that NextWave had secured (*In re NextWave Personal Communications, Inc.*), 200 F3d 43, 55-56 (2nd Cir. 1999). In this decision, the court further held that NextWave's obligations and commitments became firm at the time of the auction, not at the time of closing when the value of the licenses had changed.

The parties then sparred again, with NextWave reorganizing in an effort to raise the money necessary to retain the licenses. At the same time, the FCC, believing that its responsibility was to get the spectrum out to the public, announced that it planned to reactivate the licenses pursuant to the terms of the original agreement with NextWave. In fact, the licenses were resold to Verizon and VoiceStream, generating \$16 billion in additional revenue.

The case made its way to the Supreme Court where ultimately the high court rejected the FCC's claim that § 525 of the Bankruptcy Code applied, thus canceling NextWave's licenses not because of its default, but

because of its bankruptcy filing. *FCC v. Nextwave Communications, Inc.*, 537 US 293 (2003). Despite what it deemed to be the FCC's "valid regulatory motive," the Commission's reactivation of the licenses originally secured by NextWave was deemed invalid.

Subsequently, the revenue generated by the second auction was returned to Verizon and VoiceStream, and NextWave, although still operating under bankruptcy protection, has continued to try to secure buyers for its licenses. And that's really the kicker, because while NextWave has the licenses, it doesn't have the capital required to build a network to use the licenses. As such, its single asset is the licenses themselves.

With AT&T's recent sale to Cingular, and the realignment of the largest wireless carriers, a company with access to valuable spectrum, particularly in the most desirable bands (less subject to interference, among other things) is hot. As recently as Feb. 27, 2004, Verizon and Nextel were fighting with each other over available spectrum.

In an article in the March 2, 2004 issue of the *Wall Street Journal*, authors Gregory Zuckerman and Jesse Drucker mentioned NextWave as one of the players in what is expected to be the next big wireless deal to come down the pike. All of a sudden, NextWave again is a hot commodity.

This time, it looks like the little company that did, almost didn't, but hung on, may well be able to unload its asset at a price that will give the last laugh to those gutsy investors who took the initial risk.

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