PERSONAL COMMUNICATION SYSTEM LICENSES AND THE 'SPECTER' OF BANKRUPTCY

Carolyn Hochstadter Dicker*

Over the past several years, the Federal Communications Commission ("FCC" or "Commission") has auctioned strips of the electromagnetic spectrum to companies interested in providing wireless telephone personal communications services ("PCS"). This article focuses on the broadband PCS C-Block auction which was primarily limited to small business "entrepreneur" entities. The auction was designed to encourage the development of, and foster competition among, small, start-up wireless companies. In contrast to other auctions of PCS spectrum, the C-Block auction included bidding incentives, such as the ability to pay 90% of the debt on a low-interest installment basis, reduced up-front and down payment requirements, and the use of bidding credits.

Pocket Communications ("Pocket"), the second largest C-Block bidder, filed for bankruptcy in March 1997.[1] Prior to its filing, Pocket failed to make the first of its installment payments and upon filing, owed millions to the FCC.[2] Other C-Block bidders, including the fourth largest, National Telecom PCS ("NatTel"), have similarly defaulted over the course of the C-Block process, or are currently on the verge thereof. Most recently, in October 1997, affiliates of General Wireless, Inc., another large C-Block bidder, followed Pocket's lead and filed for bankruptcy.[3] These incidents have raised issues of first impression and are of great concern because they threaten the integrity of the C-Block auction process, together with its goal of helping small businesses, and also threaten the federal government's collection of approximately $10 billion in auction proceeds which have already been included in the federal budget. This article discusses the legal and practical issues that might arise in the context of a PCS licensee's insolvency or bankruptcy filing, pursuant to which the FCC would be placed in the dual and conflicting role of regulator and first priority secured creditor.

BANKRUPTCY CONCEPTS

Bankruptcy courts have found licenses to be executory contracts.[4] Although FCC licenses appear to have attributes of an executory contract, courts neither apply nor discuss executory contract law in dealing with the transfer of FCC licenses in bankruptcy.[5] Instead, courts generally defer to

---

* Carolyn Hochstadter Dicker is an attorney with the New York office of LeBoeuf, Lamb, Greene & MacRae, L.L.P., specializing in bankruptcy, reorganization and workout matters. Catherine P. McCarthy, who specializes in telecommunications matters and Nina E. McAdoo, a summer associate, assisted in the preparation of this article.

1 Allan Sloan, *The FCC Didn't Catch a Code, And Thereby Hangs a Wireless Tale*, WASH. POST, Sept. 23, 1997, at C3.

2 Debra Wayne, *FCC To Change C-Block Schedule: Pocket Admits Struggle To Keep Afloat*, RADIO COMM. REP., Mar. 31, 1997, at 1, 38 [hereinafter *Radio Comm. Rep.*].

3 Fourteen affiliates of General Wireless, Inc. filed for bankruptcy on Oct. 20, 1997. General Wireless originally bid about $1.1 billion for its PCS licenses and still owes more than $953 million to the FCC. *Second PCS 'C' Block Bidder Files for Bankruptcy Protection*, TELECOMMS. REP. INT'L., INC., Oct. 27, 1997; *General Wireless Affiliates Seek Chapter 11 in Dallas*, THE DAILY BANKR. REV., Oct. 28, 1997, at 2, 7; *Statement by FCC Chairman Reed Hundt on Bankruptcy Filing by PCS C-Block Licensee General Wireless*, FCC News, Oct. 27, 1997.

4 *See, e.g.*, Krafsur v. UOP (*In re* El Paso Refinery, L.P.), 196 B.R. 58, 72 (Bankr. W.D. Tex. 1996).

5 An FCC license has the following attributes of an executory contract: (1) validity of the license is conditioned on the licensee's performance of its obligations under the license (including build-out requirements that are capital-consuming) and the related installment payment plan note and security agreement, as well as its compliance with the Communications Act of 1934, regulations and opinions of the FCC and of the Wireless Telecommunications Bureau, (2) the absence of any ownership rights by the licensee in the subject matter of the license, (3) the right of the FCC to cancel the license in the event the licensee does not perform, and (4) the requirement of FCC approval of any assignment of the license. *See* 47 U.S.C. §§ 301, 310(d) (1997); 47 C.F.R. § 1.2110(e)(4) (1996); *see also* Form Broadband PCS C-Block License [hereinafter *License*] (including, within its terms, all of the above "executory" items); Form Installment Payment

telecommunications law regarding restructure, or assumption and assignment of FCC licenses in bankruptcy and thus, have blessed such transactions, subject to FCC approval.[6] For the most part, these cases have involved radio broadcast licenses. Transfer of a PCS license in bankruptcy, however, is an issue of first impression. Therefore, it is unclear in the case of these financially strapped C-Block licensees and, in view of the policy issues at stake, whether pertinent FCC rules and policy statements will be strictly enforced.

Most courts agree that, once an FCC licensee files for bankruptcy, its license becomes property of the bankruptcy estate ("estate").[7] Technically, an FCC license must be transferred to the debtor in possession ("DIP") or trustee and, outside of bankruptcy, this transfer requires formal FCC approval.[8] To expedite this transfer in bankruptcy, however, it is accorded *pro forma* approval by the FCC.[9]

Once the license is in the hands of the DIP or trustee, the latter will generally attempt to create funds for the estate by offering the license for sale. If the licensee is in default, the FCC could theoretically cancel and thus, presumably re-auction the license.[10] Such action would leave the debtor and its creditors with no recourse to the license, and possibly, with no recourse to any surplus proceeds of re-auction.[11] In contrast, in the event of sale, surplus proceeds would likely be allocated to creditors.[12] Although one court has held that cancellation of a license or *per se* refusal to approve its transfer constitutes a violation of the automatic stay created in bankruptcy, another court, *in dictum*, has expressed the opposite view.[13] The tenuous authority of the FCC in this area is highlighted by attempts, over the last year, to draft legislation granting the FCC explicit authority to revoke and re-auction licenses of debtors in bankruptcy.[14] In addition, at a June 1997 FCC forum on the subject of C-Block repayment, the Commission itself questioned its authority in bankruptcy proceedings.[15]

Not surprisingly, therefore, when faced with a

Plan Security Agreement for Broadband PCS C-Block Auction, paras. 2, 8, 11 [hereinafter *Security Agreement*] (incorporating all of the above items); Form Installment Payment Plan Note for Broadband PCS C-Block Auction, at p. 3 [hereinafter *Note*] (providing that effectiveness of license is conditioned upon compliance with obligations under *Note, License* and telecommunications law).

[6] *See, e.g.*, Internal Revenue Service v. Subranni (*In re* Atlantic Bus. and Community Dev. Corp.), 994 F.2d 1069, 1071 (3d Cir. 1993) [hereinafter *Atlantic*]; *LaRose v. FCC*, 494 F.2d 1145, 1149 (D.C. Cir. 1974) (finding that the FCC abused its discretion when it failed to consider recovery of creditors in denying a license); *In re* Ridgely Communications, Inc., 139 B.R. 374, 375 (Bankr. D. Md. 1992); *In re* Smith, 94 B.R. 220, 221 (Bankr. M.D. Ga. 1988); D.H. Overmyer Telecasting Co., Inc. v. Lake Erie Communications, Inc. (*In re* D.H. Overmyer Telecasting Co., Inc.), 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983); *In re* WFDR, Inc., 10 B.R. 109, 111 (Bankr. N.D. Ga. 1981); In *re* Applications of Second Thursday Corp. (WWGM), Nashville, Tenn., 25 F.C.C.2d 112, 115 (1970) [hereinafter *Second Thursday #2*]; *In re* Applications of Second Thursday Corp. (WWGM), Nashville, Tenn., 22 F.C.C.2d 515, 515-16 (1970) [hereinafter *Second Thursday #1*]; *see also* Shimer v. Fugazy (*In re* Fugazy Express, Inc.), 124 B.R. 426, 429 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992) [hereinafter *Fugazy #2*] (describing that the Bankruptcy Court directed the parties to obtain FCC approval of bankruptcy sale, but ultimately ignored the FCC's refusal to approve transfer based on the FCC's lack of participation in the proceedings).

[7] 11 U.S.C. § 541 (1997); *See Atlantic*, 994 F.2d at 1073; *Fugazy #2*, 124 B.R. at 430; *Ridgely*, 139 B.R. at 376; *Smith*, 94 B.R. at 221; *but see Overmyer*, 35 B.R. at 401.

[8] 47 U.S.C. § 310(d) (1997); 47 C.F.R. § 24.839(a) (1996); *see Security Agreement, supra* note 5, para. 2.

[9] 47 C.F.R. § 24.839(d)(5)(1996); *LaRose*, 494 F.2d at 1148; *Smith*, 94 B.R. at 221; Letter from William E. Kennard, then General Counsel of the FCC, and Michele C. Farquhar, then Chief of the Wireless Telecommunications Bureau, to Leonard J. Kennedy, Esq. and Richard S. Denning, Esq., 11 FCC Rcd. 21572, 21574 (1996) (discussing *Note* and *Security Agreement*) [hereinafter *C-Block Letter*].

[10] *See* 47 C.F.R. § 1.2110(e)(4)(iii)(1996); *see Security Agreement, supra* note 5, para. 8(a).

[11] *See C-Block Letter, supra* note 9, at 21576-77 (citing 47 U.S.C. § 309(j)(8) (1994)) (stating that all proceeds from the use of competitive bidding shall be deposited in the Treasury of the United States or used to cover certain of the Commission's costs); *see also C-Block Letter, supra* note 9, at 21578 n.4; *see Security Agreement, supra* note 5, para. 8(d).

[12] *See C-Block Letter, supra* note 9, at 21578 n.4; *Security Agreement, supra* note 5, paras. 1-2 (granting third parties subordinated security interest in proceeds of sale or disposition of license).

[13] *Compare Fugazy #2*, 124 B.R. at 431 (stating that revocation of license by the FCC is not an act by governmental authority to protect health and safety of public that would qualify for exemption from automatic stay), *with Overmyer*, 35 B.R. at 401 (ruling, without discussion, that stripping a broadcast license, or refusing to allow the transfer or assignment of a license qualify as actions by governmental authority which are exempt from automatic stay); *see* 11 U.S.C. §§ 362(a), (b)(4) (1994).

[14] *See Administration's Spectrum Revenue Proposal*, § 1001(a)(7)(F) (released week of June 9, 1997 by Office of Management and Budget to be part of 1997 budget reconciliation package, available via *Telecommunications Reports*, <http://www.tr.com/online/spectrum.htm>) [hereinafter *Spectrum Revenue Proposal*].

[15] Carolyn Hochstadter Dicker, Notes from the Wireless Telecommunications Bureau Public Forum on "Broadband PCS C and F Block Installment Payment Issues" (June 30, 1997) (on file with COMMLAW CONSPECTUS) [hereinafter *Notes from Public Forum*].

situation of financial distress, the FCC has consistently expressed a preference for "market-oriented solutions" to the prospect of bankruptcy.[16] FCC rules provide for work-outs between the FCC and a PCS licensee through the grant of grace periods and/or restructuring of payment plans. Since the inception of the C-Block process, the FCC has stated its willingness to grant a three to six month grace period for defaulting PCS licensees, during which time the licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the FCC a restructured payment plan.[17] The FCC has stated that it will evaluate requests for a grace period on a case-by-case basis, and consider factors such as the licensee's payment history, including whether it has defaulted previously, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer pursuant to a distress sale.[18] The FCC has further indicated that, when a licensee is in bankruptcy, foreclosure or financial distress, a presumption will exist in favor of granting a three month grace period, commencing ninety days after the missed payment date, for a total of six months.[19] In addition, the FCC encourages work-out arrangements between the licensee and its outside lenders, stating that it would become involved only in transfer situations.[20]

The availability of these out-of-court work-out opportunities presumes that, within a three to six month period, a PCS licensee would be able to procure financial backing sufficient to get itself back on its feet. This has not turned out to be feasible for the C-Block licensees. Therefore, a more flexible solution will be required if the FCC's goal is to achieve a restructuring of C-Block debt. An alternative to restructuring would be the sale of such debt. Although the FCC has always been amenable to this work-out alternative, it has consistently indicated that any such sale would be conditioned on complete fulfillment of license conditions.[21] This is likely to prove problematic for C-Block licensees. Accordingly, in the absence of a palatable restructuring proposal, these licensees are likely to opt for bankruptcy in the hope that FCC transfer requirements will not be strictly enforced by a bankruptcy court.

TELECOMMUNICATIONS ISSUES

In evaluating whether to approve a license transfer, the FCC must determine whether the licensee's conduct, during the period in which it held the license, qualifies it for renewal of the license. In bankruptcy proceedings involving radio broadcast cases, the FCC has foregone this inquiry where benefits to creditors significantly outweigh benefits to a wrongdoer licensee.[22] This is known as the "Second Thursday" doctrine.[23] In addition, the FCC is required to consider the needs of public end-users.[24] Nevertheless, the FCC is reluctant to approve transfers to licensees who are guilty of misconduct, leading to delays in approval of bankruptcy sales.[25]

Upon renewal, a PCS license may be sold in

16 *In re* Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, 6 Comm. Reg. (P & F) 362, 369 (1997) [hereinafter *97 Amendment*] (citing *In re* Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, *Report and Order*, 11 FCC Rcd. 7824, para. 85, at 7864 (1996)); *C-Block Letter*, *supra* note 9, at 21573-74 (citing *In re* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403 (1994)).

17 *C-Block Letter*, *supra* note 9, at 21573-75 (citing *In re* Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, 8 FCC Rcd. 7700 (1993) and *Fifth Memorandum Opinion and Order*, *supra* note 16, at 471).

18 *See id.*

19 Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C-Block Auction, 78 Rad. Reg. 2d (P & F) 727, 729-30 (1995); *see* 47 C.F.R. §§ 1.2110(e)(4)(ii), (iii) (1996).

20 *97 Amendment*, *supra* note 16 (citing *C-Block Letter*, *supra* note 9, at 21573).

21 *Id.* at 369; *see C-Block Letter*, *supra* note 9.

22 *LaRose*, 494 F.2d at 1147-48, followed by Shimer v. Fugazy (*In re* Fugazy Express, Inc.), 114 B.R. 865, 873-74 (Bankr. S.D.N.Y. 1990); *see Second Thursday #2*, 25 F.C.C.2d at 114-15; *Second Thursday #1*, 22 F.C.C.2d at 518; *accord* Two If By Sea Broadcasting Corp., 12 FCC Rcd. 2254 (1997) [hereinafter *Two If By Sea*].

23 *See LaRose*, 494 F.2d at 1146; *see generally Second Thursday #1*, 22 F.C.C.2d at 520 (explaining that a bankrupt wrongdoer licensee may effectuate a sale for the benefit of innocent creditors if this action will serve the public interest).

24 *C-Block Letter*, *supra* note 9, at 21574-75 (citing *Fifth Memorandum Opinion and Order*, *supra* note 16, at 471); *see LaRose*, 494 F.2d at 1146; *Second Thursday #2*, 25 F.C.C.2d at 115; *In re* Twelve Seventy, Inc., 1 F.C.C.2d 965, 969 (1965) (Cox, dissenting commissioner) [hereinafter *Twelve Seventy*]; *97 Amendment*, *supra* note 16.

25 *See Second Thursday #2*, 25 F.C.C.2d at 115-16 (approv-

bankruptcy, subject to compliance with certain restrictions. In brief, these restrictions mandate that a transfer be made to a qualified transferee who assumes the payment obligations of the transferor.[26] In bankruptcy, such rules may be waived by the FCC; however, full payment is nonetheless required.[27] These provisions are designed to prevent "unjust enrichment" of the licensee, and in the C-Block context, require that principal and accrued interest be paid to the Commission at the time of transfer.[28] Similar provisions require adjustments for any loss of eligibility to use bidding credits.[29] Interestingly, because FCC rules require that a PCS license transfer be accompanied by full payment, sale of a PCS license in bankruptcy is treated much like assumption and assignment of an executory contact. Failure to restructure or assign a PCS license, however, would not be analogous to rejection of an executory contract. Instead, the result, at least outside of bankruptcy, would be cancellation and re-auction.

The FCC's full payment requirements appear to be in conflict with the bankruptcy policy favoring restructuring of debt and equitable distribution among creditors.[30] While generally approving FCC license sales in bankruptcy, courts are silent on the issue of full repayment.[31] This is because bankruptcy case law typically deals with the normal business failure of a radio station and focuses on the role and value of the license as part of an on-going concern. In contrast, the major issue in the PCS C-Block context is the licensee's inability to fulfill its financial obligations to the FCC. Although the case law is helpful in assessing how a court might treat an FCC license transfer in bankruptcy, it does not resolve the issues that may arise in the typical PCS C-Block case. Again, attempts to draft legislation strictly enforcing the FCC's full payment obligations in bankruptcy demonstrate the Commission's fear that they would not otherwise be enforced by a bankruptcy court.[32] These fears of the "unknowns of the bankruptcy process" were also a subject of discussion at last year's C-Block repayment forum.[33]

CURRENT ISSUES

In light of these unknowns, and in order to salvage the C-Block process, the FCC has begun to relax its repayment rules, enforcing strictly only those requirements pertaining to the first half of the 10% down payment required of C-Block installment payers. Where this initial payment has not been timely made, the FCC has canceled and re-auctioned the license (as well as assessed default penalty payments).[34] The FCC has been less strict concerning both the second part of the down payment and subsequently owed installment payments. With respect to the second down payment, the FCC has been flexible with respect to minor delinquencies which neither affect the timing of the auction, nor the FCC's review of the applicant's qualifications.[35] For example, where the delay in payment has been short (ranging from one day to two weeks), and resulted from administrative error, the FCC has waived its right

ing sale upon petition for reconsideration, on grounds that second proposal provided for better recovery to creditors than first proposal); *LaRose*, 494 F.2d at 1149-50 (refusing to approve sale which provided for 97.51% recovery to creditors, the District of Columbia Court of Appeals reversed the FCC's decision); *see also Twelve Seventy*, 1 F.C.C.2d at 967 (citing court's refusal to consider sale proposal without renewal hearing, stating that creditors take risk that bankruptcy might occur).

26 *See* 47 C.F.R. §§ 1.2111(c), 24.839(d) (1996).

27 *See id.* at §§ 1.2111(c), 24.711(c), 24.839(a) (1996); *97 Amendment*, *supra* note 16, at 369-70.

28 47 C.F.R. § 24.711(c); *see 97 Amendment*, *supra* note 16, at 378.

29 47 C.F.R. § 24.712(b)(2); *see 97 Amendment*, *supra* note 16, at 378. In addition, the *Note* and *Security Agreement* require the payment of collection costs by a defaulting licensee regardless of bankruptcy. *Security Agreement*, *supra* note 5, para. 8(e); *see Note*, *supra* note 5.

30 *See C-Block Letter*, *supra* note 9, at 21574-75 (citing *Fifth Memorandum Opinion and Order*, *supra* note 16, at 471).

31 *See, e.g.*, *Atlantic*, 994 F.2d at 1070; *Fugazy #2*, 124 B.R. at 431; *Ridgely*, 139 B.R. at 375; *Smith*, 94 B.R. at 221; *Second Thursday #2*, 25 F.C.C.2d at 115; *see generally LaRose*, 494 F.2d 1145 (D.C. Cir. 1974).

32 *See Spectrum Revenue Proposal*, *supra* note 14.

33 *See Notes from Public Forum*, *supra* note 15.

34 *See* 47 C.F.R. §§ 1.2104(g)(2), 1.2109(b), 24.704(a)(2), 24.708(b), 24.711(a)(2) (1996); *97 Amendment*, *supra* note 16, at 382-83; *see generally In re* BDPCS, Inc., *Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules*, 12 FCC Rcd. 3230 (1997); *In re* Nat'l Telecom PCS, Inc., *Request for Waiver of Bid Withdrawal Payment and Application for Authority to Construct a Personal Communications System on Frequency Block C in American Samoa, Market No. B492*, 12 FCC Rcd. 10163 (1997); *In re* C.H. PCS, Inc., *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules*, 11 FCC Rcd. 9343 (1996); *Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules*, 11 FCC Rcd. 10853 (1996).

35 *See In re* Longstreet Communications Int'l, Inc., *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B012*, 12 FCC Rcd. 1549, para. 8, at 1551-52 (1997) [hereinafter *Longstreet*].

to cancel the license, charging a late fee instead.[36]

With respect to installment payments, the FCC has frozen the pertinent deadlines, coincidentally doing so on the very day that Pocket filed for bankruptcy.[37] At stake is nearly half of the $23 billion raised since 1994 when the PCS auctions began. The freeze was ordered pursuant to a formal request by certain licensees that the payment schedule be changed from quarterly to annual to facilitate their access to capital.[38]

The FCC's most recent and controversial endeavor in trying to keep the C-Block licensees out of bankruptcy is its adoption last September of a set of alternative solutions designed to strike a balance among the licensees' varying needs, and still preserve the integrity of the auction process. These alternatives range from strict enforcement of FCC full payment rules to opportunities for buy-out and/or return of the licenses in exchange for a certain amount of debt forgiveness and attendant penalties.[39] Criticism has already been voiced by interested parties, including some of the Commissioners themselves.[40] In fact, the General Wireless bankruptcy filings exemplify the dissatisfaction of the licensees with these restructuring options. At publication, the FCC was seeking comment on the re-auction process that is contemplated by these options.

The repayment issues have been further complicated by antitrust concerns raised by various bidders through complaints and/or petitions filed with the FCC and in court, accusing rival companies of collusive actions to corner certain PCS markets.[41] Some bidders are accused of using bidding signals to drive up the price for licenses sought by rival bidders. Yet another form of collusion has been alleged in a suit brought against Pocket in a New York federal district court just prior to its bankruptcy filing.[42] In that suit, brought by NatTel against Pocket and others, the defendants are accused of diverting to themselves investment funds allegedly "earmarked for the plaintiffs."[43] NatTel is seeking damages of at least

---

36 *In re* RFW, Inc., *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B230,* 12 FCC Rcd. 1536, paras. 7-8, at 1538 (1997); *Longstreet, supra* note 35; *In re* MFRI, Inc., *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B435,* 12 FCC Rcd. 1540, para. 8, at 1542 (1997); *In re* Roberts-Roberts & Assoc., LLC, *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Various BTA Markets,* 12 FCC Rcd. 1825, paras. 7-8, at 1827-28 (1997); *In re* Wireless Telecomm. Co., *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B411,* 12 FCC Rcd. 1544, para. 7, at 1546-47 (1997); *In re* Southern Communications Sys., Inc., *Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market No. B085,* 12 FCC Rcd. 1532, paras. 7-8, at 1534 (1997).

37 *See In re Installment Payments for PCS Licensees,* DA 97-649 (1997).

38 *See id.*

39 *See In re* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Notice of Proposed Rulemaking,* WT Docket No. 97-82 (Sept. 25, 1997); *FCC Adopts Menu of Options for Modifying C-Block Payments; Seeks Comment on Implementation of Options* (Rpt. No. WT 97-37) (WT Dkt. No. 97-82), FCC News, Sept. 13, 1990. The FCC order reinstates the deadline for making installment payments to Mar. 31, 1998 (one year from the date of the freeze) with the licensee being required to choose one of the following four alternative options by Jan. 15, 1998:
Option 1: Existing Note Obligations. Licensees may elect to continue making payments under their original installment payment plan notes in accordance with the terms of those notes and the Commission's rules.
Option 2: Disaggregation. A licensee may elect to disaggregate one-half of its spectrum and return such spectrum to the FCC for re-auction. The licensee must disaggregate spectrum for all of the Basic Trading Area ("BTA") licenses it owns within any Major Trading Area ("MTA"). In exchange, the licensee will have the proportionate half of its debt forgiven. One half of the downpayment will be applied toward the debt for the retained spectrum, while the other half will be forfeited. The licensee will be prohibited from rebidding for the returned spectrum or otherwise acquiring it in the secondary market for two years from the date of re-auction.
Option 3: Amnesty. A licensee may return all of its licenses, in exchange for which all of the licensee's outstanding debt will be forgiven. Its downpayment will be forfeited. It will be permitted to bid on its returned licenses at re-auction, and there is no restriction on after-market acquisitions. An exception to the all-or-nothing requirement would be made as to licensees that have met or exceeded the five year build-out requirements by Sept. 25, 1997. These licensees may retain their built-out BTAs, but must also keep the other BTAs in the MTA where the build-out requirement has been met.
Option 4: Prepayment. A licensee may purchase any of its licenses at the face value originally bid by the licensee. The licensee must purchase all the BTA licenses it owns within any single MTA. The licensee may use 70% of its downpayment and any additional monies that it is able to raise to buy out its licenses; the remaining 30% of the deposit and any unused portion of the 70% will be forfeited. Licenses that are not prepaid must be returned for re-auction, in exchange for which the corresponding debt will be forgiven. The licensee may not rebid for the returned licenses or acquire them in the secondary market for a period of two years from the date of re-auction. *See id.*

40 *See id.*; Stephanie N. Mehta and John R. Wilke, *FCC Plan to Aid Wireless Carriers Is Tougher Than Firms Hoped For,* WALL ST. J., Sept. 26, 1997, at B5.

41 *See Radio Comm. Rep., supra* note 2.

42 *See id.*

43 *See id.* The defendants were cited for "violation of the Sherman Act, breach of contract, tortious interference with contractual relations and fraud." *Id.*

$1 billion.[44]

SECURITY INTEREST

Telecommunications law and policy does not permit the grant of a direct security interest in an FCC license to a third party because such a grant might endanger the independence of the licensee, as well as interfere with the FCC's plenary power to protect the public interest in the airwaves.[45] The FCC permits the grant of a security interest in proceeds of an FCC authorized transfer, but it is generally subordinated to the FCC's first priority interest.[46]

Additional security can be obtained by taking a security interest in the assets of the licensee's business and/or obtaining a pledge of its stock.[47] Because the respective values of a license and related business assets tend to be maximized upon sale of the going concern, all of the above forms of security, taken together, would bring the lender as close as possible to having a security interest in the license itself. The value of the security would be further enhanced by the "bare license" policy of the FCC, pursuant to which the FCC will generally not approve the sale of a license without an accompanying transfer of the related facility's physical assets.[48] Conversely, if the assets are somehow lost, taken over, or become inoperable, cancellation of the license could result. Moreover, the security interest in the sale proceeds will not survive if the license is canceled.[49] Accordingly, although the FCC encourages the financing of PCS licenses by outside lenders, the FCC, acting in the role of both regulator and first priority secured creditor, ultimately controls the rights and remedies of all other creditors. These rights and remedies could range from collection of the full debt amount from the proceeds of a distress sale to loss of all rights in the collateral through cancellation of the license.

CONCLUSION

How the FCC will handle these issues is the principal question facing players in the wireless industry. The FCC seems concerned about the specter of bankruptcy filings by its C-Block licensees, despite both the historic deference accorded telecommunications law in bankruptcy proceedings and the fact that the FCC would enjoy the position of first priority secured creditor.

In attempting to keep its licensees out of bankruptcy, the FCC is encouraging distressed bidders to restructure under the September 1997 proposal – and to do so quickly. As the FCC now appears to recognize, a near-term resolution of this issue is necessary to attract capital and forestall the C-Block's loss of market share to larger wireless companies.

---

44 *See id.*

45 *See Atlantic*, 994 F.2d at 1074 (citing *Smith*, 94 B.R. at 221 (quoting *In re Merkley*, 94 F.C.C.2d 829-30 (1983))); *97 Amendment*, *supra* note 16, at 368-69; *C-Block Letter*, *supra* note 9, at 21572-73.

46 *97 Amendment*, *supra* note 16 (citing *C-Block Letter*, *supra* note 9, at 21572); *see Atlantic*, 994 F.2d at 1074-75 (citing *Ridgely*, 139 B.R. at 378-79); *Security Agreement*, *supra* note 5, paras.1-2.

47 *See* Howard M. Liberman & Gerald Stevens-Kittner, *Lending to Broadcast Stations-Part 1*, LOAN OFFICER'S LEGAL ALERT, 5, 6 (1989); Jack Whitley, *A Primer on Commercial Transactions Under the Communications Act*, ILL. B.J., 30-31 (1983).

48 *See Two If By Sea*, *supra* note 22, at 2254-55; *In re* Applications of Constellation Communications, Inc., *et al.*, 11 FCC Rcd. 18502, 18515 (1996); *In re* Application of American Music Radio and Khym, Inc., 10 FCC Rcd. 8769, 8772 (1995); *In re* Applications of BBC License Subsidiary L.P. and SF Green Bay License Subsidiary, Inc., 10 FCC Rcd. 7926 (1995) (citing Radio KDAN, 11 F.C.C.2d 934, 935 (1968)); *In re* Application of Donald L. Horton and Voice of the Caverns, Inc., 10 F.C.C.2d 271, 273 (1967).

49 *See Security Agreement*, *supra* note 5, para. 2.