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News analysis: Courting trouble

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The FCC was hoping that repossessing and reselling spectrum licences, awarded to a now bankrupt company, would be upheld in the US Court of Appeals. It wasn't. Elizabeth Biddlecombe explains why the FCC was always likely to have problems.

Embarrassment levels must be running high at the Federal Communications Commission (FCC). Last month (July) the US Court of Appeals decided that it acted unlawfully by repossessing licences originally purchased by the now bankrupt Nextwave and then selling them on in the spectrum auctions at the end of last year.

They managed to raise a record \$17 billion for the government with Verizon Wireless, the country's largest operator, paying the highest amount - \$9 billion for 113 licences, all of which were formerly Nextwave property.

However last month's ruling puts their ownership into doubt. Although at one point Verizon was reported to be talking directly to Nextwave, the assumption is that it will now have to be resolved by the FCC and Nextwave.

So how did the FCC let this happen? The rules for the last auction explicitly stated that if Nextwave was successful in court, bidders would have to relinquish their new licences in return for reimbursement.

Critics argue that because the FCC knew it would get much more for these spectrum rights second time round, in fact three times as much at around \$16 billion, it was willing to take the gamble.

The FCC would also have hoped that, as usual, it would get judicial preference as a public agency acting in the public interest. What it seems to have forgotten is that it would be dealing with a bankruptcy court - very different from its usual legal patch. And it is not unfair to say that the FCC was largely responsible for the whole problem in the first place. Its attempts to shape the market in 1996 by restricting the C Block pcs auctions to small,

entrepreneurial companies with less than \$125 million in annual revenue meant that a year later the FCC was looking at ways to bail them out since they were having trouble paying their share of the \$10 billion pledged for 493 licences.

Jeff Giese, a senior analyst with research and publishing group Fierce Wireless, describes the FCC's actions at that time as "phoney affirmative action," adding that "the FCC is a terrible creditor. It didn't do its due diligence. It says something that Nextwave went bankrupt soon after (the auction)."

Similar provisions for small business ownership were also made in the December 2000 auctions where 170 of the 422 licences were reserved for smaller companies. But this merely led to the situation where unheard of companies, Alaska Wireless for instance, were bidding on behalf of the big players, in this case AT&T Wireless. "It is a fraud. The large companies invest in small shell companies that get preferential treatment for spectrum and financial help," insists Giese. "Everybody knew they were going to flip (sell the licences) because people needed a national footprint."

"These auctions were designed to fail," adds Lawrence Spiwak, president of the Washington DC based Phoenix Center for Advanced Legal and Economic Public Policy Studies. "There is a fine line between allocation and naked revenue raising." He argues that the US government is a "frequency monopolist", selling licences city by city to get the most money for the spectrum despite the fact that "the value of mobile telephony is mobility so you'd think they'd auction it off on a half-country or nation-wide basis."

One result of this unseemly bickering and, as ever in the US, the use of the courts which always allows for years of legal argument, is to make unlicensed bands such as that used by the fast growing wifi frequency, increasingly attractive. Will the US turn into a nation of high speed wireless hot spots based on wireless local area networks while the US government ensures, just as it did with cellular roaming, that a proper nation wide service remains a dream?

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