

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

In re Applications of	)	
	)	
ABC Wireless, L.L.C.	)	File No. 0000012954
(Market B190-Hilo, Hawaii)	)	
	)	
and	)	
	)	
American Wireless, L.L.C.	)	File No. 0000012939
(Market B192-Honolulu, Hawaii)	)	

**ORDER**

**Adopted: September 8, 1999**

**Released: September 8, 1999**

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. In this Order, we dismiss Gloria Borland Hawaii PCS, Inc.'s (Borland) Petitions to Deny (Petitions) the above-captioned long form applications (FCC Form 601) filed by ABC Wireless, L.L.C. (ABC Wireless) and American Wireless, L.L.C. (American Wireless), winning bidders in Auction 22, the C, D, E and F block broadband PCS license auction that closed on April 15, 1999 (Auction 22).<sup>1</sup> Borland, an alleged five percent owner of the C block PCS licensee DCR PCS, Inc. (DCR PCS), argues that grant of the licenses to ABC Wireless and American Wireless would not be in the public interest until Borland's outstanding claims against the Commission are resolved.<sup>2</sup> For the reasons set forth below, we dismiss the Petitions.

2. The Commission granted DCR PCS two C block licenses for the above-captioned markets on November 4, 1996.<sup>3</sup> These two licenses were among 43 C block licenses that DCR PCS obtained at that time.<sup>4</sup> On March 31, 1997, DCR PCS and its parent company, Pocket Communications, Inc., filed for protection under Chapter 11 of the Bankruptcy Code, 11 U.S.C. . 101 *et seq.*, in the United States Bankruptcy Court for the Northern District of Maryland.<sup>5</sup> During the bankruptcy proceeding, DCR PCS elected, under the *C Block Restructuring Orders*,<sup>6</sup> to exercise its right to return a majority of the 43

<sup>1</sup> Petitions to Deny filed by Gloria Borland Hawaii PCS, Inc., June 3, 1999. Both Petitions are identical, other than the name of the winning bidder.

<sup>2</sup> Petitions at 2.

<sup>3</sup> In re Applications of DCR PCS, Inc., *Order*, 11 FCC Rcd. 16849 (1996).

<sup>4</sup> *Id.*

<sup>5</sup> Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999, *Order*, DA 99-56 (rel. Apr. 5, 1999) at . 2 (*April Order*).

<sup>6</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal

licenses to the Commission, including the two Hawaii licenses at issue here.<sup>7</sup> The DCR PCS elections were approved by the bankruptcy court.<sup>8</sup>

3. On December 21, 1998, Borland filed an Application for Review of the Wireless Telecommunications Bureau's (Bureau) decision to include the C block licenses for the Hilo and Honolulu, Hawaii markets in Auction 22.<sup>9</sup> Borland argued that the Hawaii licenses should not be included in the inventory for Auction 22, alleging that (1) it owns a five percent interest in the DCR PCS licenses; and (2) representations made by Commission staff created a contract allowing it to purchase the Hawaii licenses.<sup>10</sup> It further argued that the failure to remove the licenses would result in the award of the licenses to a third party, thus precluding review of the issues in the Application for Review on the merits and compounding the damage to Borland.<sup>11</sup> On March 4, 1999, Borland filed a Petition for Extraordinary Relief, requesting that the Commission act on the Application for Review.<sup>12</sup> On April 5, 1999, the Commission released an Order denying Borland's Application for Review and related Petition for Extraordinary Relief.<sup>13</sup> On May 4, 1999, Borland filed a Petition for Review of the Commission's Order (Petition for Review) with the United States Court of Appeals for the D.C. Circuit (Court).<sup>14</sup> The Petition for Review remains pending. On May 5, 1999, ABC Wireless and American Wireless, the winning bidders for the Hilo and Honolulu, Hawaii markets, respectively, filed their long form applications. On June 3, 1999, Borland filed its Petitions.

4. We find that Borland lacks standing to file a petition to deny against the above-captioned applications. Section 309(d)(1) of the Communications Act, as amended, permits any "party in interest" to file a petition to deny any application.<sup>15</sup> To establish standing, a petitioner must allege sufficient facts to demonstrate that grant of the subject application would cause the petitioner to suffer a direct injury.<sup>16</sup> The

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Communications (PCS) Licenses, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd. 8345 (1998). We refer to this Order, together with the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications (PCS) Licenses, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 16436 (1997), collectively as the *C Block Restructuring Orders*.

<sup>7</sup> *April Order*, DA 99-56 at . 2. Specifically, DCR PCS elected to relinquish 31 licenses, disaggregate 15 MHz of spectrum on 11 licenses, and prepay one 30 MHz license.

<sup>8</sup> *Id.*

<sup>9</sup> Application for Review filed by Gloria Borland Hawaii PCS, Inc., December 21, 1998 (Application for Review).

<sup>10</sup> *Id.* at 2, 5.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> Petition for Extraordinary Relief, filed by Gloria Borland Hawaii PCS, Inc., March 4, 1999.

<sup>13</sup> *April Order*.

<sup>14</sup> *Gloria Borland Hawaii PCS, Inc. v. FCC*, U.S. Court of Appeals for the District of Columbia Circuit, Case No. 99-1170 (filed May 4, 1999).

<sup>15</sup> 47 U.S.C. . 309(d)(1).

<sup>16</sup> *See* Los Angeles Cellular Telephone Company, *Order*, 13 FCC Rcd. 4601, 4603-4604, . 5 (CWD, 1998), *citing* AmericaTel Corporation, 9 FCC Rcd. 3993, 3995 (1994) *citing* *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

petition must further demonstrate a causal link between the claimed injury and the challenged action.<sup>17</sup> In the Bureau's *December 23 Public Notice*, the Bureau stated that in situations in which auctioned licenses are involved in a pending proceeding, such licenses will be granted at the close of the auction in order to serve the public interest in prompt implementation of PCS service and that the grant of such licenses will be conditioned on the outcome of pending proceedings.<sup>18</sup> Accordingly, the grant of the licenses to ABC Wireless and American Wireless will be conditioned upon the outcome of Borland's pending Petition for Review. Any claim Borland may have on the licenses will be protected by this condition placed on the grants. Therefore, because Borland will not suffer a direct injury by the conditional grants of the licenses to ABC Wireless and American Wireless, it lacks standing to bring the instant Petitions.

5. Even if we were to assume that Borland has standing, its Petitions must be denied on the merits. Borland argues that because its outstanding claims against the Commission are not resolved, grant of the long form applications will create conflicting claims for the licenses and is therefore inconsistent with the public interest.<sup>19</sup> Borland also contends that delays resulting from competing claims over the PCS licenses will complicate financing, construction and build-out of the licenses, which, in turn, will impair competition in the Hilo and Honolulu, Hawaii markets.<sup>20</sup> Finally, Borland argues that the Commission's failure to protect and respect its interests as a party to the Pocket bankruptcy case violates *LaRose v. FCC*,<sup>21</sup> in which the D.C. Circuit recognized that the Commission has a public interest duty to protect innocent creditors.<sup>22</sup>

6. In response, ABC Wireless and American Wireless argue that the Commission has already ruled on Borland's claim. American Wireless argues that because the Commission has already denied Borland's Application for Review and Petition for Extraordinary Relief regarding the Commission's decision to include the licenses in Auction 22, the Commission has already ruled on Borland's claim to the licenses.<sup>23</sup> American Wireless further contends that the fact that Borland has filed suit against the Commission has no effect on the Commission's decision.<sup>24</sup>

7. As discussed above, the Bureau has previously indicated that the grant of any auctioned licenses involved in a pending proceeding will be conditioned on the outcome of such pending proceeding.<sup>25</sup> In a *February 24 Public Notice*, the Bureau advised auction participants that, in formulating their business strategies, they must take into account the risk that a pending proceeding might ultimately displace a winning bidder.<sup>26</sup> Thus, all parties were on notice that the grant of certain licenses would be conditioned

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<sup>17</sup> See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74, 81 (1978).

<sup>18</sup> Auction of C, D, E and F Block Broadband PCS Licenses, *Public Notice*, 13 FCC Rcd. 24540, 24544 (1998) (*December 23 Public Notice*).

<sup>19</sup> Petitions at 3.

<sup>20</sup> *Id.*

<sup>21</sup> *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

<sup>22</sup> Petitions at 4.

<sup>23</sup> American Wireless Opposition at 6.

<sup>24</sup> *Id.*

<sup>25</sup> *December 23 Public Notice*, 13 FCC Rcd. at 24544.

<sup>26</sup> Auction of C, D, E and F Block Broadband PCS Licenses, *Public Notice*, DA 99-375 (rel. Feb. 24, 1999) at 4-5 (*February 24 Public Notice*).

upon the outcome of pending proceedings. In light of the fact that any claim Borland may have in connection with the above-captioned licenses will be protected under a grant conditioned on the outcome of pending proceedings, we see no need to depart from the procedure announced by the Bureau in its *December 23 Public Notice*, and we find that it is in the public interest to conditionally grant the licenses to ABC Wireless and American Wireless.<sup>27</sup>

8. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. . 154(i), and sections 0.331, 1.2108 and 24.830 of the Commission's rules, 47 C.F.R. .. 0.331, 1.2108 and 24.830, the Petitions to Deny filed by Gloria Borland Hawaii PCS, Inc., on June 3, 1999, in the above-referenced proceedings, ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari  
Chief, Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau

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<sup>27</sup> In keeping with our decision to grant licenses conditioned on the outcome of pending proceedings, we are today issuing a Public Notice announcing that we are prepared to grant the above-captioned license applications following the applicants' full and timely payment of the remaining balance of their winning bids, pursuant to section 1.2109(a) of the Commission's rules. 47 C.F.R. . 1.2109(a).