

Before the FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Additional Information Regarding Broadband PCS )  
Spectrum Included in the Auction Scheduled for )  
March 23, 1999 )

ORDER

Adopted: March 24, 1999

Released: April 5, 1999

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a Statement.

1. The Commission has before it an Application for Review filed on December 21, 1998, and Petition For Extraordinary Relief filed on March 4, 1999 by Gloria Borland Hawaii PCS, Inc. ("Borland").<sup>1</sup> In her Application for Review, Borland requests full Commission review of the Wireless Telecommunications Bureau's ("WTB") Public Notice entitled "Additional Information Regarding Broadband PCS Spectrum Included in the Auction Scheduled for March 23, 1999; Comment Sought on Auction Procedural Issues," DA 98-2337, released November 19, 1998. Specifically, Borland requests that the Commission remove from Auction No. 22, which began as scheduled on March 23, 1999, the C block licenses for the Honolulu and Hilo, Hawaii markets ("Hawaii licenses"), which were formerly held by DCR PCS, Inc. ("DCR"), a wholly-owned subsidiary of Pocket Communications, Inc. ("Pocket"), and direct WTB to grant Borland the Hawaii licenses.<sup>2</sup> For the reasons discussed below, we deny Borland's Application for Review and Petition for Extraordinary Relief.

2. Borland claims that she negotiated a September 21, 1995 agreement with DCR to acquire a five percent equity ownership interest in the Hawaii licenses in the event that DCR acquired such licenses. The Hawaii licenses were among the 43 licenses the Commission awarded DCR on November 6, 1996. On March 31, 1997, DCR and Pocket 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. During the bankruptcy proceeding, DCR elected, under the *C Block Restructuring Orders*,<sup>3</sup> to exercise its

<sup>1</sup> Gloria Borland Hawaii PCS, Inc., Application for Review (filed December 21, 1998) (Application for Review) and Petition For Extraordinary Relief (filed March 4, 1999) (Petition For Extraordinary Relief).

<sup>2</sup> The Petition for Extraordinary Relief similarly requests that the Hawaii licenses be removed from the auction pending resolution of the Application for Review.

<sup>3</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licenses, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*First Reconsideration Order*"). We refer to this order together with the *C Block Second Report and Order*, 12 FCC Rcd 16,436 (1997) collectively as the "*C Block Restructuring Orders*."

right to return licenses to the Commission, including the Hawaii licenses. The DCR elections were approved by the bankruptcy court. Borland alleges that representations made by Commission staff created a contract allowing her to purchase the Hawaii licenses. Alternatively, she claims that the doctrine of promissory estoppel prevents the Commission from destroying the value of her agreement to purchase the licenses.

3. Before addressing the merits of Borland's claims, we note that her Application for Review is defective. In effect, her Application for Review is an unripe request that the Commission review a decision by WTB on her claim to the Hawaii licenses, one it never had before it, and must be dismissed.<sup>4</sup> Even assuming that Borland's claims are properly before the Commission as a Petition for Extraordinary Relief, we are not persuaded to reverse WTB's inclusion of the Hawaii licenses in Auction No. 22.

4. There is no merit to Borland's argument that alleged statements concerning the Hawaii licenses made by Commission staff created a contract. Under the Supreme Court's decision in *U.S. v. Winstar*, the creation of a vested property right on behalf of a private party against the U.S. Government must be unambiguous or clearly implied from the instruments at issue.<sup>5</sup> In this instance, no agreement existed. Borland cites to no contract negotiated with the U.S. Government akin to what private parties might negotiate. In addition, representations, if any, made by staff members do not bind the Commission to a course of regulatory action unless such action has been duly authorized in expressly delegated terms. Discussions with Commission staff about the possible disposition of licenses do not create contractual relationships.

5. In addition, the elements of promissory estoppel are not present in this instance because there was no duly authorized promise by the Commission nor any intent that Borland rely on the Commission's statements as authorized representations. The Second Restatement of Contracts provides that "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."<sup>6</sup> Given DCR's ultimate control over whether to elect to return the Hawaii licenses, it was unreasonable for Borland to rely on her contacts with Commission staff as a promise by the Commission to sell Borland the Hawaii licenses. Further, Commission staff had no reasonable expectation that Borland would take action or forbear from action based on its discussions.

6. At most, Borland's purported interest in DCR's Hawaii licenses would make her a non-controlling investor in DCR. Borland, however, failed to preserve any rights she may have had in the bankruptcy proceeding vis-a-vis DCR by failing to file a proof of claim. DCR properly chose to relinquish the Hawaii licenses as part of an overall election that has enabled it to retain twelve C block licenses free and clear of debt to the U.S. Government. The election, including the relinquishment of the Hawaii licenses for inclusion in future auctions, was fully consistent with Commission authority, rules and policies

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<sup>4</sup> 47 C.F.R. § 1.115(c)

<sup>5</sup> See *U.S. Winstar Corporation et al.*, 518 U.S. 839, 860-861 (1996). See also *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986) (alleged contract right in issue was part of a regulatory program, which Congress retained its right to amend in the exercise of its power to provide for the general welfare).

<sup>6</sup> Restatement (Second) of Contracts, § 90 (1981).

under the *C block Restructuring Orders*. The bankruptcy court with jurisdiction over the case ruled that the election constituted a lawful disposition of DCR's rights under the Bankruptcy Code. Borland's Application for Review now requests that we undo this election by awarding to her licenses to use spectrum that is currently unassigned. Since the licensee itself made a valid election, consistent with federal communications and bankruptcy law and pursuant to bankruptcy court order, we perceive no grounds for overturning that election. If Borland believed that the Commission should have been held to a course of action in the bankruptcy proceeding, the appropriate forum for pursuing such a remedy was with the bankruptcy court. Indeed, to the extent Borland is seeking to overturn the rulings of the bankruptcy court, we have no jurisdiction to take such action.

7. For the aforementioned reasons, WTB properly included the Hawaii licenses in Auction No. 22 which began March 23, 1999, and we uphold that decision for the reasons stated therein. We find no reason to disturb it.

8. Accordingly, IT IS ORDERED that the Application for Review filed on December 21, 1999, by Borland IS DISMISSED.

9. IT IS FURTHER ORDERED that the Petition for Extraordinary Relief filed on March 4, 1999, by Borland IS ALSO DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary