

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

In the matter of )  
 )  
Applications of Alaska Native Wireless, L.L.C. )  
File Nos. 0000364320 and 0000363827 )  
 )  
Auction No. 35 – C & F Block Broadband PCS )

**Order**

**Adopted: May 23, 2003**

**Released: June 3, 2003**

By the Commission:

**I. INTRODUCTION**

1. On April 3, 2002, TPS Utilicom, Inc. (“TPS Utilicom”) filed an Application for Review (“April 3 Application for Review”) requesting that the Commission reverse the decision of the Wireless Telecommunications Bureau (“Bureau”) dismissing TPS Utilicom’s Petition to Deny (“Petition”) the above-captioned applications (“Applications”) of Alaska Native Wireless, L.L.C. (“Alaska Native Wireless”)<sup>1</sup> and grant the Petition or, in the alternative, remand the proceeding to the Bureau with instructions to grant the Petition. Also before the Commission is an additional Application for Review, filed by TPS Utilicom on April 10, 2002 (“April 10 Application for Review”), challenging the Bureau’s subsequent grant of fifteen C and F Block Broadband Personal Communications Services (“PCS”) licenses to Alaska Native Wireless.<sup>2</sup> For the reasons stated herein, we dismiss both the April 3 Application for Review and the April 10 Application for Review (collectively, “Applications for Review”) for lack of standing.

**II. BACKGROUND**

2. When the Commission instituted competitive bidding, as directed by Congress,<sup>3</sup> it wanted to ensure that small businesses would be provided an opportunity to participate in the wireless market.<sup>4</sup> To ensure such participation, the Commission set aside certain PCS licenses for businesses satisfying the

<sup>1</sup> See Applications of Alaska Native Wireless, L.L.C. File Nos. 0000364320 and 0000363827, *Order*, 17 FCC Rcd. 4231 (2002) (“March 4, 2002 Order”).

<sup>2</sup> See Wireless Telecommunications Bureau Grants Fifteen C and F Block Broadband Personal Communications Services (PCS) Licenses to Alaska Native Wireless, L.L.C., *Public Notice*, 17 FCC Rcd. 4563 (2002) (“March 11, 2002 Public Notice”).

<sup>3</sup> See Omnibus Budget Reconciliation Act of 1993 § 6002(a), 47 U.S.C. 309(j).

<sup>4</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd. 2348, 2349, 2350, 2388-89, ¶¶ 3, 6, 227-30 (1994) (“*Second Report and Order*”); see also 47 U.S.C. § 309(j)(3)(B) (objectives of competitive bidding include participation of small businesses); 309(j)(4)(D) (regulations promulgated by the Commission must ensure that small businesses are provided an opportunity to participate in competitive bidding).

entrepreneurial eligibility criteria.<sup>5</sup> These C and F block PCS licenses are auctioned in closed bidding only to applicants that demonstrate that they, together with their affiliates and controlling interests, have gross revenues of less than \$125 million in each of the previous two years and total assets of less than \$500 million at the time such applicants file their short-form applications (Form 175).<sup>6</sup> Additionally, the Commission offers bidding credits to discount the price of licenses acquired through open bidding to applicants meeting the designated entity criteria.<sup>7</sup> In Auction No. 35, the Commission made available bidding credits of fifteen and twenty-five percent for small and very small businesses, respectively.<sup>8</sup> To qualify as a very small business, an applicant had to certify that it, together with its affiliates and controlling interests, had average gross revenues not exceeding \$15 million for the previous three years.<sup>9</sup>

3. In Auction No. 35, Alaska Native Wireless applied for entrepreneurial eligibility status and participated in closed bidding. Alaska Native Wireless also applied for bidding credits as a very small business designated entity in open bidding markets. Alaska Native Wireless was the high bidder for forty-four markets in Auction No. 35, which closed on January 26, 2001.<sup>10</sup> Alaska Native Wireless filed two long-form applications (Form 601), each dated February 12, 2001,<sup>11</sup> which contained exhibits regarding its compliance with the Commission's entrepreneurial eligibility and designated entity rules.<sup>12</sup> The exhibits contained information concerning Alaska Native Wireless' current assets and gross revenues.<sup>13</sup> The Applications were placed on the Accepted for Filing Public Notice, dated February 27,

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<sup>5</sup> See *Second Report and Order*, 9 FCC Rcd. at 2392, ¶¶ 245-48; see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd. 5532, 5539, 5584-88, ¶¶ 14, 118-27 (1994) (“*Fifth Report and Order*”) (adopting competitive bidding rules for the award of Broadband PCS licenses).

<sup>6</sup> See 47 C.F.R. § 24.709(a).

<sup>7</sup> See *Second Report and Order*, 9 FCC Rcd. at 2391-92, ¶¶ 241-42; see also *Fifth Report and Order*, 9 FCC Rcd. at 5539, 5589-91, ¶¶ 15, 130-33.

<sup>8</sup> See 47 C.F.R. §§ 24.712(a), 24.717(a) (small businesses), 24.712(b), 24.717(b) (very small businesses); see also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16,266, 16,287-88, ¶¶ 43-45 (establishing the bidding credit amount available to designated entities for PCS licenses acquired through open bidding and eliminating bidding credits for licenses acquired through closed bidding).

<sup>9</sup> See 47 C.F.R. §§ 24.720(b)(2), 1.2110(f)(2)(ii).

<sup>10</sup> See C and F Block Broadband PCS Auction Closes, *Public Notice*, 16 FCC Rcd. 2339, 2339, 2356-66 (2001).

<sup>11</sup> The above-captioned applications originally were filed on February 12, 2001, but have been amended and supplemented since the initial filing. Alaska Native Wireless filed two long-form applications in order to separate those markets for which it was not applying for tribal lands bidding credits (file no. 0000364320) from the seventeen markets for which it was seeking tribal lands bidding credits (file no. 0000363827). Alaska Native Wireless later reduced the number of markets for which it was seeking tribal lands bidding credits from seventeen to five. See Alaska Native Wireless, L.L.C., Request for Partial Waiver, filed Aug. 7, 2001; see also Alaska Native Wireless Application No. 0000363827, filed Aug. 16, 2001. Alaska Native Wireless subsequently withdrew its request for tribal lands bidding credits in the remaining markets. See Letter from Conrad N. Bagne, Arctic Slope Regional Corp., et al. to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, dated Oct. 11, 2001; see also Alaska Native Wireless Application No. 0000363827 at Schedule B (filed Oct. 12, 2001).

<sup>12</sup> See 47 C.F.R. §§ 24.709 (entrepreneurial eligibility rules), 1.2110, 24.712, 24.717, 24.720(b) (designated entity rules); see also Alaska Native Wireless Application, ULS No. 0000363320, at Exhibits C, Minor Amendment to Exhibit C, D (filed Aug. 3, 2001); Alaska Native Wireless Application, ULS No. 0000363827, at Exhibits C, Minor Amendment to Exhibit C, D (filed Oct. 10, 2001) (“Applications”).

<sup>13</sup> See Applications at Exhibits C, Minor Amendment to Exhibit C, D.

2001, which announced that petitions to deny had to be filed no later than March 9, 2001.<sup>14</sup>

4. TPS Utilicom filed the Petition, dated March 9, 2001, requesting that the Commission deny Alaska Native Wireless' Applications. TPS Utilicom argued that: (1) Alaska Native Wireless failed to include the gross revenues and assets of AT&T Wireless PCS Interests, L.L.C. ("AT&T Wireless") in its calculations to determine eligibility for designated entity status and closed bidding licenses and inclusion of such gross revenues and assets would make Alaska Native Wireless ineligible for designated entity status and closed bidding licenses [small business designation];<sup>15</sup> and (2) Alaska Native Wireless' failure to report AT&T Wireless' assets and gross revenues constitutes lack of candor disqualifying Alaska Native Wireless as a licensee.<sup>16</sup> Alaska Native Wireless filed an Opposition to the Petition to Deny, dated March 21, 2001, to which TPS Utilicom responded by filing a Response to Opposition to Petition to Deny, dated March 28, 2001.

5. On March 4, 2002, the Bureau released an Order dismissing the Petition on the grounds that TPS Utilicom did not have standing to file a petition to deny against Alaska Native Wireless' Applications.<sup>17</sup> Moreover, the Bureau stated that even if it were to address the Petition on the merits, TPS Utilicom failed to raise any facts demonstrating that Alaska Native Wireless was ineligible for the licenses for which it was the high bidder in Auction No. 35 or that it acted with a lack of candor in filing its Applications.<sup>18</sup> TPS Utilicom argues in the April 3 Application for Review that: (1) the Bureau's dismissal of the Petition for lack of standing was erroneous and contrary to federal case law and the Commission's rules; (2) the Bureau's finding that the Petition was an untimely challenge to a prior rulemaking is erroneous as it brings a new application of the Commission's rules to light; and (3) the Alaska Native Wireless Applications are in violation of the Communications Act of 1934, as amended ("Communications Act"),<sup>19</sup> and the Commission's rules. Alaska Native Wireless filed an Opposition to the April 3 Application for Review, dated April 18, 2002, to which TPS Utilicom responded by filing a Reply to Opposition to Application for Review, dated April 29, 2002.

6. The Bureau granted fifteen licenses to Alaska Native Wireless on March 11, 2002.<sup>20</sup> On April 10, 2002, TPS Utilicom filed an additional Application for Review. TPS Utilicom claims in the April 10 Application for Review that the Bureau erred in issuing the fifteen licenses to Alaska Native Wireless, because Alaska Native Wireless is not an entrepreneur or very small business under the Commission's rules.<sup>21</sup> TPS Utilicom states that it submitted the April 10 Application for Review as a "protective measure in order to assure the preservation of its arguments" that the fifteen licenses were

<sup>14</sup> See C and F Block Broadband Personal Communications Services (PCS) Auction; Applications Accepted for Filing, *Public Notice*, 16 FCC Rcd. 4742, 4742 (2001); see also 47 C.F.R. § 1.2108 (requirements for petitions to deny).

<sup>15</sup> See Petition at 1-5.

<sup>16</sup> See Petition at 5-6.

<sup>17</sup> See March 4, 2002 Order, 17 FCC Rcd. at 4235-36, ¶¶ 8-9.

<sup>18</sup> *Id.* at 4236, ¶ 10.

<sup>19</sup> 47 U.S.C. § 151 *et seq.*

<sup>20</sup> See March 11, 2002 Public Notice at 1. The licenses granted were WPUI366 (C Block, BTA063 – Burlington, VT), WPUI367 (C Block, BTA064 – Butte, MT), WPUI368 (C Block, BTA077 – Cheyenne, WY), WPUI369 (C Block, BTA188 – Helena, MT), WPUI370 (F Block, BTA192 – Honolulu, HI), WPUI371 (C Block, BTA241 – Lansing, MI), WPUI372 (C Block, BTA259 – Logan, WV), WPUI373 (C Block, BTA341 – Paris, TX), WPUI378 (C Block, BTA004 – Ada, OK), WPUI379 (C Block, BTA045 – Bismarck, ND), WPUI380 (C Block, BTA136 – Fairbanks), WPUI381 (C Block, BTA221 – Juneau-Ketchikan, AK), WPUI382 (C Block, BTA224 – Kalispell, MT), WPUI383 (C Block, BTA299 – Minot, ND), and WPUI384 (F Block, BTA425 – Spokane, WA).

<sup>21</sup> See April 10 Application for Review at 1; see also 47 C.F.R. §§ 1.2110(f)(2), 24.709, 24.712, 24.717, 24.720(b).

improperly granted,<sup>22</sup> and admits that “the arguments presented in the [April 10 Application for Review] are essentially identical to those already pending before the Commission in [TPS Utilicom’s April 3] Application for Review of the Bureau’s Order.”<sup>23</sup> TPS Utilicom suggests that the Commission can consolidate the April 3 Application for Review and the April 10 Application for Review and “dispose of both in a single decision.”<sup>24</sup>

7. On May 1, 2002, Alaska Native Wireless filed a letter regarding the April 10 Application for Review.<sup>25</sup> Alaska Native Wireless states that it first learned of the April 10 Application for Review on April 29, 2002, during a telephone conversation with TPS Utilicom’s counsel.<sup>26</sup> Alaska Native Wireless argues that: (1) there was insufficient service of the April 10 Application for Review; (2) it is a redundant and frivolous pleading as the arguments are identical to those raised in the April 3 Application for Review; (3) to the extent that TPS Utilicom attempts to raise any new arguments, it is forbidden from doing so by the Commission’s rules, and TPS Utilicom cannot enhance its earlier filing by submitting another application for review that would be untimely under the Commission’s rules; and (4) an application for review of the grant of the licenses is prohibited by the Commission’s rules because the Bureau did not have an opportunity to review this issue first.

8. On November 14, 2002, the Commission announced that it would allow eligible winners in Auction No. 35 the option to request the dismissal of their pending applications for C and F block PCS licenses for spectrum that previously had been licensed to NextWave Personal Communications Inc., NextWave Power Partners Inc., or UrbanComm-North Carolina, Inc.<sup>27</sup> Alaska Native Wireless filed a request that its pending applications for twenty-nine C and F block PCS licenses be dismissed.<sup>28</sup> The Bureau reviewed Alaska Native Wireless’ request and granted the dismissal of the remaining pending applications.<sup>29</sup> As Alaska Native Wireless elected to dismiss its applications for the other twenty-nine licenses, TPS Utilicom’s challenge of these applications is now moot. Thus, we consider TPS Utilicom’s April 3 Application for Review only as it pertains to the fifteen licenses granted on March 11, 2002.

### III. DISCUSSION

#### A. Standing

9. TPS Utilicom argues that its Petition should not have been dismissed for lack of standing. Specifically, TPS Utilicom alleges that: (1) the Bureau misconstrued the decision of the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) in *High Plains Wireless, L.P. v.*

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<sup>22</sup> April 10 Application for Review at 2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 2-3.

<sup>25</sup> Letter from Michele C. Farquhar and Angela E. Giancarlo, Counsel for Alaska Native Wireless, L.L.C., to Marlene H. Dortch, Secretary, Federal Communications Commission (May 1, 2002) (“May 1, 2002 Alaska Native Wireless Letter”).

<sup>26</sup> May 1, 2002 Alaska Native Wireless Letter at 1.

<sup>27</sup> See Disposition of Down Payment and Pending Applications by Certain Winning Bidders in Auction No. 35, Requests for Refunds of Down Payments Made in Auction No. 35, *Order and Order on Reconsideration*, FCC 02-311 (rel. Nov. 14, 2002).

<sup>28</sup> See Applications, Dismissal Request (filed Nov. 27, 2002).

<sup>29</sup> See Wireless Telecommunications Bureau Grants Dismissal Requests of Eligible Auction No. 35 Winners and Dismisses Applications for 156 C and F Block Broadband Personal Communications Services (PCS) Licenses, *Public Notice*, DA 02-3340, at 1, Attachment A (rel. Dec. 3, 2002).

FCC;<sup>30</sup> and (2) the Bureau should have determined that TPS Utilicom has standing to challenge Alaska Native Wireless' Applications pursuant to section 1.1202(d)(1) of the Commission's Rules.<sup>31</sup> We disagree.

10. To have standing under Section 309(d)(1) of the Communications Act to file a petition to deny, an entity must demonstrate that it is a "party in interest."<sup>32</sup> A petitioner must make specific allegations of fact sufficient to demonstrate that grant of the challenged application would cause the petitioner to suffer a direct injury.<sup>33</sup> The petitioner also must establish a causal link between the claimed injury and the challenged action by demonstrating that the injury can be traced to the challenged action.<sup>34</sup> Additionally, it must be likely, as opposed to merely speculative, that the injury would be prevented or redressed by the relief requested.<sup>35</sup>

11. In addition to those general requirements for establishing standing, the Commission and the D.C. Circuit have discussed standing requirements specifically in the context of the Commission's auctions of spectrum.<sup>36</sup> While a bidder in a government auction has a "right to a legally valid procurement process,"<sup>37</sup> a disappointed bidder, to have standing to challenge the auction outcome, must demonstrate "that it was able and ready to bid and that the decision of the Commission prevented it from doing so on an equal basis."<sup>38</sup> Accordingly, an entity that was not qualified to bid in particular markets in an auction has no standing to file a petition to deny the winning bidders' applications in those markets.<sup>39</sup>

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<sup>30</sup> See April 3 Application at 3-5 (citing 276 F.3d 599 (D.C. Cir. 2002)).

<sup>31</sup> See April 3 Application at 5 (citing 47 C.F.R. 1.1202(d)(1)).

<sup>32</sup> 47 U.S.C. § 309(d)(1). See *Minnesota PCS Limited Partnership, Order*, 17 FCC Rcd. 126, 128, ¶ 6 (CWD 2002) ("*Minnesota PCS*"); *Black Crow Wireless, L.P., Order*, 16 FCC Rcd. 15643, 15644-45, ¶ 4 (CWD Policy and Rules Br. 2001) ("*Black Crow*"); *Applications of ABC Wireless, L.L.C., Order*, 15 FCC Rcd. 6787, 6789, ¶ 4 (CWD Policy and Rules Br. 1999) ("*ABC Wireless*"); *Application of Los Angeles Cellular Telephone Company, Order*, 13 FCC Rcd. 4601, 4603-04, ¶ 5 (CWD 1998) ("*Los Angeles Cellular*").

<sup>33</sup> See *Minnesota PCS*, 17 FCC Rcd. at 128, ¶ 6; *Black Crow*, 16 FCC Rcd. at 15644-45, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; *Americatel Corporation, Memorandum Opinion, Order, Authorization and Certificate*, 9 FCC Rcd. 3993, 3995, ¶ 9 (1994) ("*Americatel Corporation*"); see also *High Plains*, 276 F.3d at 605; *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 231-32 (D.C. Cir. 2000); *DIRECTV v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997); *Omnipoint Corporation v. FCC*, 78 F.3d 620, 628 (D.C. Cir. 1996); *U.S. v. Hays*, 515 U.S. 737, 743 (1995); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 73-74 (1978); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

<sup>34</sup> See *Americatel Corporation*, 9 FCC Rcd. at 3995, ¶ 9; *Black Crow*, 16 FCC Rcd. at 15645, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; see also *High Plains*, 276 F.3d at 605; *U.S. Airwaves*, 232 F.3d at 231-32; *DIRECTV*, 110 F.3d at 829; *Omnipoint*, 78 F.3d at 628; *Hays*, 515 U.S. at 743; *Lujan*, 504 U.S. at 560-61; *Duke*, 438 U.S. at 72, 74, 78, 81.

<sup>35</sup> See *Americatel Corporation*, 9 FCC Rcd. at 3995, ¶ 9; *Black Crow*, 16 FCC Rcd. at 15645, ¶ 4; *ABC Wireless*, 15 FCC Rcd. at 6789, ¶ 4; *Los Angeles Cellular*, 13 FCC Rcd. at 4603-04, ¶ 5; see also *High Plains*, 276 F.3d at 605; *U.S. Airwaves*, 232 F.3d at 231-32; *DIRECTV*, 110 F.3d at 829; *Omnipoint*, 78 F.3d at 628; *Hays*, 515 U.S. at 743; *Lujan*, 504 U.S. at 560-61; *Duke*, 438 U.S. at 72, 74, 78, 81.

<sup>36</sup> See *High Plains*, 276 F.3d at 605.

<sup>37</sup> *High Plains*, 276 F.3d at 605. See also *U.S. Airwaves*, 232 F.3d at 232; *DIRECTV*, 110 F.3d at 829.

<sup>38</sup> *High Plains*, 276 F.3d at 605; *U.S. Airwaves*, 232 F.3d at 232; *DIRECTV*, 110 F.3d at 829-30 (citing *Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

<sup>39</sup> See *High Plains*, 276 F.3d at 605. The D.C. Circuit found in that case that an auction participant, *High Plains Wireless, L.P.* ("*High Plains*"), that did not bid on some of the licenses it was petitioning did not have standing to

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Additionally, a disappointed bidder must prove that its injury is redressable by demonstrating that it is “ready, willing, and able” to participate in a new auction should it prevail.<sup>40</sup>

12. TPS Utilicom makes no attempt to explain how it satisfies the general requirements for demonstrating standing – e.g., how it would be directly injured by the grant of Alaska Native Wireless’ Applications and how denying Alaska Native Wireless licenses for which TPS Utilicom did not bid would redress the injury that TPS Utilicom alleges it suffered in the bidding for other licenses that Alaska Native Wireless did not win and all but four of which were won by entities other than TPS Utilicom. Instead, TPS Utilicom asserts that participation in the bidding for a particular license is not determinative in finding standing to challenge the high bidder of that license.<sup>41</sup> Commission rules, however, allow auction participants to bid only in those markets for which they apply in their short-form applications (Form 175) that are filed prior to the auction.<sup>42</sup> TPS Utilicom in its short-form application did not apply for any of the markets in which Alaska Native Wireless was the winning bidder and therefore was not qualified to bid in those markets.<sup>43</sup> Thus, TPS Utilicom cannot demonstrate, as it must, “that it was able and ready to bid”<sup>44</sup> on the licenses for which Alaska Native Wireless was the winning bidder, because it never applied for them, and therefore, was precluded from bidding for them. Similarly, TPS Utilicom cannot demonstrate, as it also must, “that the decision of the [Bureau] prevented it from [bidding] on an equal basis,”<sup>45</sup> because TPS Utilicom itself chose not to seek to qualify to bid for the licenses won by Alaska Native Wireless.

13. TPS Utilicom also challenges the Bureau’s determination that TPS Utilicom failed “to demonstrate that the award of the [Alaska Native Wireless] licenses would somehow deprive it of a valid auction process with respect to the markets for which it did bid.”<sup>46</sup> TPS Utilicom notes that it was eligible to participate in the auction of twenty-three licenses and alleges that Alaska Native Wireless forced the bids to increase in all of the markets in which TPS Utilicom was bidding.<sup>47</sup> We are not persuaded by TPS Utilicom’s arguments in this regard.

14. TPS Utilicom does not explain how awarding Alaska Native Wireless licenses for which TPS Utilicom was not eligible to bid would affect the auction process for licenses that Alaska Native Wireless did not win. TPS Utilicom instead appears to be arguing that Alaska Native Wireless’ mere participation in the bidding for different licenses, even though ultimately unsuccessful, deprived TPS Utilicom of a

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challenge the award of the thirty-one challenged licenses on which High Plains did not bid and that were won by another entity, Mercury PCS II, LLC (“Mercury”). See also *U.S. Airwaves*, 232 F.3d at 232.

<sup>40</sup> *High Plains*, 276 F.3d at 605; *U.S. Airwaves*, 232 F.3d at 232.

<sup>41</sup> April 3 Application at 3-4.

<sup>42</sup> See 47 C.F.R. § 1.2105(a); see also C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000, *Public Notice*, 15 FCC Rcd. 19,485, 19,531 (2000).

<sup>43</sup> See TPS Utilicom, Inc., Form 175 Application (Nov. 28, 2000); see also Auction of Licenses for the C and F Block Broadband PCS Spectrum, *Public Notice*, DA 00-2725, at Attachment B, 24 (rel. Dec. 1, 2000).

<sup>44</sup> *High Plains*, 276 F.3d at 605.

<sup>45</sup> *High Plains*, 276 F.3d at 605.

<sup>46</sup> April 3 Application at 4 (citing March 4, 2002 Order, 17 FCC Rcd. at 4235-36, ¶ 9). See *High Plains*, 276 F.3d at 605 (giving as an additional reason for denying High Plains standing to challenge the licenses won by Mercury that High Plains did not “allege that the award of those licenses somehow deprived it of a valid auction process with respect to the lots for which it did bid”).

<sup>47</sup> April 3 Application at 4-5. TPS Utilicom states that of the twenty-three licenses for which they applied, fifteen were open bidding licenses and eight were closed bidding licenses. See *id.* at 4.

valid auction process so as to provide it standing to challenge the licenses that Alaska Native Wireless did win but for which TPS Utilicom did not compete.

15. In each of the twenty-three markets in which TPS Utilicom was eligible to bid, there were multiple auction participants, not just Alaska Native Wireless. As we have stated, Alaska Native Wireless was not the winning bidder in any of those markets, and in nineteen of those markets, an entity other than TPS Utilicom was the winning bidder. Moreover, as to those nineteen markets, Commission records show that in each market in which both Alaska Native Wireless and TPS Utilicom placed bids, TPS Utilicom continued bidding against other participants after Alaska Native Wireless placed its last bid or that entities other than or in addition to Alaska Native Wireless continued to place bids after TPS Utilicom submitted its last bid. TPS Utilicom, therefore, ultimately was outbid for the licenses not by Alaska Native Wireless but by other auction participants whose eligibility TPS Utilicom, with one exception, has not challenged.<sup>48</sup> TPS Utilicom does not suggest, as it could not do reasonably, that the Commission should deny the unchallenged winning bidders their licenses so that a new auction could be held.<sup>49</sup> Accordingly, denying Alaska Native Wireless' Applications for other markets would not redress

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<sup>48</sup> The only winning bidder in those markets whose eligibility TPS Utilicom challenged was DCC. *See* DCC PCS, Inc., File No. 0000365171, FCC Auction No. 35, Petition to Deny, filed by TPS Utilicom, Inc. (Mar. 9, 2001).

Commission records of the bidding in Auction No. 35 show the following information for each market in which both TPS Utilicom and Alaska Native Wireless were qualified to bid. CWB007C3 – TPS Utilicom's last bid was in round fourteen. Six auction participants continued bidding for the license after TPS Utilicom stopped bidding. Leap Wireless International, Inc. was the high bidder in round 29. CWB007C4 – TPS Utilicom's last bid was in round ten. Eight auction participants continued bidding for the license after TPS Utilicom stopped bidding. Northcoast Communications, L.L.C ("Northcoast") was the high bidder in round 28. CWB007C5 – TPS Utilicom's never placed a bid for this license. Ten auction participants bid for the license. Cellco Partnership, d/b/a Verizon Wireless ("Cellco") was the high bidder in round 34. CWB043C2 – TPS Utilicom's last bid was in round 65. Cellco was the high bidder in round 66. Alaska Native Wireless' last bid was in round 23. CWB127C2 – TPS Utilicom's last bid was in round 71. Cellco was the high bidder in round 72. Alaska Native Wireless' last bid was in round 37. CWB208C1 – TPS Utilicom's last bid was in round 38. Northcoast was the high bidder in round 39. Alaska Native Wireless' last bid was in round 23. CWB215C4 – TPS Utilicom's last bid was in round 75. Cellco was the high bidder in round 78. Alaska Native Wireless' last bid was in round 20. CWB215C5 – TPS Utilicom's last bid was in round 77. Salmon PCS, LLC ("Salmon") was the high bidder in round 80. Alaska Native Wireless' last bid was in round 16. CWB330C4 – TPS Utilicom's last bid was in round 37. Cellco was the high bidder in round 45. Alaska Native Wireless' last bid was in round 11. CWB330C5 – TPS Utilicom's last bid was in round 46. Two auction participants continued bidding for the license after TPS Utilicom stopped bidding. Salmon was the high bidder in round 76. CWB333C1 – TPS Utilicom's last bid was in round 63. Northcoast was the high bidder in round 64. Alaska Native Wireless' last bid was in round 13. CWB333C2 – TPS Utilicom's last bid was in round 61. Cellco was the high bidder in round 62. Alaska Native Wireless' last bid was in round 11. CWB352C3 – TPS Utilicom's last bid was in round 16. Six auction participants continued bidding for the license after TPS Utilicom stopped bidding. Devtel, LLC was the high bidder in round 28. CWB352C4 – TPS Utilicom's last bid was in round 16. Four auction participants continued bidding for the license after TPS Utilicom stopped bidding. Polycell Communications, Inc. was the high bidder in round 36. CWB352C5 – TPS Utilicom's last bid was in round 16. Four auction participants continued bidding for the license after TPS Utilicom stopped bidding. NTCH, Inc. ("NTCH") was the high bidder in round 23. CWB352F – TPS Utilicom's last bid was in round 16. Three auction participants continued bidding for the license after TPS Utilicom stopped bidding. PCS Partners, L.P. was the high bidder in round 54. CWB438C1 – TPS Utilicom's last bid was in round 12. Three auction participants continued bidding for the license after TPS Utilicom stopped bidding. DCC PCS, Inc. ("DCC") was the high bidder in round 18. CWB463C1 – TPS Utilicom's last bid was in round 12. Five auction participants continued bidding for the license after TPS Utilicom stopped bidding. MCG PCS II, Inc. was the high bidder in round 42. CWB563C2 – TPS Utilicom's last bid was in round 12. Six auction participants continued bidding for the license after TPS Utilicom stopped bidding. NTCH was the high bidder in round 43.

<sup>49</sup> As noted above, *supra* note 48, TPS Utilicom filed a petition to deny DCC's application. TPS Utilicom's challenge of DCC's eligibility, however, even if it were granted, would not establish TPS Utilicom's standing to challenge Alaska Native Wireless' Applications.

any alleged injury suffered by TPS Utilicom in bidding for licenses that it did not win, because those licenses were won by other auction participants.

16. For similar reasons, we also are not persuaded that TPS Utilicom was deprived of a valid auction process in the four markets in which it was the high bidder.<sup>50</sup> Again, Commission records show that in each of those four markets, TPS Utilicom continued bidding against other participants after Alaska Native Wireless placed its last bid. To be the high bidder for those licenses, therefore, TPS Utilicom ultimately had to outbid not Alaska Native Wireless but other auction participants whose eligibility TPS Utilicom has not challenged. Thus, regardless of whether Alaska Native Wireless bid in earlier rounds of the auction, other entities continued to compete against TPS Utilicom until prices reached a level at which those entities were not willing to bid higher.<sup>51</sup> Moreover, if TPS Utilicom thought that the bidding of an ineligible bidder was raising the price of a license beyond what it was willing to pay for the license, its remedy was to stop bidding and challenge the unqualified bidder if it won the license, through a petition to deny the license in that market. The remedy was not to continue bidding beyond what it was willing to pay for the license and later attempt to renegotiate the price.<sup>52</sup>

17. TPS Utilicom further asserts that it is ready, willing and able to bid in a new auction and that “the Commission is aware of TPS Utilicom’s financial ability as it currently holds a significant sum of money in trust for TPS Utilicom as a result of TPS Utilicom’s upfront payment and selective down payments for two of four licenses upon which it was the high bidder.”<sup>53</sup> As TPS Utilicom fails to demonstrate that it was able and ready to bid on the licenses won by Alaska Native Wireless and that Alaska Native Wireless’ participation in markets in which TPS Utilicom was eligible to participate directly injured it or deprived it of a valid auction process, TPS Utilicom’s alleged ability to participate in a new auction of those licenses would not by itself be sufficient, even if proven, to provide TPS Utilicom with standing in this matter.<sup>54</sup> Moreover, money held by the Commission to cover the default payment assessed against TPS Utilicom for defaulting on its FCC Auction No. 35 obligations<sup>55</sup> does not constitute indicia of TPS Utilicom’s financial ability to participate in any future auction held by the Commission.

18. The second argument raised by TPS Utilicom in support of its contention that it has standing is that it is a party with standing under section 1.1202(d)(1) of the Commission’s rules.<sup>56</sup> First, we note

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<sup>50</sup> TPS Utilicom was not granted any of the four licenses for which it was the high bidder in Auction No. 35, because it defaulted on its obligation to submit the down payment necessary to bring its total deposits up to twenty percent of its high bids by February 12, 2001. *See* TPS Utilicom, Inc., *Order*, 16 FCC Rcd. 14,835 (CWD Policy and Rules Br., 2001) (denying a request for waiver of the Commission’s rules requiring a down payment and assessing initial default payments, obligations, and procedures), *Order on Reconsideration*, DA 03-480 (WTB, rel. Feb. 21, 2003) (“TPS Utilicom Order on Reconsideration”); *see also* 47 C.F.R. § 1.2107(b).

<sup>51</sup> Commission records of the bidding in Auction No. 35 show the following information for the four markets in which TPS Utilicom was the high bidder. Alaska Native Wireless concluded active bidding in each of those markets in the early rounds. Thereafter, TPS Utilicom competed with many other auction participants before being determined the high bidder: CWB043C1 – Alaska Native Wireless’ last bid was in round 19 and TPS Utilicom submitted the high bid for the license in round 67. CWB127C1 – Alaska Native Wireless’ last bid was in round 23 and TPS Utilicom submitted the high bid for the license in round 73. CWB215C3 – Alaska Native Wireless’ last bid was in round 25 and TPS Utilicom submitted the high bid for the license in round 79. CWB330C3 – Alaska Native Wireless’ last bid was in round 13 and TPS Utilicom submitted the high bid for the license in round 75.

<sup>52</sup> TPS Utilicom Order on Reconsideration, DA 03-480, at ¶ 18.

<sup>53</sup> April 3 Application at 3.

<sup>54</sup> *See supra* text accompanying notes 37-40 (required showings for standing in auctions context).

<sup>55</sup> *See supra* note 50 (discussing TPS Utilicom’s default).

<sup>56</sup> 47 C.F.R. § 1.1202(d)(1). *See* April 3 Application for Review at 5.

that this argument is improperly raised, because the Bureau was not afforded an opportunity to evaluate the merits of this argument prior to Commission review.<sup>57</sup> Even if we were to ignore the procedural defect and address this argument, however, we would find it to be without merit. Section 1.1202(d)(1) of the Commission's rules does not define who is a party in interest for purposes of determining standing; instead, it defines who is a party under the Commission's *ex parte* rules.<sup>58</sup> Thus, the definition of a party in section 1.1202(d)(1) would not demonstrate that TPS Utilicom is a party in interest for the purpose of establishing standing.<sup>59</sup>

#### **B. April 10 Application for Review**

19. In its May 1, 2002 letter, Alaska Native Wireless claims that it was not properly served with the April 10 Application for Review and only learned of its existence during a telephone conversation with TPS Utilicom's counsel on April 29, 2002.<sup>60</sup> Accordingly, due to the failure of service, we will accept the May 1, 2002 Alaska Native Wireless Letter, even though it was not filed as a timely opposition to the April 10 Application for Review.<sup>61</sup>

20. For the same reasons that we found that TPS Utilicom fails to establish standing to file the April 3 Application for Review, we find that TPS Utilicom lacks standing to file the April 10 Application for Review, which reiterates the same arguments as the April 3 Application for Review. We accordingly dismiss the April 10 Application for Review for lack of standing.

#### **IV. CONCLUSION**

21. In conclusion, for the reasons discussed above, we dismiss both the April 3 Application for Review and the April 10 Application for Review for lack of standing. In any event, we have been presented with no basis for sustaining a challenge to Alaska Native Wireless' qualifications to hold its C and F block PCS licenses.

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<sup>57</sup> See 47 C.F.R. § 1.115(c).

<sup>58</sup> See 47 C.F.R. §§ 1.1200-16. "The fact that a person is deemed a party for purposes of this subpart does not constitute a determination that such person has satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or requirements as to timeliness. Nor does it constitute a determination that such person has any other procedural rights, such as the right to intervene in hearing proceedings." *Id.* § 1.1202, Note 3 to paragraph (d).

<sup>59</sup> TPS Utilicom further argues that section 1.1202(d)(1) is applicable because the Bureau recognized Alaska Native Wireless' applications and TPS Utilicom's Petition as a proceeding under section 1.1208 of the Commission's rules. 47 C.F.R. § 1.1208 (prohibiting "*ex parte* presentations . . . to or from Commission decision-making personnel" in restricted proceedings). Again, application of the Commission's *ex parte* rules does not establish standing for purposes of a petition to deny.

<sup>60</sup> See May 1, 2002 Alaska Native Wireless Letter at 1-2.

<sup>61</sup> See 47 C.F.R. § 1.115(d) (stating that oppositions to an Application for Review should be filed fifteen days after the Application for Review is filed).

**V. ORDERING CLAUSE**

22. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) and 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(1), and sections 1.115, 1.2108 and 24.830 of the Commission's Rules, 47 C.F.R. §§ 1.115, 1.2108, 24.830, the Applications for Review filed by TPS Utilicom, Inc. on April 3, 2002 and April 10, 2002 are hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary