to issue multiple ownership regulations of prospective application without individual hearings in each case to determine the public interest. That is, the Commission's authority to set by rulemaking basic qualifications criteria for license applicants was questioned. The Court ruled that the Commission had such authority under the Communications Act. The Court did not address the issue of retroactive application of the Commission's rules. Storer, to the contrary, supports the Commission's determination to establish specific qualifications criteria for pioneer's preferences and a separate licensing track. The procedural and factual context of Storer is also inapplicable to the pioneer's preference program.

The disrupted expectations of a broadcasting applicant could not even approximate those of a tentative preference holder. The regulatory treatment and procedural rights of these two groups are entirely different.[13]

First, the policy of government-encouraged investment that sustains the pioneer's preference program is completely absent in the broadcast context. For broadcasting applicants, all investment by the applicant is understood to be contingent on the grant of the license.[14] The pioneer's program induces just the

---

[13] In fact, one of the reasons the pioneer's program was adopted was to provide the pioneer more regulatory certainty early into the process than could be given in comparative hearings, like that used in broadcasting.

[14] In broadcasting, this sequence of reliance is widely accepted, as is seen by the fact that financing for broadcast stations is generally expressly conditional on the grant of the license.

opposite behavior by encouraging investment prior to and as a prerequisite of the grant of the application so that the Commission can study the proposed innovation, issue a rulemaking, and establish a report and order for new service.[15] Second, the Commission's existing rules did not provide the applicant in Storer with any right to a disposition prior to the time the broadcasting rules at issue in that case changed. In contrast, the tentative PCS pioneers clearly had a right to a final determination on September 23, 1993 -- one month after the release of the NPRM proposing rule changes.[16] Therefore, Storer and any analogy to the limited rights of an applicant for an established service are inapposite.[17]

BellSouth states that retroactivity is permissible in this case because the "Special Rule" of Section 6002(c) of the 1993 Budget Act should be read to mean "that the only application that could be exempted from auctions in services coming under the auction criteria were those accepted for filing prior to July 26,

---

[15] Section 1.402(a) requires the pioneer to disclose publicly valuable technical and service innovations.

[16] 47 C.F.R. § 1.402(d); see also Omnipoint comments at 31-33.

[17] Further, PageMart argues that pioneers have no basis to argue because, under FHA v. Darlington, 358 U.S. 84 (1958), the government is free to enact changes in regulatory legislation. Comments of PageMart, Inc. at 8. However, like the Storer case, Darlington discussed prospective changes to the law. As discussed above, a change in the pioneer's rules would have a retroactive effect and thus these precedents to not address the issues in this case.

1993."[18] Like Southwestern Bell, BellSouth fails in the task of statutory construction. The "Special Rule" that BellSouth points to only applies to applications subject to random selection licensing pursuant to Section 309(i) of the Communications Act:

> Special Rule - The Federal Communications Commission shall not issue any license or permit pursuant to Section 309(i) of the Communications Act . . . unless --
>
> (1) the Commission has made the determination required by paragraph (1)(B) of such section . . .; or
>
> (2) one or more applications for such license were accepted for filing by the Commission before July 26, 1993.

47 U.S.C. § 6002(c) (emphasis added). It is clear that the Commission is only authorized to use random selection under Section 309(i) when "the Commission determines that the use is not described in subsection (j)(2)(a) [of Section 309]." 47 U.S.C. § 309(i)(1)(B). Therefore, BellSouth's statutory analysis is, at best, misguided.

More telling than the weakness of these two arguments is the lack of legal support of the other commenters that favor retroactivity. Nextel and GTE offer not a single coherent legal theory for the Commission to base such a decision.

However, as Omnipoint and others pointed out in the initial comments,[19] the Commission cannot merely rest on "administrative

---

[18] Comments of BellSouth at 14.

[19] See Omnipoint Comments at 27-31; American Personal Communications Comments at 11 and Attachment A; Cox Enterprises, Inc. Comments at 7-8.

discretion" where a number of judicial decisions and the 1993 Budget Act strongly counsel against retroactivity.

To their credit, no commenters favoring retroactivity suggested that such a decision would be equitable -- except for GTE. GTE believes that the capital markets will "recognize" the three pioneers.[20] Investors and lenders will not support a pioneer that assumes extraordinary risk only for the chance to receive the same return as other market participants. Omnipoint and the vast majority of other commenters have made clear that equity demands that the Commission refrain from retroactive application of any modified rules.

VI. PIONEERS SHOULD RECEIVE THE BENEFIT OF THEIR BARGAIN.

As noted, the overwhelming majority of commenters opposed any retroactive change to the rules or rewards under which the tentative pioneers have proceeded. Out of the 13 commenters which made a specific recommendation as to what allocation should be awarded to those finalized for 2GHz PCS pioneers preferences, the majority - 70% - either argued for the equity of allocating the 30MHz mainstream PCS licenses or specifically argued that the pioneer's licenses should not be diminished relative to the 30MHz allocations which were tentatively awarded. Only two companies -- Nextel and Southwestern Bell -- ignored the technical realities of

---

[20] GTE Comments at 4.

the pioneers proposals and tried to argue for crippling the pioneers with 10MHz in the unexplored 2.1GHz band. The problem with all the arguments opposing a 30MHz allocation is that they are not based on the facts of the pioneers petitions, but rather on what these commenters would like.

Omnipoint specifically requested a 30MHz allocation at 1850-1990MHz during the pioneer's preference application process.[21] In fact Omnipoint was the only one of the 96 applicants to specify 30MHz at 1850-1990MHz. We based our request on the specifics of using our unique spread spectrum technology as well as the unique service vision we proposed.

A month after Omnipoint made its request, the Commission proposed allocating three 30MHz licenses in each territory. Three months later, the Commission tentatively awarded Omnipoint along with the two other tentative preference holders one of these 30MHz allocations. Thus, for over 18 months Omnipoint has been designing its PCS service offering based on the assumption that 30MHz or more would be allocated to mainstream, or so-called "Big PCS", licenses. The Commission has now finalized 102 such 30MHz licenses, twice as many as was once contemplated just last year. There is no rationale or equitable basis for some of these commenters to now argue that others should get these 30MHz licenses because they have more money, but that a pioneer such as Omnipoint, the only company to

---

[21] See Omnipoint's filing on June 25, 1992 at 16.

originally petition for 30MHz and a company tentatively awarded one of these 30MHz licenses, should now be rewarded by being relegated outside the mainstream. In fact, as Omnipoint noted in its letter of September 29, 1993, the pioneer preference is not supposed to be a "reward" but rather an "award" to offer the service the pioneer proposed. It is illogical to recognize Omnipoint as a pioneer and then to allocate it spectrum which it didn't ask for.

We would also note that six companies specifically cited the proposal of "carving out" from within the 30MHz MTA the core BTA(s) for allocation to the PCS pioneers. As Omnipoint noted in its Comments, if the Commission feels this is an appropriate method for achieving the original intent of the pioneers program and awarding a 30MHz allocation, Omnipoint would accept this alternative, since this would still allow the fulfillment of its business plan.

CONCLUSION

For any commenter to feign surprise today at the realities of the pioneers preference PCS award -- that the pioneers tentative awards were for 30MHz, that these license would be perceived as being valuable, that the non-pioneers would have had to buy their licenses anyway from the lottery winners, that auctions changed nothing with respect to competitive advantages or disadvantages, that charging for the license was never part of the deal offered to incent the PCS pioneers -- can only suggest that their attacks stem from other motives. It is a sad statement that the parties complaining the most about a level playing field in the

broadband PCS proceeding are ones which received their cellular licenses for free -- without being subject to competing applications. It is companies like Southwestern Bell, GTE, PacBell, and NYNEX that complain about the unfairness of free licenses awarded based on investment in innovation. Since these companies literally received cellular licenses for free without contributing any innovation as the reason for their set aside, are they saying that the FCC had no right to give them their cellular licenses without having held comparative hearings? Are these companies saying that the FCC has the right to retroactively take their licenses away and sell them to the highest bidder? Hardly, in fact the cellular industry recently successfully defeated any suggestion that the cellular operators even pay a modest fee or royalty in the auction process to help level their extraordinary advantage of having received their licenses for free without any competing applications. Now these giant telecom companies are asking the FCC for protection from start ups such as Omnipoint.

One has to remember that winning a pioneers preference is like winning the marathon in the U.S. Olympic trials. The only reward is to then go run against the strongest competitors in the world. In effect, GTE, BellSouth, NYNEX, Nextel, etc are suggesting that maybe the exhausted tentative preference winners shouldn't be sent to the Olympic competition, that the Olympics are only for the "big name" competitors, and that the award should only be a reimbursement for the pioneers' training costs or the price of

their running shoes. The unfairness of this is obvious to anyone who has sacrificed anything based on the promise of a chance to compete.

To quote Southwestern Bell from their reply comments on the original NPRM on pioneer's preferences on July 30, 1990,

> An innovator should not be penalized in those rare circumstances where either the Commission does not allocate sufficient spectrum for more than one license or the new service does not permit more than one licensee.
>
> P. 10

> ...it would be highly ironic if the pioneer depended on the preference rules in developing the new service but, due to circumstances beyond his control, the preference application were to be denied although the new service was being licensed.
>
> P. 11

The Commission will rarely be given such a clear cut choice as that facing them in deciding the fate of the tentative PCS pioneers.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By: Douglas G. Smith

Douglas G. Smith, President

Of Counsel:

Ronald L. Plesser
Mark J. Tauber
Nora E. Garrote
Emilio W. Cividanes
Mark J. O'Connor

PIPER & MARBURY
Suite 700
1200 19th Street, N.W.
Washington, D.C. 20036

A:\OmniReply
21278-1:112193