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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 31, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: Opposition to Bell Atlantic Informal Request
GEN Docket No. ~~90-314~~
February 25, 1994 Invitation for Pioneer's Preference Applications

Dear Mr. Caton:

Omnipoint Communications, Inc., by its attorneys and pursuant to Section 1.45(a) of the Commission's rules, hereby opposes the informal request of Bell Atlantic¹ dated March 16, 1994 (the "Bell Atlantic Letter"). The Bell Atlantic Letter mischaracterizes the Commission's invitation for broadband PCS pioneer's applications² as an illegal action that adds confusion to the PCS regulatory process. Omnipoint strongly disagrees with Bell Atlantic. The Commission has done nothing illegal or inappropriate. To the contrary, the timely licensing of the PCS pioneers is critical to meet the Commission's statutory obligation and its own goal of rapid deployment of PCS.³

¹ Bell Atlantic describes its letter as a "formal request" pursuant to Section 1.41 of the Commission's rules. In fact, Section 1.41 is for informal requests. 47 C.F.R. §1.41.

² "Commission Invites Filing of Broadband Personal Communications Service Pioneer's Preference Application" (released February 25, 1994) (the "February 25 Invitation").

³ Omnipoint will shortly file its application for a PCS license to serve the New York MTA.

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I. The Commission Has Not Violated the Paperwork Reduction Act.

Bell Atlantic asserts that the February 25 Invitation to the three PCS broadband pioneers violates the Paperwork Reduction Act. This assertion is simply wrong. The Paperwork Reduction Act defines "collection of information" as an information request to "ten or more persons." 44 U.S.C. §3502(a)(4)(A). The regulations implementing the Paperwork Reduction Act similarly define the "[c]ollection of information" as "the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions . . ." 5 C.F.R. §1320.7(c). Given that the February 25 Invitation specified only three parties to file an application, the invitation is not a "collection of information" under the Paperwork Reduction Act and it does not require OMB approval.⁴

Further, because Bell Atlantic was not one of the three invited to file an application, it has no standing to object. Bell Atlantic is not in any way harmed by the paperwork requirements imposed on the three pioneers.

II. Use of Part 22 Application Procedures Does Not Add Regulatory Uncertainty.

The February 25 Invitation adequately conveys the Commission's intention to accept pioneer's applications using FCC Form 401 and to process the pioneers' initial applications pursuant to Part 22 guidelines. This is consistent with the Commission's proposal that Part 22 procedures be used for all PCS applicants.⁵ It is also consistent with the Commission's decision to treat PCS and traditional Part 22 services (i.e., cellular, air-ground service) under the new regulatory classification of "commercial mobile service."⁶ It is only logical that the PCS pioneers would file an application similar to the existing Part 22 application if these services are now to receive similar regulatory treatment. Contrary to Bell Atlantic's feigned surprise, the Commission's February 25 Invitation is perfectly consistent with its prior statements on

⁴ 44 U.S.C. §3507(a); 5 C.F.R. §1320.4(a).

⁵ In the Matter of Implementation of Section 3(j) of the Communications Act, Competitive Bidding, Notice of Proposed Rulemaking, PP Docket No. 93-253, 8 FCC Rcd. 7635, ¶ 128 (1993).

⁶ In the Matter of Regulatory Treatment of Mobile Services, Second Report and Order, GEN Docket No. 93-252, FCC 94-31, ¶¶ 118, 102 (released March 7, 1994).

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application procedures.⁷ The February 25 Invitation is simply a public notice summarizing a Commission decision; Bell Atlantic offers no valid legal theory as to why the Commission cannot invite applications in this manner.

Bell Atlantic reaches for a justification by arguing that the auction rulemaking order has not yet been issued, and so the PCS licensing rules are uncertain. But, the broadband PCS pioneers are not subject to the auction licensing procedures.⁸ As the Commission has said many times, pioneers are on a separate licensing track.⁹ There is simply no rule requiring that the Commission treat PCS pioneers under the exact same licensing mechanics as applicants subject to the auction process.¹⁰ Rather, the Commission has decided that pioneers will file an FCC Form 401 application, consistent with Part 22 and Part 24 of the Commission's existing rules.

Further, no party has been or will be denied an opportunity to comment on or oppose the pioneers' applications. The February 25 Invitation made it clear that interested parties would have the prescribed thirty-day period from public notice to file oppositions. Obviously, if a major modification of an application is required, then the application will be subject to a renewed thirty-day public notice period. These are not rules new to the FCC license application process and no interested parties should be surprised by them.¹¹

⁷ At this stage in the auction and pioneer's preference proceedings, Bell Atlantic's protests are inappropriate. In its auction comments, Bell Atlantic did not object to the Commission's proposal to the use of Part 22 application rules in PCS. See *Comments of Bell Atlantic Personal Communications, Inc.*, PP Docket No. 93-253 (filed November 10, 1994). Yet, now that the Commission is on the verge of licensing PCS, it is suddenly confused.

⁸ *First Report and Order*, ET Docket No. 93-266, 9 FCC Rcd. 605, n. 23 (1994); *Third Report and Order*, GEN Docket No. 90-314, FCC 93-550, ¶ 2 (released February 3, 1994).

⁹*Id.*

¹⁰ Bell Atlantic states that the auction "rules and standards will govern all PCS applications, including those submitted by parties who have received a pioneer's preference." Bell Atlantic provides no support for this statement. Omnipoint recognizes that the Commission has stated that the pioneers "may be required to amend the applications" if the general PCS licensing forms change. This is a logical policy choice of the Commission, not mandated by statute, and Omnipoint will comply with any modification requests. Permitting the pioneers to file before non-pioneers is also logical and within the Commission's discretion.

¹¹ 47 U.S.C. §309(d)(1).

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III. The February 25 Invitation Strengthens the Commission's Commitment to PCS.

Congress and the Commission have adopted rapid deployment as a key regulatory goal in PCS. The discussions and proceedings regarding "Personal Communications" are now well into their sixth year. The FCC's invitation to the 2 GHz preference holders is consistent with the goal of rapid deployment and, indeed, inherent to fulfilling one of the original purposes of the pioneer's preference program.

The entire PCS industry will benefit by the expeditious processing of the pioneer's applications. Launching PCS will require many new and untried methods on many fronts. As just one example, never before has the Commission used a voluntary, negotiated sharing and relocation methodology for allocating spectrum. There are some 23,000 incumbent microwave links occupying the frequencies allocated for PCS. Yet, not one of these 23,000 has been formally negotiated with by a PCS operator. All PCS industry participants will benefit by the efforts of the pioneers working through the massive logistical issues that this challenge presents. The PCS industry needs to see examples of how well various sharing and negotiation technologies will work in order to prepare for what could otherwise be an overwhelming set of thousands of simultaneous OFS requests, petitions, and applications to the Commission.

For all these reasons, Omnipoint respectfully urges the Commission to deny Bell Atlantic's informal request that the Commission rescind its February 25 Invitation.

Sincerely,



Mark J. Tauber
Mark J. O'Connor

Counsel for Omnipoint
Communications, Inc.

MJO/mjo

cc: David Siddall
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