

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

APR 11 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's) GEN Docket No. 90-314
Rules to Establish New) RM-7140, RM-7175, RM-7618
Personal Communications)
Services)

To: The Commission

ACT'S OPPOSITION TO
OMNIPPOINT'S MOTION TO STRIKE

1. The motion to strike filed on March 31, 1994 by Omnipoint Communications, Inc. (Omnipoint) is without merit.

I.

Argument regarding page limit
(Omnipoint's motion at 1)

2. The petition for reconsideration as filed by Advanced Cordless Technologies, Inc. (ACT) exceeded the 25-page limit in Commission regulations by 4 pages. This point is raised in Omnipoint's single-spaced motion which, itself, is a violation of Commission regulations which require that pleadings such as Omnipoint's motion be double spaced. 47 C.F.R. §1.49(a). We are filing with this opposition a motion for acceptance of the petition for reconsideration notwithstanding its length as filed. The petition was filed under heavy time pressure due to the press of that and other business, and in the process we ran over the limit without making adjustments that would have complied with the Commission's rules. We apologize for that.

3. However, there is no valid reason to reject the petition out of hand as Omnipoint would like. 47 C.F.R. §1.49(a) provides that pleadings such as our petition may use either 12-point type

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or 10-point type. The petition as filed employed 12-point type. In our motion for leave to accept the petition, we show that the retyped text of the petition (submitted with our motion) employing 10-point type totals 22 pages, well within the 25 page limit.

II.

Argument regarding abuse of process

(Omnipoint's motion at 2-3)

4. In this portion of the motion, Omnipoint argues that our petition for reconsideration is so defective that it should be rejected out of hand as an abuse of the Commission's processes. We suggest that Omnipoint take a valium and lie down for a while -- its irrational rhetoric does not remotely begin to make the case for such draconian and unsustainable action on the Commission's part. Nor do the cases cited by Omnipoint:

(a) Harrea Broadcasters, Inc., 52 FCC2d 998, 33 RR2d 1075, 1080 (Commission 1975, Commissioner Hooks concurring), and Midland Broadcasters, Inc., 48 FCC2d 195, 196, 30 RR2d 962 (Commission 1974, Commissioner Hooks dissenting), were early decisions in cases where Black community groups filed petitions to deny license renewal applications for claimed failures to provide programming to serve the Black community and to hire Black employees. In both cases, the petitioners filed identical "blanket" complaints against multiple broadcast stations (two stations in Harrisburg, Pennsylvania in Harrea, nine stations in Topeka, Kansas in Midland). The Commission held that the petitioners did not allege sufficient facts to warrant

designation of the renewal applications for hearing. However -- and apropos Omnipoint's argument here -- the Commission considered the substance of the petitions (and denied them), the Commission did not reject the petitions out of hand as any abuse of its processes.¹

(b) KOED, Inc., 77 FCC2d 195, 196, 48 RR2d 22 (Commission 1980, Commissioner Jones concurring) involved a petition to deny the license renewal application of a public television station in San Francisco. The petition was filed by a number of community groups, including Black organizations. One of their concerns was a claimed lack of adequate local programming. As in Harrea and Midland, the Commission declined to designate the renewal application for hearing on that particular matter (adequacy of local programming) because it found that no specific facts warranting such action had been alleged. Of relevance here (as in Harrea and Midland), the Commission dealt with the allegations in the petition (and denied them), the Commission did not reject the petition out of hand as any abuse of its processes.

(c) City of New York Municipal Broadcasting System, 38 RR2d 1058 (ALJ Denniston), 39 RR2d 102 (Commission 1976) involved a comparative hearing relative to certain changes in facilities and operations proposed by two AM stations, one in New York City

¹ These are curious cases for Omnipoint to cite. They were, to use a phrase, pioneering efforts by community groups which eventually bore fruit as reflected in the subsequent growth and development of the Commission's concern about minority employment, most recently reflected in Policy Statement on Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd. 929 (Commission 1994).

(WNYC) and the other in Minneapolis (WCCO). The Commission's Broadcast Bureau filed proposed findings on certain of the hearing issues after the time set for doing so, with an accompanying petition to accept its late-filed proposed findings. One of the parties, the National Business Aircraft Association (NBAA), opposed the Bureau's petition solely on the ground that there were rumors that WCCO put political pressure on the Bureau and this was the reason for its late filing. A motion to strike that opposition was granted by Judge Denniston, who also certified the matter to the full Commission to determine if action should be taken against counsel for NBAA under its disciplinary rules. The Commission declined to take any such disciplinary action, although it agreed with Judge Denniston that making such an allegation solely on the basis of a rumor was improper.

5. There have been rumors here, i.e., that the lobbying for pioneer's preferences has been fierce and that in the end only a few major companies would be favored to the exclusion of individuals and small entrepreneurs. The truth of the former part of the rumors remains to be seen, the latter part of the rumors, for sure, has become a reality. On this score, we stated, "Of course, we cannot sustain a petition of alleged wrongdoing on the basis of a rumor." ACT petition at ¶33. We followed that statement by saying "Here is what we have at this juncture." Id. We followed that statement with detailed presentations of specific facts and circumstances on which we do

rely. ACT petition at ¶¶34-46.

6. One category of specific facts and circumstances on which we rely is the evidence of numerous instances of letters filed by the three recipients of preferences in question (APC, Cox and Omnipoint) which on their face demonstrate that the substance of the undisclosed oral communications could not have related to previously-filed written presentations that had been served on the other parties. The analysis of such facts and circumstances is detailed in letters filed with the Commission by counsel for Pacific Bell appended to our petition. ACT petition at ¶34 and Appendices B-C; see also, ¶¶43-44 and Appendix E.

7. Another category of specific facts and circumstances on which we rely is the amazing number of ex parte contacts that were made by these three parties, the facts that such contacts were made in heavy concentrations just before Commission action granting their pioneer's preferences and at a time when other issues relative to PCS were quiescent, and the facts that immediately following such action by the Commission granting their preferences, the heavy concentration of contacts ceased. ACT petition at ¶¶35-36, 38-40, Appendix D.

8. Still another category of specific facts and circumstances on which we rely is the confluence of the subjects that were unrestricted and the restricted subject of these pioneer's preferences which could not intellectually or conceptually be separated under the heavy barrage of contacts during the time period when their preferences were under active

consideration. ACT petition at ¶¶37, 40-41, 45-46.

9. Following the receipt of responsible oppositions addressed to the merits of our petition for reconsideration, and our reply thereto, the Commission must deal with the substance of these matters. It cannot categorically ignore them as requested by Omnipoint, whose motion to strike should be denied.

Respectfully submitted,



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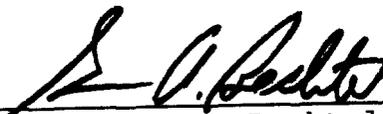
CERTIFICATE OF SERVICE

I certify that copies of the foregoing ACT'S OPPOSITION TO OMNIPOINT'S MOTION TO STRIKE are being sent by first class United States mail, postage prepaid, this 11th day of April 1994 to the following:

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