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**FEDERAL COMMUNICATIONS COMMISSION**  
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PP Docket No. 93-253

In the Matter of )  
 )  
Implementation of Section 309(j) )  
of the Communications Act - )  
Competitive Bidding )

**OMNIPOINT COMMUNICATIONS, INC.**  
**PETITION FOR CLARIFICATION AND RECONSIDERATION**

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## SUMMARY

The Commission's broadband PCS auction rules provide entrepreneurs and designated entities with several measures to reduce the burden of the bid price. The rules do not, however, address the entrepreneur's overall difficulty in raising capital to finance system construction, marketing and operations. In fact, Omnipoint finds that there are several aspects of the entrepreneur band auction rules that work against the formation of capital for true entrepreneurs; we recommend several clarifications and rule changes that will make entrepreneurs more viable competitors in PCS.

First, the requirement that the applicant's investors, in aggregate, maintain less than \$125 million in revenues and \$500 million in assets for at least five years (and 10 years to retain the discount and installment benefits) is impossibly restrictive. The rule has a deleterious effect on investment in entrepreneurs because it requires that all investors and affiliates restrain themselves from being "too successful." In place of the current five-year eligibility rule and the aggregation rule, we recommend that the Commission apply the eligibility cap to the applicant and its attributable investors (a) at the time that the auction applications are due and, (b) at the time of any investment subsequent to the auction. If each entity in the control group and attributable investors are under the cap, the applicant is eligible to bid and to hold a license. New attributable investors that invest after the auction filing deadline are also subject to the same cap. In addition, we urge the Commission to hold eligible for the entrepreneur's band discounts any applicant whose attributable investors are all "small businesses," just as the Commission has provided for "small business consortia."

Second, the eligibility rules for entrepreneurs that raise capital through public offerings need to be clarified. We recommend that the Commission carefully examine the eligibility rules in the context of the current exchange rules or proposed rules, and the practicability of any specific eligibility rules on public offerings. We will be analyzing possible alternative rules for submission in the near future.

Third, the Commission should provide further guidance on the standards it will use to judge *de facto* control of applicants and investors in applicants. This is critical for entrepreneurs because the risk of losing eligibility after the auction increases the applicant's cost of financing; without more guidance, the Commission's case-by-case *de facto* approach makes it difficult to provide assurance to investors that the applicant's eligibility is not at risk. As detailed below, we recommend that the Commission adopt several guidelines on what investor participation does not constitute control. In addition, we recommend that the Commission take a deferential approach when making post-auction *de facto* control decisions.

Fourth, if the Commission rejects our proposal in section one the Commission should adopt a weighted average or multiplier approach when calculating the applicant's attributable assets and revenues. The multiplier approach is commonly used in the Commission's broadcasting rules and the Commission has recently adopted this approach for the calculation of ownership interests for the PCS-cellular overlap restriction and the PCS spectrum aggregation cap. The multiplier approach provides an accurate representation of the applicant's true ownership and financial picture and so should be adopted for calculating eligibility on the entrepreneur's band.

Last, clarification is needed on whose assets and revenues are attributable to the applicant and whose assets and revenues are not attributable. We believe that the rules balance the need to prevent large companies from controlling the entrepreneur's band with the need for true entrepreneurs to establish financing with entities that would themselves not qualify for the entrepreneur's band. For example, the rules do not count toward the assets and revenues of the applicant those assets and revenues of a non-controlling investor in an entity that has an attributable interest in the applicant. Also, the rules on personal net worth should be reformed to encourage individuals to investment in PCS.



objective will not be served if parties take advantage of bidding in these blocks and immediately assign or transfer control of the authorizations to other entities. Such a practice could unjustly enrich the auction winners and would undermine the congressional goal of giving designated entities the opportunity to provide spectrum-based services."<sup>2</sup> However, Omnipoint is concerned that the current rules could adversely impact on the formation of lasting and independent entrepreneur licensees.

As discussed below, the current rules unnecessarily tie investors in entrepreneurs to a five-year eligibility period. The problem arises because investors in entrepreneurs are constrained by a ceiling of an aggregate of \$125 million in gross revenues and \$500 million in total assets for at least 5 years and even 10 years to obtain preference benefits. We believe that constraining investors to these financial limits for these periods of years can achieve the goal of avoiding shams and can better provide entrepreneurs with more affordable financing opportunities if the limits are measured only (a) at the time of the auction, and (b) at the time of any subsequent new investment. We propose that the Commission require that, at the time of auction, the applicant and each attributable investor in the applicant (including affiliates) meet the \$125 million/\$500 million cap. For a period of five years after the auction, new attributable investors in the applicant must also meet this cap at the time their investment triggers the attribution rule. Further, there is no need to aggregate the revenues or assets of the control group or those above 15%, since a weighted average aggregation (or multiplier) will result in the same end result. Finally, we propose that an applicant who qualifies as a "small business" and whose investors individually qualify as a "small business" should be deemed eligible for the "small business" benefits, just as the Commission has provided for a "small business consortium."

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<sup>2</sup> Fifth Report and Order at ¶ 128.

**A. The Existing Rules Impose A Ceiling On All Assets/Revenues Of All Attributable Investors.**

The current eligibility rule provides that the licensee "shall maintain eligibility until at least five years from the date of initial license grant."<sup>3</sup> Licensee eligibility is determined by aggregating together the assets/revenues of the licensee, its affiliates, persons who hold ownership interests in the applicant and their affiliates.<sup>4</sup> The aggregate gross revenue figure cannot exceed \$125 million and the aggregate total asset figure cannot exceed \$500 million. This means that all of the investors and their other investments are limited by an assets/revenues ceiling that, if broken perhaps years after construction costs have been outlaid, jeopardizes the licensee's eligibility. Worse yet, the aggregation rule means that an increase in a single investor's assets/revenues could undermine the interests of all other investors. These rules will surely raise the risk of investing in entrepreneurs to an intolerable level, and they are unnecessary to achieve the goal of preventing shams.

**B. The Existing Rules Make It Difficult To Attract Capital By Penalizing An Investor's Growth.**

The current rule is likely to cause two types of problems for pre-auction investors. First, a pre-auction investor that, at the time of auction, does not create an eligibility problem could later experience an increase in assets/revenues after the auction. Second, an investor who invests after the auction in an entity which subsequently increases in assets/revenues during the five year/ten year holding period could also create an eligibility problem. This means that, for example, a venture capital firm that controls a fund which makes a pre-auction investment in a PCS entrepreneur must ensure for at least five years after the auction that none of the other

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<sup>3</sup> 47 C.F.R. § 24.709(a)(3).

<sup>4</sup> 47 C.F.R. § 24.709(b)(1). See Diagram 1, attached.

investments made by that fund, or other funds that the firm controls, disqualify the licensee. For any investor, but especially professional equity investors and venture capitalists who are continually seeking new investment opportunities, this is a deal-breaking condition.

The attached Diagram 2 makes this point visually. Suppose that "VC Fund" purchases a majority interest in Company A (a high-risk entrepreneur firm unrelated to PCS) either before or just after the auction. At the time of the auction, the PCS Applicant is an eligible bidder because Company A's assets/revenues are low. Now suppose that two years after the auction Company A's assets/revenues increase dramatically and so, if required to maintain eligibility, the Licensee loses its right to hold the license. Presumably, the pre-auction arrangement with the PCS Applicant would have to provide that VC Fund must sell its interest in Company A (or any other investment) if it threatens the licensee's eligibility. This rule makes it impossible for the PCS Applicant, or investors in the Applicant, to convince VC Fund to invest when it could find another entrepreneur like Company A to invest in that does not have the peculiar constraints that come with an investment in the PCS Applicant.

The rule provides that the licensee's "debt financing, revenue from operations, business development or expanded service" are not to be considered as part of the licensee's assets/revenues calculation during the holding period.<sup>5</sup> Obviously, this exception is so that eligibility rules do not impede the success of PCS entrepreneurs. However, a similar flexibility is needed for affiliates and investors in the applicant in their post-auction investment decisions (or pre-auction investments that grow after the auction). Without it, the holding period rule will work to the entrepreneur's detriment because no investors will be willing to constrain the success of all their other investments. Limiting a pre-auction investor's post-auction investing does not

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<sup>5</sup> Id.

further the Commission's goal of ensuring entrepreneur control of the licenses, it only makes financing more difficult.

In addition, the current rules do not take into account how the eligibility process will work for attributable investors who invest after the auction. At the time the new investor takes its interest, does the applicant's eligibility depend on the aggregate of all assets/revenues of all investors at the time of the new investment? Such a rule would also penalize post-auction growth of the existing investors.

**C. Flexibility For Equity Investors Implements Congressional Policy By Lowering The Total Cost And Difficulty of Obtaining of Capital For Entrepreneurs.**

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Restricting equity investment seriously impinges on a primary source of funding for designated entities. As the Commission has often recognized, those eligible for entrepreneur licenses do not have equal access to traditional debt-financing opportunities.<sup>6</sup> Equity investment, including individual investors and venture capital, is often the only way that entrepreneurs can raise money to meet construction build-out costs. The Commission's tools of installment payments and bid discounts designated to make up for the entrepreneurs' lack of access to capital only address the licensee's cost of paying its bid price. They do not ease the daunting burden of funding timely system build-out and operation. In this respect, the effect of the current eligibility rules on equity investment seems contrary to both the Congressional mandate "to ensure that small business concerns are not negatively impacted' and to give priority to passage of 'legislation and regulations that enhance the viability of small business concerns.'"<sup>7</sup>

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<sup>6</sup> See, e.g., Fifth Report and Order at ¶ 96-102.

<sup>7</sup> Fifth Report and Order at ¶ 93, quoting, Small Business Credit and Business Opportunity Enhancement Act of 1992, § 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

By removing impediments to investors, the Commission would help to resolve one of the most persistent problems it faces -- the lack of alternative financing for new telecommunications firms and especially small businesses. Just two months ago, the Commission eased restrictions on in-region cellular ownership of PCS licensees who are minorities and women, despite the many anti-competitive dangers of allowing cellular operators a foothold in PCS.<sup>8</sup> Obviously, the need to provide minorities and women with alternative financing options outweighed the risk of anti-competitive behavior. All entrepreneurial small businesses continue to face a critical need for alternative financing. However, the current rules make it difficult to raise more capital through equity financing by increasing the investor's risk.

**D. The Test For Entrepreneur Eligibility Should Evaluate Individually Each Of The Attributable Investors In The Applicant, As Well As The Applicant, At The Time Of Auction And Subsequently At The Time Of Any Attributable Investment, On Basis Of The \$125 Million/\$500 Million Cap.**

Omnipoint proposes that the Commission adopt a slightly different standard for evaluating an applicant's eligibility to bid on and hold an entrepreneur's license. We propose that the standard should evaluate each attributable investor in the applicant, as well as the applicant, on an individual basis, *i.e.*, without aggregation, and only at two points in time. First, so long as each investor in the applicant, and the applicant, has less than \$125 million in revenues for the past two years and less than \$500 million in assets at the time of filing the short-form application (FCC Form 175), the applicant is eligible to bid on and to hold an entrepreneur's license. Second, after the short-form applications are filed, new attributable investors in the applicant are permissible so long as the new investors meet the same assets/revenue cap.<sup>9</sup> We note that this

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<sup>8</sup> Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144, at ¶¶ 127-128 (released June 13, 1994).

<sup>9</sup> For existing investors that were not attributable before the auction but become attributable after the auction, the Commission should calculate their assets/revenues on a pro

*(Footnote continued to next page)*

proposal would not change the affiliation rules, and it would not allow companies that do not meet the cap to control an investor in the applicant.<sup>10</sup>

We believe this proposal has several advantages over the current rule. First, it does not inhibit investors from growing their existing businesses. Second, once the investor qualifies at the time of the short form application it is then free to make other investments in other companies regardless of their size. Third, it does not inhibit the applicant's own growth in businesses or investments not related to the PCS license. Fourth, it greatly simplifies the rule with respect to post-auction equity financing of a PCS entrepreneur system. Attributable investors who come on the scene after the short-form application is due face the same spectrum cap as if they had made the investment before the filing date. Undoubtedly, many entrepreneurs will need new infusions of capital as they plan for the three phases of construction build-out requirement. This proposal makes it simple to identify who is an eligible investor.

Eliminating the aggregation rule will have no real effect on eligibility. The aggregation rule was presumably designed to prevent small companies from being *de facto* big companies. However, the only fair methodology for calculating the aggregate value is to use a weighted average or "multiplier" rule as the Commission uses in other contexts.<sup>11</sup> For example, with the multiplier approach, an investor with \$100 million in revenue and 16% of the voting equity only

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*(Footnote continued from previous page)*

rata basis. Take the example of an Investor that has a 15% interest in the applicant the time of filing the auction application, and later Investor increases its interest to 16%. In this case, the calculation would be 14/16 of the investor's revenues/assets at the time of filing, plus 2/16 of the investor's revenues/assets at the time of the 2% increase.

<sup>10</sup> This proposal would, however, eliminate the aggregation rule and the requirement to maintain eligibility for five years. 47 C.F.R. §§ 24.709(a)(1)&(3), (b)(1). It would not impact in any way the "control group" standards or the "passive equity" rule. 47 C.F.R. § 24.709(b)(4).

<sup>11</sup> See Section VI, below.

contributes \$16 million to the aggregate revenue calculation. Without such a multiplier rule, the aggregate thresholds are artificially too low. After all, an investor with only 16% of the equity of the PCS applicant is not going to devote 100% of the financial resources of its \$100M business to the PCS applicant of which it has so small a stake.

However, using a multiplier approach eliminates the whole need for calculating aggregate value at all. Because only the control group and attributable investors are used in the aggregate calculation, and all of whom must be under the revenue and asset limits according to Omnipoint's proposal, then a weighted average calculation, by definition, results in an aggregate value that is also under the financial limits. Thus, eliminating the aggregate rule has no effect and greatly reduces the complexity of monitoring the eligibility of applicants for the entrepreneur band.

If the aggregation rule is not eliminated, it will be extremely complex to determine whether investors after the auction change the eligibility of the license holder. Since investors eligible at the time of the auction should be allowed to grow after the auction, how would the FCC calculate aggregated value when new investors invest one or two years after the auction? If the original investor's revenues and assets have grown, are their new sizes used to aggregate with the new investor's revenues and assets, or is the aggregate at the time of the auction (three years earlier) used? Similarly, it is unclear what points in time are used if another investor invests the year after, and another a year later, etc.

Issues of defining, maintaining, measuring, and enforcing eligibility become extremely complex unless the aggregation rule is eliminated. Further, eliminating the aggregation rule has no downside because investors in an applicant should be able to grow their other businesses and investments post-auction and post-investment.

*De facto* control rules and the size limit on the applicant and its investors prevent abuse.

**E. A Group Of Small Business Investors In A Small Business Applicant Should Be Entitled To The Same Exemption From The Aggregation Rule As A Small Business Consortium.**

The Commission's current rules provide an exception to the aggregation of attributable investors in an applicant where the applicant is a consortium of small businesses, i.e., companies with revenues of under \$40 million.<sup>12</sup> Omnipoint finds that permitting joint ventures of small businesses, while not allowing those same small businesses to form a single corporate applicant, promotes form over substance. The Commission's reasoning for the consortium exception applies equally well to a company with small business investors: "in the broadband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors."<sup>13</sup> We believe that the same exception to the aggregation rule should apply to an applicant that is formed by several attributable investors that each meet the "small business" definition.

**II. The FCC Should Re-Examine Eligibility Requirements For Licensees That Go Public After The Auctions.**

The Commission's rules currently permit entrepreneur entities to raise capital through public offerings. We have serious concerns, however, that the current rules requiring the control group to retain 50.1% of the voting equity and 25% of the total equity<sup>14</sup> will raise legal and/or practical problems with existing or proposed public exchange rules. We urge the Commission to seek out the opinion of the exchanges regarding these issues and, in light of that, re-examine its

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<sup>12</sup> 47 C.F.R. § 24.709(b)(3).

<sup>13</sup> Fifth Report and Order at ¶ 180.

<sup>14</sup> 47 C.F.R. § 24.709(b)(4)(iii).

eligibility rules for publicly held licenses. Omnipoint may also file comments on these issues in the near future.

### **III. The Passive Equity Threshold For Voting Equity Should Be Increased To Twenty Percent.**

Omnipoint asks that the Commission further modify its definition of "passive equity"<sup>15</sup> so that the assets/revenues of investors outside the control group who hold less than 20% voting interest are not included in the applicant's assets/revenues calculation.<sup>16</sup> While Omnipoint commends the Commission on its recent relaxation of the passive equity rule from 5% to 15%,<sup>17</sup> a 20% voting stock threshold would maximize financing opportunities and it would not jeopardize the Commission's goal of attributing investors with minority voting control. The 20% threshold is consistent with the Financial Accounting Standards Bureau concepts of control: ". . . an investment of less than 20% of the voting stock of an investee should lead to a presumption that an investor does not have the ability to exercise significant influence unless such ability can be demonstrated."<sup>18</sup> Further, as the Commission stated in its recent reconsideration order raising the attribution threshold from 5% to 15%, allowing non-controlling investor participation "diminish[es] the substantial risks associated with committing funds to a PCS applicant and enhances the potential rewards for providing start-up capital to these new ventures."<sup>19</sup>

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15 47 C.F.R. § 24.720(j).

16 Of course, we are assuming that the applicant has formed a valid "control group" pursuant to 47 C.F.R. § 24.709(b)(4).

17 Order on Reconsideration, PP Docket No. 93-253, FCC 94-217 (released August 15, 1994) ("Reconsideration Order").

18 Accounting Standards, Original Pronouncements, Financial Accounting Standards Board, APB Opinion No. 18, ¶ 17 (1987).

19 Reconsideration Order at ¶10.

#### **IV. The FCC Should Reduce Uncertainty Associated With Post-Auction De Facto Control Determinations.**

Omnipoint urges the Commission to alleviate some of the risk to investors, and thereby reduce the total cost of capital for PCS entrepreneurs, by clarifying and narrowing the focus of the "*de facto* control" standard. While the Commission has established bright-line eligibility criteria (e.g., \$125 million gross revenues/ \$500 million total assets), applying those criteria to small companies with several equity investors and affiliated entities inevitably comes down to a determination of who exercises control, and who does not. Though the Commission takes a "case-by-case" approach to individual *de facto* control determinations, the number of post-auction disqualifications could be reduced if the Commission were to provide more prospective guidelines and other clarifications.

The Commission's rules make the determination of control all the more critical by encouraging "control group" licensees, which allow entrepreneurs to attract passive investment from otherwise ineligible entities.<sup>20</sup> If those investors are outside the control group and are not attributable, the licensee's eligibility is not a risk factor in determining the cost of capital. However, whatever margin of uncertainty exists will raise the cost of attracting investors, who must account for the risk that the applicant will be found ineligible. While the entrepreneur can form its "control group" to meet the *de jure* control standards *de facto* control, especially under the Commission's case-by-case approach, is a source of uncertainty, and so contributes to the cost of capital. Further clarification -- with specific guidance on acceptable participation by ineligible

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<sup>20</sup> See 47 C.F.R. § 24.709(b)(4) (the assets/revenues of certain passive equity investors in licensees with eligible "control groups" may be excluded); 47 C.F.R. § 24.720(k) ("control group" is an entity that has both *de jure* and *de facto* control of the licensee).

investors -- will reduce the cost of capital prior to the auctions, thereby increasing the diversity of bidders and the overall viability of the entrepreneurial band PCS competition.

**A. The Commission Should Sanction Certain Forms Of Equity Investor Participation That Will Not Be Deemed Participation In A De Facto Control Group.**

Equity investment, by its very nature, implies some degree of participation in the company's affairs. For example, limited partners are not completely without a voice in a partnership, and the maintenance of these rights is often required by law. Equity investors protect their stake in the company through such participation; it does not mean that the participating investor has taken control of the company.

In the area of transfer of control, the Commission's own precedent affirms that an investor's participation in the management of the licensee does not necessarily warrant a finding of "control" by that investor. In the normal course of affairs, the issue of control is simply determined by the *de jure* standards because control is typically exerted in direct proportion to ownership -- those that own a majority of the voting equity also make the ultimate policy and operational decisions. *De facto* control is relevant only in those peculiar instances where those with the ownership are distinct from those with the control. Of course, the minority investor has a right to protect its investment by participating in the affairs of the company; it is only when the investor's influence rises to a level of dominance that the investor can be said to be "in control."<sup>21</sup>

In order to reduce the uncertainty of assessing eligibility, the Commission should provide specific guidelines on the type of investor participation that does not raise issues of *de facto*

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<sup>21</sup> We request that the Commission clarify that it intends to apply its own *de facto* and *de jure* control precedent, and not the precedent of the Small Business Administration ("SBA"). We raise this issue because the Fifth Report and Order enthusiastically adopts the SBA's affiliation test nearly verbatim. 47 C.F.R. § 24.720(l); Fifth Report and Order at ¶ 164.

by a wealthy individual applicant or a wealthy investor in the applicant. Contrary to the plain wording of the rule, the summary of eligibility requirements in the text of the order states "[n]o attributable investor *or affiliate* may have \$100 million or more in personal net worth."<sup>30</sup> This summary clearly does not accurately reflect the rule. We ask that the Commission clarify that the personal wealth rule does not apply to wealthy individuals who are investors in an entity that is deemed an "investor in the applicant."

Similar to the requested rule changes for institutional and corporate investors noted above, without which such investors are prevented from being successful in other investments, individual investors also need similar flexibility. In short, the increase in value of the stock owned by an individual investor in any company with a PCS license should not be counted when determining whether an investor's net worth is over \$100 million.

Any investor with more than \$100 million net worth before any investment in entities with PCS licenses would still be ineligible to own more than 25% of the total equity or 15% of the voting equity of a company eligible for the entrepreneur's band. But any investor with less than \$100 million prior to their PCS investment would not be penalized by the growth of any other PCS investment he or she makes. The Commission should encourage all individuals to invest in PCS without facing the absurd constraint that the success of one PCS company would render another PCS company ineligible for entrepreneur band status.

In addition, the Commission should clarify that the personal net worth calculation is separate from, and is not meant to be aggregated with, the business assets/revenue eligibility calculation. Rule section 24.709(b)(2) states that "[t]he personal net worth of individual applicants . . . and other persons who hold interests in the applicant . . . , if under the amount in (a) (2), shall not be considered for purposes of determining whether the applicant . . . is eligible."

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<sup>30</sup> Fifth Report and Order at ¶ 115 (emphasis added).

For example, if the personal net worth of an individual affiliate is less than \$100 million, the rule does not appear to require that personal net worth be included in the licensee's attributable assets for entrepreneur block eligibility purposes.

**B. The Commission Should Clarify That Only The Assets Of The "Applicant," "Investors In The Applicant," And "Affiliates" Are To Be Measured Against The Assets/Revenue Cap.**

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Omnipoint requests that the Commission clarify that the assets/revenues of persons or entities that hold a non-controlling interest in an attributable "investor in the applicant" are not attributable to the applicant/licensee. While we believe that this conclusion reasonably follows from the rules adopted in the Fifth Report and Order,<sup>31</sup> clarification is necessary as entities seek significant funding for the upcoming auction and subsequent build-out.

In the Fifth Report and Order, the Commission noted that it adopted attribution rules "to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules."<sup>32</sup> The rules implement the Commission's obligations to review licensees' qualifications and to examine who controls Commission licenses.<sup>33</sup> Under the rules as adopted, any entity having the legal power to control an applicant, or asserting actual control over the applicant, is taken into account. Thus, the Commission has more than adequately ensured that the entrepreneur is in control of the licensee.

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<sup>31</sup> A non-controlling investor in an "investor in the applicant" is not an "affiliate" under the Commission's rules. 47 C.F.R. § 24.720 (l) ("An individual or entity is an affiliate of (a) an applicant or (b) a person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity -- (i) directly or indirectly controls or has the power to control the applicant.").

<sup>32</sup> Fifth Report and Order at ¶ 205.

<sup>33</sup> 47 U.S.C. §§ 308(b), 310(d).

By excluding any non-controlling interests in investors in the applicant from the attribution calculus, the Commission allows large investors with the necessary capital to play a passive but important role in the entrepreneur's band. As has been recognized throughout the Commission's PCS proceedings, broadband PCS must be funded to meet the capital-intensive build-out costs of an independent PCS system. By the very nature of the assets/revenues cap, the entrepreneur must look to other sources to finance these costs. Omnipoint requests that the Commission clarify that such passive investment would not destroy an entrepreneur's eligibility.

**VI. The Commission Should Use A Multiplier Approach When Calculating The Assets/Revenues of the Applicants**

In the event that the Commission does not adopt the proposal in Section I(D) above, Omnipoint requests that the Commission modify its broadband PCS auction rules to adopt an average or "multiplier" approach for the calculation of an applicant's assets/revenues.<sup>34</sup> The Commission has long used the multiplier approach in calculating interests held by affiliates of broadcast licensees.<sup>35</sup> The Commission has also adopted this approach when calculating ownership interests for the PCS-cellular cross ownership restriction and the PCS spectrum aggregation cap.<sup>36</sup>

As the Commission stated in its recent Further Order, "[w]ithout a multiplier, parties that have neither the ability to exert control nor a substantial financial stake in the cellular or

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<sup>34</sup> The current rule implies that assets/revenues are attributed without the multiplier: "the gross revenues and total assets of the applicant . . . and its affiliates, and other persons who hold interests in the applicant . . . and their affiliates shall be considered on a cumulative basis and aggregated..." 47 C.F.R. § 24.709(b)(1).

<sup>35</sup> 47 C.F.R. § 73.3555, n. 2(d).

<sup>36</sup> Further Order on Reconsideration, GEN Docket No. 90-314, FCC 94-195 (released July 22, 1994) ("Further Order").

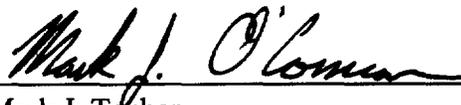
broadband PCS license could be unduly restricted in acquiring interests in such license."<sup>37</sup> Likewise, the assets/revenues attributed to the PCS applicant should be based on the assets of the investor, multiplied by the percentage ownership interest that such an investor has in the applicant. Given that the Commission has taken this approach when determining the true anti-competitive effect of cellular or PCS licensees, there is no reason to treat entrepreneurs or their investors under a more harsh rule that would attribute all of the assets/revenues of minority investors and indirect affiliates to the PCS applicant.

**VII. Conclusion.**

For the reasons stated above, Omnipoint urges the Commission to reformulate its entrepreneur band rules so that smaller entities can not only bid in the auction, but can obtain financing to construct and build out a truly viable and independent PCS system.

Respectfully submitted,

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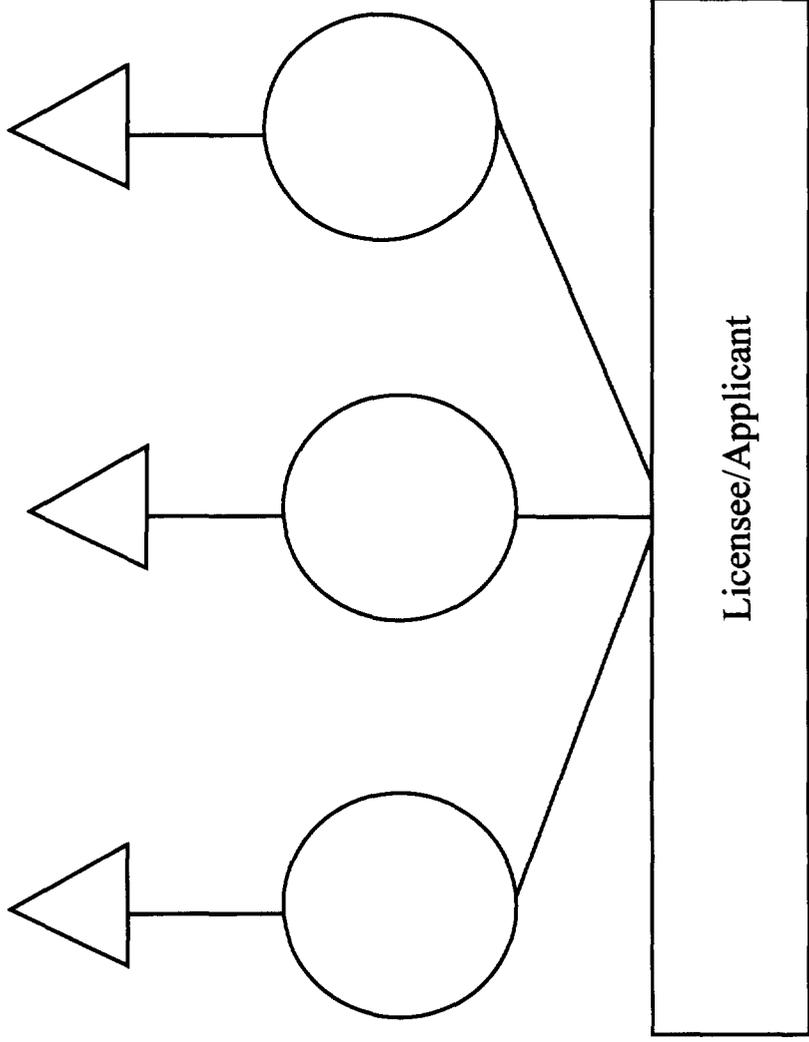
Its Attorneys

Date: August 22, 1994

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<sup>37</sup> Id. at ¶ 4.

# DIAGRAM I



Affiliates

Investors in  
the Applicant

Licensee/Applicant

# DIAGRAM 2

