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October 6, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

HAND DELIVER

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, Room 202
Washington, D.C. 20554

Re: PP Docket No. 93-253
Ex Parte Presentation

Dear Mr. Caton:

In accordance with Section 1.1206(a)(1) of the Commission's Rules, enclosed please find two copies of a written ex parte presentation on behalf of Omnipoint Communications, Inc. regarding the reconsideration of the Commission's broadband PCS auction rules.

Should there be any questions regarding this matter, please contact the undersigned directly.

Sincerely,



Mark J. O'Connor

Enclosure

cc: Dr. Robert Pepper
Mr. Donald Gips
Mr. Gregory Rosston
Mr. Andrew Sinwell

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Re: PP Docket No. 93-253
Ex Parte Presentation

Dear Mr. Caton:

On August 22, 1994, Omnipoint Communications, Inc. petitioned for reconsideration of several auction rules decided in the Fifth Report and Order. OCI's underlying concern is to reformulate the current rules in a comprehensive manner that allows true entrepreneurs to obtain affordable financing. We recognize that it is an ambitious regulatory undertaking, and so we have attempted to rewrite the rules, as presented below, in order to implement many of OCI's reconsideration proposals. We offer these proposed rules to further clarify our position and to provide the Commission with some proposed rules as it faces the drafting process in the next few weeks.

Summary of Proposed Changes

We are requesting that the FCC adopt a "two-point in time" test with respect to when it applies its gross revenue and total assets tests. The two-points in time when such tests are to be applied are: (1) the date upon which an applicant's short-form application is filed and (ii) the date upon which a new attributable investor invests in an applicant. This "two-point in time" test would replace the time continuum approach presently in place under the rules.

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We are also requesting that, when attributing the gross revenues, total assets or personal net worth of an investor to an applicant, the FCC do so on an individual basis. The individual attribution approach is the preferred method of performing such an analysis. However, if the FCC elects not to adopt such an approach, we strongly urge that it adopt and apply a multiplier approach in calculating the assets and revenues of applicants pursuant to Rule 24.709(b).

Proposed Changes

In blacklined form, OCI proposes the following changes:

1. The \$125 million gross revenue and \$500 million asset limitations contained in Rule 24.709(a)(1) should be modified as follows:

(1) ~~No~~ An application is acceptable for filing and ~~no~~ a license ~~shall~~ may be granted for frequency Block C or frequency Block F, ~~unless the applicant, together with its affiliates and persons holding interests in the applicant and their affiliates, have gross revenues of less than \$125 million in each of the last two calendar years and total assets of less than \$500 million if~~ at the time the applicant's short-form (Form 175) application is filed, and determined on an individual basis, neither the applicant nor any one of its individual affiliates nor any person holding an interest in the applicant nor any of their affiliates, has either (a) gross revenues equal or exceeding \$125 million in each of the last two calendar years or (b) total assets equal or exceeding \$500 million. Under this rule, new attributable investors in the applicant will be permissible after the applicant's short-form application is filed so long as, at the time such investment is made in the applicant, neither the new investor nor any person holding an interest in the applicant ("licensee"), nor any of its affiliates has either (a) gross revenues equal or exceeding \$125 million in each of the last two calendar years or (b) total assets equal or exceeding \$500 million.

2. Consistent with item 1 above, Rule 24.709(b)(1) should also be modified as follows:

(b) ~~Attribution and Aggregation~~ Attribution and Aggregation of Gross Revenues, Total Assets, and Personal Net Worth

(1) Except as specified in ~~paragraphs (3) and paragraph~~ paragraph (4), the gross revenues and total assets of the applicant (or licensee) and its affiliates, and other persons

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that hold interests in the applicant (or licensee) and their affiliates shall be considered on ~~a cumulative~~ an individual basis and shall not be aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

3. Although the passive equity limitations contained in Rule 24.720(j) have already been amended from 5% to 15%, OCI proposed that the threshold be increased to 19.9% and that the specific language of Rule 24.720(j) be amended as follows:

(j) Passive Equity.

Passive equity shall mean (i) for corporations, non-voting stock or stock that includes no more than ~~five~~ nineteen and nine-tenths percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

4. At present, it is unclear whether the personal net worth limits contained in Rule 24.709(a)(2) & (b)(2) apply to investors in entities that are in turn investors in an applicant (i.e., indirect investors in an applicant). To clarify the rule to specifically limit the \$100 million personal net worth test to applicants and direct investors in applicants, the following language changes to Rule 24.709(a)(2) & (b)(2) are proposed:

(a)(2) No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, if, at the time the application is filed, the applicant (or a person holding ~~an~~ a direct interest in the applicant) is an individual and he or she (or affiliates) has \$100 million or greater in personal net worth at the time the applicant's short-form (Form 175) application is filed. Individuals holding an interest in an entity that holds or possesses an interest in the applicant (or persons holding a more indirect ownership interest in the applicant) are excluded from this rule.

(b)(2) The personal net worth of individual applicants (or licensees) and other persons that hold direct interests in the applicant (or licensee), and

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their affiliates, if under the amount in paragraph (a)(2), shall not be considered for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

5. OCI previously recommended that the \$100 million personal net worth contained in Rule 24.709(a)(2) exclude appreciation on stock or other interests held by an investor in a PCS licensee or a company or companies conducting business in the PCS industry. To accomplish this, the definition of "personal net worth" contained in Rule 24.720(h) should be modified as follows:

Rule 24.720(h) Personal Net Worth. *Personal net worth* shall mean the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor. However, an individual's personal net worth shall not include the value of assets resulting from appreciation in the value of the stock or other interests owned, directly or indirectly, by the individual in any company owning a PCS license whose primary increase in value is primarily related to the ownership of the PCS license.

As presently written, the FCC's rules could preclude an investor from investing, either directly or indirectly, in multiple PCS companies, because the success of one PCS company, and the associated appreciation in its equity value, could disqualify a Designated Entity or licensee. The foregoing language change is necessary to ensure that investors wishing to invest in multiple PCS companies are not precluded from doing such solely on the basis of one PCS company's success.

The proposed rule change also removes the possibility of anomalies resulting from the sequential nature of the PCS auctions.

6. OCI also recommended that, if the FCC fails to adopt the non-aggregation rule discussed in Paragraph 4 above, the FCC adopt and apply a multiplier approach when calculating the assets and revenues of applicants pursuant to Rule 24.709(b). The FCC has adopted this approach both in calculating interest held by affiliates of broadcast licensees, and when calculating ownership interests for the PCS-cellular cross ownership restriction and the PCS spectrum aggregation cap. Should the

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FCC adopt this concept, Rule 24.709(b) should be modified by adding the following Note.

Note 2 Attribution of the revenues and assets of direct and indirect investors in PCS applicants shall be calculated according to the "multiplier" approach. Ownership interests in a PCS applicant that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall be treated as if such ownership percentage were 100% for purposes of this multiplication. The revenues and assets of the investor attributable to the applicant shall be calculated by multiplying the investor's ownership interest in the applicant, as described herein, by the investor's revenues and assets. [Example 1. If A owns 10% of company X, which owns 30% of company Y, "Applicant," then 3% of A's revenues and 3% of A's assets are attributable to Y. Example 2. If A owns 10% of company X, which owns 60% of company Y, which owns 25% of "Applicant," then X's interest would be 25% (the same as Y's interest because X's interest in Y exceeds 50%), and the amount of A's revenues and assets attributable to "Applicant" would be 2.5% (0.1 x 0.25).]

In accordance with the Commission's ex parte rules, two copies of this letter have been submitted to the Commission's Secretary for inclusion in the above-referenced docket.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint
Communications, Inc.

cc: Dr. Robert Pepper
Mr. Donald Gipps
Mr. Gregory Rosston
Mr. Andrew Sinwell