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April 12, 1995

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**HAND DELIVER**

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

Re: GEN Docket No. 93-253 -- TEC Waiver Proceeding  
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber and Ronald Plessner, of Piper & Marbury, and I met today with Christopher Wright and Julius Genachowski of the Commission's Office of the General Counsel to discuss issues raised by the TEC Waiver Proceeding. During the discussion, we raised arguments presented in Omnipoint Communication Inc.'s Comments filed on April 3, 1995 in the same proceeding. In addition, we discussed points raised in the bullet-sheets attached hereto, a copy of which was distributed to Mr. Wright and Mr. Genachowski. Finally, we discussed current designated entity financing opportunities and how those might be affected by the release of a Commission public notice announcing the Block C auction short-form application filing date.

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Mr. William F. Caton  
April 12, 1995  
Page 2

In accordance with the Commission's rules, I hereby submit one original and one copy of this letter.

Sincerely,



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

Enclosures

cc(w/enclosures): Christopher Wright, Esq.  
Julius Genachowski, Esq.

APR 12 1995

**WHY THE SHORT FORMS SHOULD BE FILED AFTER ADARAND**FEDERAL COMMUNICATIONS COMMISSION  
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- The D.C. Circuit's March 15, 1995 Order creates uncertainty that Adarand may resolve.
  - The threat of post-auction court challenge had always been latent.
  - The D.C. Circuit gave credibility to TEC's Equal Protection claims.
  - Supreme Court's grant of cert. in Adarand case makes validity of minority/women bidding credits at least suspect.
  - Adarand decision may help resolve even latent uncertainty *prior* to the auction.
  
- Filing the Short-form for the Entrepreneur Band Auction forces *every* minority/women-controlled applicant to make *significant* legal decisions on structure and financing.
  - *Attribution of revenues/assets of large investors:* Perhaps the most important advantage in the eligibility rules for women/minority-controlled applicants is that large investors can own up to 49% of the applicant's total equity, rather than just 25% equity limit set for all other entrepreneurs. If the 49% scheme is invalidated, applicants using that option will be later held to the 25% eligibility standard and will be ineligible to hold the licenses won at auction.
  - *Affiliation Rule Exemptions:* The affiliation rules exempt minority/women investors, and their affiliates, from the calculation of aggregate revenues/assets when determining the applicant's eligibility. If these exemptions are invalidated, minority/women applicants that relied on them may find that they are ineligible to bid on and/or hold the license.
  - *Control Group Equity:* The 49% option, available only to women/minority-controlled applicants, permits 20% of the control group equity to be held by certain non-qualifying entities; the 25% option, available to all other entrepreneurs, allows those same non-qualifying entities to hold only 10% of the control group equity. If the 49% option is invalidated, non-qualifying entities exceed the ownership limits of control group equity under the 25% option, and so they would be ineligible to hold the license.
  
- **There is no practical way for entrepreneur-applicants to restructure their corporations and financing after the short-forms are filed in order to adjust for the results of the Adarand decision.**

- Even if the preferences are ultimately held constitutional, applicants making the three eligibility decisions described above, without the benefit of the Adarand decision, face an unknowable future.
- Once parties file the short -forms, the auction anti-collusion rules make it impossible to negotiate with other parties filing for the same markets.
  - Bidders that would otherwise form new alliances to deal with the change in legal status cannot regroup and form new affiliations.
- Forcing the filing of the short-form *prior* to Adarand forces rational parties to *assume* the preferences are illegal.
  - Parties that want to participate in the auction, but avert the incalculable risk of the minority/women preferences, will either avoid the auction entirely or participate through non-minority/women entities.
  - If Adarand *supports* the constitutionality of the bidding preferences, rational applicants/investors will have been needlessly discouraged.
- Scheduling the filing of the Short Forms until after Adarand need only delay the auctions by 30-45 days. This is preferable to the false-start and massive legal dilemmas caused by a head-long rush to file the short-forms.
- **Rushing the short forms before Adarand will hurt the very DEs that swift implementation is supposed to help.**