

EX PARTE OR LATE FILED

PIPER & MARBURY

L.L.P.

1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430
202-861-3900
FAX: 202-223-2085

DOCKET FILE COPY ORIGINAL

BALTIMORE
NEW YORK
PHILADELPHIA
LONDON
EASTON, MD

WRITER'S DIRECT NUMBER
(202) 861-6471
FAX: (202) 861-3862

June 21, 1995

HAND DELIVER

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

RECEIVED

JUN 21 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

Dear Mr. Caton:

In conformity with section 1.1206(a) of the Commission's Rules, enclosed please find two copies of an ex parte presentation to be submitted for inclusion in the above-referenced docket.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

/mjo
Enclosures

No. of Copies rec'd 021
List A B C D E

EX PARTE OR LATE FILED

PIPER & MARBURY

L.L.P.

1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430

202-861-3900
FAX: 202-223-2085

BALTIMORE
NEW YORK
PHILADELPHIA
EASTON
LONDON

MARK J. TAUBER
202-861-3913

June 21, 1995

RECEIVED

JUN 21 1995

HAND DELIVER

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614-B
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: PCS Block C Auction & the Adarand Decision
PP Docket No. 93-253: Ex Parte Presentation

Dear Mr. Kennard:

Omnipoint Corporation agrees with several commenters¹ that a further rulemaking is the only real alternative for resolving the complicated issues that Adarand Constructors, Inc. v. Pena, 1995 WL 34735 (dec. June 12, 1995) ("Adarand") has created. Perhaps even more importantly, as National Telecom recommended, a period of adjustment subsequent to the release of the revised rules is essential to permit all prospective applicants to renegotiate with investors.

The Adarand decision, released just three days before the June 15 short-form deadline, has left the Commission with very difficult options to be resolved in short

¹ Letter from Eliot J. Greenwald, attorney for Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, PP Dkt. No. 93-253 (filed June 16, 1995); Letter from Eliot J. Greenwald, attorney for Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, PP Dkt. No. 93-253 (filed June 19, 1995); Letter from Jack E. Robinson, President of National Telecom, to Regina Keeney, PP Dkt. No. 93-253 (filed June 16, 1995); Letter from Sherrie Marshall, on behalf of The Marshall Company, to the Honorable Reed Hundt, PP Dkt. No. 93-253 (filed June 16, 1995).

William E. Kennard, Esq.
June 21, 1995
Page 2

order. After reviewing the Adarand decision and the Commission's record, it now seems that there is no choice but for the Commission to proceed on a path that involves a further notice of proposed rulemaking, with adequate opportunity for public comment, on how best to proceed. Without such a process, a Commission decision made on the current record will undoubtedly result in appellate court challenges that will add exponentially to the delay for Block C entrepreneurs.

Absent a rulemaking to supplement the existing record, it appears that the Commission has three options available to it, each of which presents intolerable risks for all entrepreneurs. First, the Commission could simply go ahead with its current auction rules claiming they will meet the new strict scrutiny criteria. This alternative would be very risky in light of Adarand (particularly its recognition of "forward looking" consequences) and the fact that the Commission justified its minority preferences under the intermediate scrutiny standards set forth in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).² Second, the Commission could completely strip the minority preferences out of the auction rules.³ However, without public comment on the record, the choice of this option as opposed to others may itself be subject to judicial challenge, since it appears inconsistent with the auction statute.⁴ Third, the Commission could find on its own reconsideration that all entrepreneurs are qualified for the same preferences that were formerly reserved for minorities. This alternative not only raises the same issues as the prior option, it radically changes the nature of the Entrepreneur-Band auction, it undermines the extensive rulemaking process begun in September, 1993, and it is contrary to the Commission's basic notice and comment rulemaking procedure. The status of women applicants under the last two options, whose preferences are not immediately threatened by the Adarand holding, and the statutory mandate to promote

2 Second Report and Order, 9 FCC Rcd. 2348, 2398, ¶ 289 (1994); see also, FCC, "Opposition to Emergency Motion for Stay," at 10 - 12, Telephone Electronics Corp. v. FCC, Case No. 95-1015 (D.C. Cir. February 17, 1995) (FCC argues to the D.C. Circuit that intermediate scrutiny applies to race-conscious Block C auction rules).

3 Under this option, the cellular eligibility rules may also have to be modified. 47 C.F.R. § 24.204(d)(2)(ii).

4 47 U.S.C. § 309(j)(4)(C) (Commission is directed to promote economic opportunity for "businesses owned by members of minority groups.").

William E. Kennard, Esq.
June 21, 1995
Page 3

economic opportunities for women further complicate matters. Ultimately, the problem with each of these options is that it fails to reconcile the balance of interests developed over the course of the past year and one-half; no single dramatic shift in the rules accomplishes the careful balance the Commission intended.

Omnipoint believes that the status of the rules must first be resolved in a traditional public notice and comment rulemaking, and then prospective applicants should have a reasonable amount of time to review their eligibility options, negotiate with potential investors under the new rules, and prepare their applications in the face of the new competitive playing field. The Commission's stated intent to announce a short-form filing date this week, prior to the resolution of the issues raised by Adarand, exacerbates the uncertainty among entrepreneur-band applicants. Further, it is questionable how *any* applicant could plan its short-form applications when it seems inevitable that there will be new rules for the auction affecting eligibility, affiliation standards, ownership percentages, bid discounts, payment terms, as well as bidding strategy, consortium, and partnering decisions.

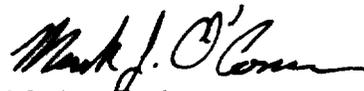
Any changes to the eligibility and preference rules change the market economic dynamic under which all applicants and investors have operated and negotiated. For example, investments have been made, and opportunities foregone, on the fact that the attribution exception of the "49% option" applied to some but not all applicants. If the Commission now changes the "49% option" in either direction it will have a profound effect on the participants and the nature of the entire Entrepreneur's-Band auction. Eligible participants have been forced to negotiate under one set of rules for nearly 21 months. After the revised rules are in place, there must be some reasonable period for participants to adjust to the changes.

A notice of proposed rulemaking with comments and reply comments is the best way for the Commission to lay a proper record for whatever course it ultimately decides on. This will make all potential applicants more certain of the validity of the Block C license allocation scheme.

William E. Kennard, Esq.
June 21, 1995
Page 4

In accordance with the Section 1.1206(a)(1) of the Commission's rules, two copies of this letter have been submitted this day to the Commission's Secretary's Office for inclusion in the above-referenced docket.

Sincerely,



Mark J. Tauber
Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Honorable Reed Hundt
Honorable James Quello
Honorable Andrew Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Regina Keeney
Dr. Robert Pepper
Kathleen Ham
Donald Gips
Jonathan Cohen, Esq.
Peter Tenhula, Esq.