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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252

REQUEST FOR STAY

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REQUEST FOR STAY

Introduction and Summary

Omnipoint Corporation ("Omnipoint"), by its attorneys and pursuant to Section 1.43 of the Commission's Rules, files this request for a stay pending appeal of certain Commission rules on eligibility to bid in the upcoming auctions for Block C PCS licenses. Although it only released final rules for eligibility to bid on and hold these licenses on July 18, 1995, the Commission has set an application filing deadline of July 28, 1995 for all applicants to participate in the Block C auctions. Omnipoint has today filed a Petition for Review of the Commission's decision in the United States Court of Appeals for the District of Columbia Circuit. As set forth therein and as discussed in detail below, portions of the new rules are arbitrary and capricious, and violate equal protection principles of the Fifth Amendment of the U.S. Constitution.

Regrettably, a stay is necessary here to prevent irreparable harm to Omnipoint in the upcoming auction because the rules as implemented are grossly unfair. Omnipoint has been an ardent supporter of the Entrepreneur's Band from its inception, and continues to support the notion that small businesses, minorities, and women should have a place among the emerging

giants of the PCS industry. However, by expanding the 49% equity exception, the Commission has changed the rules so dramatically that the band can no longer be described as reserved for entrepreneurs. Rather, it is more likely to become the "Big Company Front Band." Omnipoint is compelled for business and policy reasons to do whatever it can to prevent that. Thus, it is seeking a stay of the expansion of the 49% equity exception. Secondly, if such a dramatic policy change is indeed being made, then it should be done in a manner that allows reply comments, and an appropriate period of time for all entrepreneurs to adjust to the changes. Allowing only eight business days for many parties to reorganize their applicants' corporate structures is patently unfair and contrary to law. Thus, it is seeking a stay to the July 28th filing deadline.

BACKGROUND

Just six days ago, the Commission decided to change the rules governing the auction of spectrum licenses in the Personal Communications Service ("PCS") for the Block C "Entrepreneur's Band," Sixth Report and Order, PP Dkt. No. 93-253, GN Dkt. No. 90-314, GN Dkt. No. 93-252 (FCC 95-301, released July 18, 1995), 60 Fed. Reg. 37786 (July 21, 1995) (the "Sixth Report and Order). PCS is a group of services that offer the promise of wireless telephony, video, and data exchange. The original vision of PCS, as enunciated by the Commission, was to "free individuals from the constraints of the wireline public switched telephone network and enable them to communicate when they are away from their home or office telephone."[1]

The FCC, acting pursuant to authority delegated by Congress, 47 U.S.C. § 309(j), chose simultaneous, multiple round auctions as the methodology to allocate broadband PCS licenses to

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1 Notice of Inquiry, GEN Dkt. No. 90-314, 5 FCC Rcd. 3995 (1990).

private commercial radio service providers.[2] Thus far, the Commission has conducted only one broadband PCS auction, which allocated 99 Block A and B licenses.[3]

The Block C auction, which is scheduled to commence on August 29, 1995, was developed for a different purpose, to "encourage smaller entities to enter the auctions for broadband PCS licenses . . . . "[4] Following the Congressional directive to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ," 47 U.S.C. § 309(j)(4)(D), the Commission adopted a complex set of eligibility criteria, 47 C.F.R. §§ 24.709, 720, as well as license anti-trafficking restrictions, 47 C.F.R. § 24.839(d), to prevent large, established telecommunications companies from participating in Block C.

However, on the basis of its finding that lack of access to capital was a prevalent problem for all entrepreneurs in the telecommunications field, and that large, non-qualifying entities could be a valuable source of equity financing, the Commission created two conditions under which large entities could participate.[5] First, large, otherwise non-qualifying entities were permitted to hold up to 25% passive equity in any qualifying entrepreneur. 47 C.F.R. § 24.709(b)(3) (the "25% equity exception"). Second, because minorities and women faced "especially acute problems" in attracting necessary capital,[6] they were permitted to sell an additional 24.9%, or up

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2 Fifth Report and Order, PP Docket 93-253, 9 FCC Rcd. 5532, 5544 (1994) (the "Fifth Report and Order").

3 Each Block A and B license has a licensed spectrum of 30 MHz, and has a geographic service area covering a single Rand McNally Major Trading Area ("MTA"). 47 C.F.R. § 24.229(a).

4 Fifth Report and Order, 9 FCC Rcd. at 5585

5 Fifth Report and Order, 9 FCC Rcd. at 5579-80, 5590, 5591, 5602-03.

6 Id. at 5582.

to 49.9%, of their equity to non-qualifying investors. 47 C.F.R. § 24.709(b)(4) (the "49% equity exception").[7]

To participate in the Block C auction, an applicant must complete and file FCC Form 175 (the "Short-Form Application"), 47 C.F.R. § 24.709(c)(1)(ii), which, inter alia, requires an applicant to declare its eligibility with respect to the 49% or the 25% equity exception. Moreover, the Commission's anti-collusion rules, 47 C.F.R. § 1.2105(c), prohibit bidders (and investors holding 5% or more of an applicant's equity) from discussing auction-related matters with other bidders (and their investors) in any of the same markets, for the duration of the auction process. Thus, once Short-Form Applications are filed, an applicant may not engage in auction financing discussions with investors already funding other bidders that have even one market in common with the applicant. An applicant wishing to file for all Block C markets would be precluded from such discussions altogether.

The Block C auction rules were previously challenged in the D.C. Circuit on the basis of race and gender preferences in Telephone Electronics Corporation v. FCC, Case No. 95-1015 ("TEC"). In the TEC , the petitioner alleged that the rules violated its equal protection rights and requested a stay of certain explicit race and gender-based rules or alternatively, a stay of the Block C auction, then scheduled for April 17, 1995. Telephone Electronics Corporation, "Emergency Motion for Stay," Case No. 95-1015 (filed February 10, 1995). In response, the Court granted a stay of those portions of the auction orders "establishing minority and gender preferences, the C block auction employing those preferences, and the application process for that auction," finding that the petitioner had "demonstrated the requisite likelihood of success on the merits and irreparable injury." Order, Case No. 95-1015 (D.C. Cir, March 15, 1995). The

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[7] See Sixth Report and Order, at ¶ 13. The Commission also adopted a number of other economic preferences for minorities and women, including bid discounts, deferred auction payment plans, special interest rates on auction payments and tax certificates. See 47 C.F.R. §§ 24.711 - 713.

petitioner withdrew its case when it reached a private agreement with a third party to obtain a license. On May 1, 1995, the Court granted the petitioner's voluntary motion to dismiss and dissolved the stay without resolving the Constitutional issues.

The FCC rescheduled the Block C auction without revising its minority-based preferences. FCC Public Notice, Commercial Mobile Radio Service Information, May 11, 1995. However, three days before the due-date of Short-Form Applications for the rescheduled auction, the Supreme Court handed down its decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995) ("Adarand"). Adarand held that strict scrutiny, as articulated in Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), must be applied to all governmental affirmative action programs. Adarand, 115 S. Ct. at 2112. Thus, a federal program or rule designed to benefit members of a particular race, to the exclusion of members of another race, must serve a compelling interest and be narrowly tailored to that interest. Id. at 2113. On June 13, in response to Adarand, the Commission suspended the Short-Form Application date. FCC Public Notice, June 13, 1995. Ten days later, on June 23, the Commission released a Further Notice of Proposed Rulemaking, PP Dkt. No. 93-253, GN Dkt. No. 90-314, GN Dkt. No. 93-252 (FCC 95-263) (the "FNPRM"), to seek limited public comment on certain rule changes proposed "to eliminate all race- and gender-based provisions contained in our competitive bidding rules." FNPRM at ¶ 2. The FNPRM requested comments from the public on or before July 7 and excluded the opportunity to submit reply comments. FNPRM at ¶ 17. Among the rules proposed by the Commission was an expansion of the availability of the 49% equity exception to all qualified Block C applicants. FNPRM at ¶ 15. The Commission's rationale for this proposal was that making the 49% equity exception facially race-neutral "would be the least disruptive and would allow many minority or women applicants . . . to proceed." FNPRM at ¶ 16

Omnipoint submitted comments on July 7 and engaged in several permissible ex parte contacts urging the Commission not to extend the 49% equity exception to all applicants (or even all small businesses). Omnipoint argued that the Commission should either attempt to meet the

"strict scrutiny" standard or eliminate the 49% equity exception entirely. On July 18, only eight business days before the deadline for Short-Form Applications, the Commission released its Sixth Report and Order which, among other things, rejected Omnipoint's comments and extended the 49% equity exception to all qualified Block C applicants explicitly to preserve minority- and women-owned deals. Sixth Report and Order at ¶¶ 16-17.

DISCUSSION

The standard for a stay is well established. The Commission engages in a balancing of the following four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). As Omnipoint demonstrates below, consideration of each of these factors leads to the conclusion that the expanded 49% equity exception and the July 28 filing deadline should be stayed.

I. Omnipoint Is Likely To Prevail On The Merits.

Omnipoint challenges the rules on three independent grounds: (i) the rulemaking procedure leading to the Sixth Report and Order violated APA standards and the Commission's own procedural rules; (ii) the result of this deficient process, expansion of the 49% equity exception, reflected a significant shift in agency policy that was without adequate rationale and was, therefore, arbitrary and capricious; and (iii) the rule violates Omnipoint's right to equal protection under the law. Applying the relevant legal standards to the facts and circumstances of this case, it is likely that Omnipoint will prevail on all three grounds.

A. The Commission's Rulemaking Process Violated APA Procedure.

The unusual abbreviated process that the Commission established to reform the rules in light of Adarand was arbitrary and fell short of APA requirements, leaving the record grossly inadequate to support any revision of the rules.

1. The Absence Of An Opportunity To Make Reply Comments, Despite the Commission's Rules Requiring Such an Opportunity is Arbitrary and Capricious.

The Commission violated its own rules by excluding reply comments from the rulemaking process. The Commission admitted the violation, yet offered no explanation. "Notwithstanding Section 1.415(c) of the Commission's rules, . . . we are not inviting reply comments." FNPRM at ¶ 17. Section 1.415(c) clearly gives interested parties the expectation that, in rulemaking proceedings, "[a] reasonable time will be provided for filing comments in reply to the original comments." 47 C.F.R. § 1.415(c). In light of the critical importance of the Block C auction eligibility rules to all prospective bidders, and the fact that numerous commenters presented proposals, the absence of reply comments left interested parties without an effective "opportunity to participate in the rule making." 5 U.S.C. § 553(c)(3).

The Commission's unexplained failure to follow its own procedures is contrary to law; the Commission must abide by its own rules and regulations. Administrative agencies are bound by the regulations they promulgate even where the statute authorizing them would permit less stringent rules. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959); Nader v. Nuclear Regulatory Commission, 513 F.2d 1045, 1051 (D.C. Cir. 1975). See also Doraiswamy v. Secretary of Labor, 555 F.2d 832, 843 (D.C. Cir. 1976). The proposition that an agency must obey its own rules applies to the procedures used in government-sponsored bidding. North Georgia Bldg. & Const. Trades v. Goldschmidt, 621 F.2d 697, 710 (5th Cir. 1980).

It is apparent from the record that the Commission considered the issue of reply comments prior to releasing the FNPRM.[8] Indeed. Omnipoint itself wrote to the General

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[8] See e.g., letter from Elliot J. Greenwald to William F. Caton, Secretary, Federal Communications Commission, PP Docket No. 93-253, at 4 (filed June 19, 1995) ("[W]e advise caution on the question of dispensing with reply comments . . . .").

Counsel arguing against curtailing reply comments.[9] Nonetheless, the Commission offered no explanation for excluding reply comments, even though it was fully aware that interested parties objected. Such an unexplained departure from its own rules clearly is arbitrary and, as discussed below, contributed to an arbitrary and illegal substantive result.[10]

2. The Commission Lacked Good Cause To Waive The 30 Day APA Public Notice Requirement.

The Sixth Report and Order (at ¶ 60) provides that the rules adopted will take effect immediately upon "publication in the Federal Register," in violation of the APA requirement that "required publication or service of a substantive rule shall be made not less than 30 days before its effective date." 5 U.S.C. § 553(d). The Commission explains that "good cause" exists to create a justifiable exception to the 30-day notice requirement because of the impending July 28 Short Form Application due date. Id.

However, under scrutiny, the Commission's "good cause" turns out to be only "boot strapping" to circumvent statutory rulemaking requirements. The July 28 deadline was set by the Commission itself on the same day that it adopted and released the FNPRM; it was a part of the Commission's decisional process as it initiated this proceeding. In setting a public comment date of July 7, the Commission had to have been aware that it would be literally impossible to provide parties with the required 30-day notice before the Short Form Applications due date . This type of "boot strapping" does not begin to meet the rigorous judicial standard for a "good cause

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9 Letter from Mark J. Tauber to William E. Kennard, General Counsel of the Federal Communications Commission, PP Docket No. 93-253, at 3 (filed June 22, 1995).

10 Vermont Yankee Nuclear Power Corp v. NRDC, 435 U.S. 519, 524 (1978), holds that reviewing courts may not require additional procedures to be followed beyond the limits provided for in the APA in cases where those additional procedures were never a part of the agency process. In this case, however, unlike the situation in Vermont Yankee, the agency, not a court, capriciously changed the rulemaking process by expunging the right of reply contained in its own rules without any explanation.

exception" to the APA requirement. Ngou v. Schweiker, 535 F. Supp. 1214, 1216-17 (D.D.C. 1982); Rowell v. Andrus, 631 F.2d 699, 704 (10th Cir. 1980); United States v. Gavrilovic, 551 F.2d 1099, 1106 (8th Cir. 1977); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972).

Moreover, the Commission's justification of the need for expedition -- to reduce the "head start" Blocks A and B PCS licensees have over Block C licensees, Sixth Report and Order at ¶ 8 -- is contrary to the Commission's own repeated treatment of this issue. In fact, the wireless marketplace "head start" given to Blocks A and B licensees has been considered several times by the Commission and, at each juncture, it decided that "head start" issues were secondary to other policy objectives. In the auction rulemaking process, it decided, and affirmed on reconsideration, that the Block A and B auction would proceed before Block C auction.[11] After the rulemaking process, prospective Block C licensees twice argued that the "head start" issues warranted the deferral of A and B Block license grants, and twice the Commission rejected this argument.[12] In its most recent decision on the "head start" issues, the Commission made it clear that "our decision does not turn on a particular timetable or date for the C block auction." Recon. Order at ¶ 28. After four times denying it, the Commission is estopped from resurrecting the "head start" issues for the convenience of disregarding APA requirements. It is inconceivable that the additional 25 days mandated by the 30 day rule is somehow now an extreme delay.

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11 Fifth Report and Order, 9 FCC Rcd. at 5547; Fourth Order on Reconsideration, 9 FCC Rcd. 6858, 6863 (1994).

12 Deferral of Licensing of MTA Commercial Broadband PCS, Order, PP Dkt. No. 93-253, ET Dkt. 92-100 (WTB, released April 12, 1995), aff'd on reconsideration, In the Matter of Deferral of Licensing of MTA Commercial Broadband PCS, Memorandum Opinion and Order, DA 95-1410 (WTB, released June 23, 1995), ("Recon. Order").

B. The Commission Failed To Explain Adequately Its Departure From The Limited Application of the 49% Equity Exception.

In setting aside Block C licenses for entrepreneurs, the Commission's overarching intent was to design a license allocation scheme that would allow competitive bidding between smaller entities (including small businesses, minorities, and women) and exclude large companies from overwhelming the competition for these licenses. Fifth Report and Order, 9 FCC Rcd. 5532, 5584-88, ¶¶ 118-127 (1994). This design was justified as necessary to meet the Commission's statutory obligations to promote economic opportunities for those groups historically left out of the telecommunications field and to advance the dissemination of licenses among a wide variety of applicants. 47 U.S.C. §§ 309(j)(3)(B), 4(C)(ii) & (4)(D). On the basis of the record before it, the Commission specifically determined that it was necessary to exclude large entities from the bidding process:

> We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies . . . . If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business.

Fifth Report and Order, 9 FCC Rcd. at 5585, ¶ 121.

In conjunction with the band plan for entrepreneurs, the Commission's orders consistently reflected a balanced approach toward the equity and attribution limits for large, non-qualifying entities in Block C entrepreneurs. On one hand, the Commission recognized that smaller companies often rely on the resources of larger entities and must offer minority equity positions to them. On the other, the Commission's rules also reflected a concern that excessive investment and control by a large entity should, at some point, disqualify the entrepreneur-applicant.[13]

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13 See, e.g., Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403, 436, ¶ 59 (1994).

For these reasons, the Commission created an exception to the attribution rules that permitted a non-qualifying investor to own no more than 25% of the applicant's equity. This threshold was adopted because "the 25% limitation on equity investment interest will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps." Fifth Report and Order, 9 FCC Rcd. at 5601-02, ¶ 159 (1994).

The Commission also concluded, however, that, due to racial and gender discrimination, women and minority entities faced additional and "especially acute problems" in attracting necessary capital as compared to other similarly-situated companies.[14] To offset this discrimination, the Commission adopted an approach that permitted minority- and women-owned applicants to sell an additional 24.9% equity to a single large investor, thus increasing the attribution threshold for these categories of applicants from 25% to 49.9%.

In the face of Adarand, the Commission has decided not to defend its existing minority and gender preference program for Block C. Sixth Report and Order at ¶ 11; FNPRM at ¶ 8. Yet, despite that, and the fact that the Commission had previously specifically identified the 49% equity exception as one adopted solely to aid minorities and women, the Commission has also decided not only to retain this option, but to expand its availability to all entrepreneurs. The Commission's rationale is that, by so expanding the option, it becomes race-neutral, but still "preserv[es] existing business relationships formed in reliance on our prior rules." Sixth Report and Order at ¶ 16; FNPRM at ¶ 16.

The Commission's decision to retain and expand the scope of the 49% equity exception is arbitrary and capricious in two respects. First, it fails, either adequately or at all, to explain why the Entrepreneurs Band has been changed so radically in its entirety. For twelve months, the

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14 Fifth Report and Order 9 FCC Rcd. at 5602, ¶ 160.

rules prevented large entities from owning more than 25% of any applicant except for the express purpose of helping reverse prior race and gender discrimination. Now, large entities can own 49% of *every* applicant and *every* license. Nowhere in the Fifth Report and Order, on the basis of the record before it, did the Commission find that these entities had access to capital problems that warranted the extension of the 49% equity exception to them.[15] In the Sixth Report and Order, however, the Commission reverses its position. Omnipoint is not aware of any new evidence in the record created by the FNPRM, nor does the Commission cite to any, that indicates that non-minority and male-owned firms are now in need of the 49% equity exception.

Any unexplained shift in Commission policy, not supported by the record, clearly constitutes arbitrary and capricious decision making. The APA requires that an agency thoroughly and carefully articulate changes in policy and substantive rules. See People of the State of Cal. v. FCC, 39 F.3d 919, 925 (9th Cir. 1994). See also Macon County Samaritan Mem. Hosp. v. Shalala, 7 F.3d 762, 765-66 (7th Cir. 1993), quoting, Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983)); Office of Communication, Etc. v. FCC, 560 F.2d 529, 532 (D.C. Cir. 1977). The Sixth Report and Order does not evidence any of this.

Second, the extension of the 49% equity exception undermines the Commission's earlier rationale for the rule -- providing an extra benefit for women and minorities vis-a-vis other applicants. When the rationale for a rule no longer exists, the Commission is bound either to rescind the rule or provide new public interest justification for it. Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1973); Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992). The only justification offered by the Commission is expedition. Sixth Report and Order at ¶ 16, which it had rejected on four earlier occasions. But the Commission could just as easily have achieved

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15 Fifth Report and Order, 9 FCC Rcd. at 5601-02.

expedition by requiring all firms to be limited to the 25% rule, thereby preserving the purpose of the Entrepreneurs Band. See p. 3, supra. On this occasion, as Omnipoint argues below, that justification only emphasizes the race- and gender-based nature of the expanded rule.

C. The Preservation Of The 49% Equity Exception Violates the Fifth Amendment of the U.S. Constitution.

While the Commission purports to make its rules facially race neutral, the new rules, and the context in which they were promulgated, reveal an intent to discriminate on the basis of race and gender. In such cases, while the effects of discrimination are implicit, they are still reviewed under the same degree of judicial scrutiny as cases involving explicit race-based classifications. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 264-68 (1976); Hunter v. Underwood, 471 U.S. 222 (1985); Washington v. Davis, 426 U.S. 229, 241-42 (1975); Hernardez v. New York, 500 U.S. 352, 359-60 (1991); See also Guinn v. U.S., 238 U.S. 347 (1915).[16]

Under Arlington Heights, a facially race-neutral statute or regulation must be invalidated on equal protection grounds if it is shown to have a "racially disproportionate impact" and a "racially discriminatory intent or purpose." Arlington Heights, 429 U.S. at 265. With respect to intent or purpose, the Court explained that a petitioner need not prove that discrimination was the primary intent of the agency, but "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified." Id. at 265-66. That proof, inter alia, may take the form of "a clear pattern [of agency action] unexplainable on grounds other than race . . .the historical background of the decision . . . [t]he specific sequence of events up to the challenged decision . . . or [d]epartures from the normal procedural sequence

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16 The Adarand Court recognized that there can be "laws that, although facially neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." Adarand, 115 S. Ct. at 2105.

. . . ." Id. at 266-68. Analysis of the Sixth Report and Order in light of these factors clearly reveals the Commission's discriminatory intent and motive.

A clear pattern and historical background of racial preference surround the 49% equity exception. From its inception, it was justified as a measure designed exclusively for minorities and women. See pp. 3-4, supra; Fifth Report and Order, 9 FCC Rcd. at 5602. The Sixth Report and Order only confirms that. While the Commission decided that it would not justify the explicit preferences in the face of Adarand, i.e., that it would not attempt to make a "strict scrutiny" showing, the 49% equity exception remains. Sixth Report and Order at ¶ 2.[17]

The Commission initially unveiled its intent in the FNPRM that proposed expansion of the 49% equity exception. In each paragraph of the FNPRM discussing the Commission's tentative conclusion, the purpose of preserving minority and women business deals struck under the rubric of the former minority and gender-based preferences is explicit:

> We tentatively conclude that this proposed rule change would cause the least disruption to existing business relationships formed in anticipation of the C block auction that was premised on the use of this particular equity structure. Our proposed rule change enables minority- or women-owned businesses to retain their 50.1/49.9 percent equity structures . . .
>
> * * *
>
> [W]e view this as the best approach to preserve many of the existing business relationships that have been formed, including those of women and minorities. We think this approach would be the least disruptive and would allow many women and minority applicants -- both entrepreneurs and small business -- to proceed.
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> * * *

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17 Cf., Adarand, 115 S. Ct. at 2113. "[T]he point of strict scrutiny is to 'differentiate between' permissible and impermissible use of race," even in cases of apparently "benign" discrimination. If the Commission is unwilling to face a strict scrutiny challenge, then it should also be unwilling to allow race to be a factor in the decisional process.

> [W]e, nonetheless, intend to continue to request bidder information on the short-form filings as to minority- or women-owned status. We tentatively conclude that such information will assist us in analyzing the applicant pool and the auction results to determine whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses as directed by Congress.

FNPRM at ¶¶ 15, 16, 17.

The Commission's adoption of the expanded 49% equity exception in the Sixth Report and Order, exactly as it had proposed in the FNPRM, is no less explicit:

> [W]e . . . want the maximum number of existing business relationships formed under our prior rules and in anticipation of the Block C auction -- including those of women and minority applicants -- to remain viable.
>
> * * *
>
> [R]etaining the Control Group *Minimum 50 Percent Equity Option* should help to preserve existing business relationships formed in reliance on our prior rules. . .

Sixth Report and Order at ¶¶ 1, 16. By definition, the only possible existing 49% equity exception business relationships are those with minority- and women-owned businesses.

Perhaps the most significant indicia of the Commission's discriminatory intent is the absurdly short timetable chosen by the Commission for non-minority, male-owned applicants to attempt to implement their new eligibility for the 49% equity exception. For minority- and women-owned entities, the 49% exception has been in place since the release of the Fifth Report and Order on July 15, 1994. In contrast, the Sixth Report and Order makes this same option available to non-minority entities for the first time on July 18, 1995 -- only eight business days before all applicants are required to file Short-Form Applications.

It is hard to imagine a more blatant discriminatory act, other than an explicit racial classification itself, than for an agency to provide members of one race or gender over a year to pursue financing with two equity options for investors and then, with the discretion to choose

any plan of action and any application deadline, to permit members of another race just eight business days at the end of the negotiating cycle to take advantage of the same options. As a practical matter it will be virtually impossible for non-minority applicants to seek out 49% equity investors, negotiate the terms of the partnership or investment, and then draft and sign binding legal agreements in eight days. See attached Affidavit of Douglas G. Smith at ¶ 4 ("Smith Affidavit").

The Commission purposely created this unreasonable timetable fully aware that non-minority applicants will not reasonably be able to pursue and take advantage of this equity option. In its July 7 comments, Omnipoint raised this issue with the Commission and requested that, if the scope of the 49% equity exception were to be expanded, the Commission allow parties a reasonable time to take advantage of their new eligibility. In the Sixth Report and Order the Commission completely ignored this issue.

Moreover, the fact that minority applicants have had more than a year head start over non-minorities means that the large, non-qualifying investors interested in a pre-auction 49% investment that have already finalized (or nearly finalized) their deals had to have done so with minority- and women-owned firms, leaving non-minorities with fewer remaining opportunities under this scheme. The Commission may have removed the words "minority" and "women" from its regulations, but, in creating an impossibly short timetable for non-minority applicants, it has effectively preserved the *status quo ante* of minority and gender advantages.

Finally, the highly unusual rulemaking process leading to the Sixth Report and Order and the Commission's unexplained departure from established procedure makes the decision suspect. As already described, contrary to its own regulations, the Commission offered no opportunity for reply comment (see pp. 7-8, infra), inexplicably broke with prior policy rationales carefully laid down (see pp. 9-12, infra), and provided the public only eight days, instead of the required 30, to receive, review, and react to the new rules (See pp. 8-9, infra). All of these irregularities are consistent with the purpose of implicit discrimination. They are explainable only as an effort to

preserve minority preferences secured under the former race-based rules. Expedition by itself would have dictated that the Commission pursue other alternatives, either reducing all eligible applicants to 25% or requiring existing 49% owners to divest down to 25% after the auction if they won.

II. Omnipoint Will Suffer Irreparable Injury From The Commission's Arbitrary and Racially Discriminatory Actions.

Omnipoint will suffer irreparable injury if the expanded 49% equity exception adopted in the Sixth Report and Order is permitted to take effect. As a matter of law, a violation of equal protection rights constitutes a harm that cannot be compensible after the auction, and therefore, the incidence of harm should be prevented by this Court. In addition, participation in an auction is a unique event; the loss of opportunity to acquire licenses cannot be remedied after the auction by monetary compensation.

A. As A Matter Of Law, Omnipoint Will Suffer Irreparable Injury.

The Fifth Amendment of the U.S. Constitution provides Omnipoint with equal protection rights that will be irreparably harmed if the 49% equity exception is not stayed. The violation of a constitutional right may by itself amount to irreparable injury for purposes of determining whether injunctive relief is appropriate. See Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion).[18] At least two federal courts have held that a violation of a bidder's equal protection rights through a race-based bidding scheme constitutes an irreparable injury. Milwaukee County

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18 In a series of decisions concerning the standing of a plaintiff to challenge discriminatory treatment, the Supreme Court has held that the injury caused by the denial of equal protection is not to be measured in solely economic terms. Discriminatory bidding rules cause "injury in fact" to bidders who are not eligible for preferred treatment even if the victims cannot show that they would have been the low bidders in a fair auction. Northeast Florida Chapter of the Association of General Contractors of America v. City of Jacksonville, 113 S.Ct. 2297 (1993); Harris v. McRae, 448 U.S. 297, 322 (1980).

Pavers Ass'n v. Fiedler, 707 F.Supp. 1016, 1031-32, modified, 710 F.Supp. 1532 (W.D. Wis. 1989); Central Alabama Paving, Inc. v. James, 499 F.Supp. 629, 639 (M.D. Ala. 1980) ("The alleged harm that these plaintiffs will suffer . . . is the deprivation of constitutionally protected rights of equal protection. The Court is of the opinion that these rights are so fundamental to our society that any violation thereof will cause irreparable harm irrespective of the financial impact. See A Quaker Group v. Hickel, 421 F.2d 1111 (D.C Cir. 1969) . . ."). Other courts have recognized that bidding rules which violate a bidder's equal protection rights may constitute irreparable harm. General Building Contractors Association, Inc., v. City of Philadelphia, 762 F. Supp. 1195, 1211 (E.D.Pa. 1991); M.C. West, Inc. v. Lewis, 522 F.Supp. 338, 341 (M.D. Tenn. 1981).

If the auction is allowed to proceed as planned, Omnipoint will suffer irreparable injury in the form of a lost opportunity to compete on an equal basis with other bidders. Omnipoint's equal protection rights will be violated as soon as the July 28 filing deadline occurs, and money damages will not undo the constitutional harm caused by the discriminatory bidding scheme even if Omnipoint manages to win a license despite the unlawful bidding rules. Further, this is the only 30 MHz auction available to smaller firms such as Omnipoint.

B. The Auction is a Unique Event, And Omnipoint Will Suffer Irreparable Harm To Its Business Unless It Can Participate On An Equal Basis With Other Applicants.

Minority and women-owned competitors in the Block C auction will have had over twelve months to exploit the extraordinary 49% financing option, an advantage that would be difficult to quantify and compensate in money damages after the fact. The July 28 filing deadline *permanently* prevents Omnipoint and all other non-minority and non-women owned firms from ever obtaining investments with any investor in any of the "existing" 49% deals that the FCC is trying to preserve. Only by staying this exception will all bidders be placed on the same level. The granting of the equal protection claim is magnified by the fact that Omnipoint and other bidders who are unable to exploit the 49% equity structure during the allotted 8

business days will suffer serious economic harm as a consequence of the advantage conferred on minority- and women-owned entities. See Constructors Association of Western Pennsylvania v. Kreps, 573 F.2d 811, 820 n. 33 (3rd Cir. 1978)

What is at stake here is Omnipoint's ability to acquire Block C licenses for the foreseeable future. These are the *only* 30 MHz PCS licenses available to smaller businesses that the FCC will ever auction. It is critical for Omnipoint to have a fair opportunity to obtain these licenses; denial of this opportunity in no way constitutes "mere" economic injury. See Bath Industries, Inc., v. Blot, 427 F.2d 97, 112 (7th Cir. 1970); Northern Natural Gas Co. v. U.S. Dept. of Energy, 464 F. Supp. 1145, 1155-58 (D.Del. 1979).

III. A Stay Of the 49% Equity Exception Will Not Cause Harm To Other Parties.

Obviously, entities that plan to claim eligibility under the 49% equity exception would be impacted by a stay. However, these entities are in a position to re-negotiate the terms of their equity structure. Unlike entities that have never been eligible for the exception, these entities, by definition, have an existing relationship with a single large investor. Therefore, they need only to reform their existing equity structures to meet the 25% equity exception. This adjustment can be accomplished by reducing the passive investor's equity interest by 24% and converting that equity portion into debt. If the Commission finds that eight days is not enough time for this re-negotiation, it is entirely within the agency's power to provide additional time before or after Short-Form Applications are due. Indeed, the Commission could provide even more time to adjust down to 25% by simply requiring that existing 49% owners divest down to 25% over several months during or after the auction. A stay before the auction that prevents the participation of 49% equity exception applicants will cause far less harm to all parties than protracted litigation after the auctions are over, with the possibility of court invalidation of the auction results. These auctions are simultaneous auctions of all 493 geographic markets because

the FCC determined that each market's value is inextricably intertwined with every other market. Fifth Report and Order, 9 FCC Rcd. at 5544. Thus, it would be impossible to undo the harm of having to undo specific market outcomes through post-auction litigation. One would have to reauction all of the Block C licenses if even one of the licenses is found to have been won through a violation of equal protection principles.

IV. The Public Interest Favors A Stay Of the 49% Equity Exception.

The public interest favors the grant of this stay because, without it, the Block C auction commencing on August 29 will work an unconstitutional deprivation of equal protection rights. With the requested stay, however, the auction can proceed as scheduled and not violate interested parties' constitutional rights.

Further, a stay will minimize the post-auction litigation that is bound to occur if the 49% equity exception is implemented as planned in the Sixth Report and Order. The absence of legal uncertainty would encourage licensees to invest with more confidence the funds necessary to build out their systems and actually provide service to the public. Rapid deployment of Block C PCS systems will, in turn, promote much needed competition in the wireless marketplace.

CONCLUSION

For the foregoing reasons, Omnipoint requests that the Commission grant its request to stay the 49% equity exception, and the relevant portions of the Commission's Sixth Report and Order, to prevent unconstitutional, irreparable injury to Omnipoint in the upcoming Block C auction.

Respectfully submitted,

OMNIPOINT CORPORATION

By: _____

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Date: July 24, 1995

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AFFIDAVIT

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

I, Douglas G. Smith, being first duly sworn, depose and state as follows:

1. I am President and Chairman of the Board of Directors of Omnipoint Corporation ("Omnipoint"). I have personal knowledge of the matters set forth herein.

2. Omnipoint and its "affiliates," as that term is defined in the rules and regulations (the "Rules") of the Federal Communications Commission (the "FCC"), 47 C.F.R. § 24.720(l), have gross revenues of less than $125 million in each of the last two years, total assets of less than $500 million, and less than $40 million in gross revenues on average for the past three years. Omnipoint is qualified to bid as a "small business" in the upcoming FCC Block C PCS auction presently scheduled for August 29, 1995 and intends to do so.

3. It is my understanding that one of the Rules adopted by the FCC in its July 18, 1995 Sixth Report and Order (FCC 95-301), § 24.709(b)(6), would for the first time permit Omnipoint to offer a 49% equity interest to an entity that would not otherwise qualify as a "small business" or "entrepreneur" under the FCC Rules, without Omnipoint losing its "small business" status and ability to bid in the upcoming Block C auction. However, it will be impossible for Omnipoint to take advantage of this new rule. First, Omnipoint could not possibly locate, negotiate and consummate a 49% equity arrangement with a large, non-qualifying investor within the 8 business days remaining before the July 28, 1995 Short-Form Application filing deadline, or even within the 19 business days before the deposit deadline of August 15, 1995. Such deals require delicate negotiations on a number of issues and usually take several months to complete. The entities that were previously qualified to offer potential non-qualifying investors a 49% equity position have had over a year, since July 15, 1994, the day the FCC released the Fifth Report and Order in PP Dkt. No. 93-253, to strike those deals. Second, because prior to the FCC Rule change, Omnipoint could only offer non-qualifying investors a 25% equity interest, Omnipoint has already offered 25% equity arrangements to investors. A company that chose to use the option that allows up to three 25% owners plus one 10% institutional owner (i.e., 85/15%

structure) has no practical means to try to convert it into the structure of 49/20/30% without disadvantaging all but one of the investors. Third, the FCC's anti-collusion rules make it impossible after July 28th to conduct negotiations with potential 49% investors who have any investments (of 5% or more) in any applicant in any market in which Omnipoint is an applicant on July 28th.

4. For the past eight months, Omnipoint has been actively involved in negotiating for Block C auction financing. All of these negotiations were predicated on the fact that all other firms faced the same 25% structural constraints except those specifically designed to rectify past discrimination against minority- and women-owned firms. The sudden FCC rule change that now allows any large entity to own 49% of any applicant, any bidder, or any license (even post auction) has radically changed the nature of the entire competitive landscape for the Entrepreneur's Band. If it is the policy decision of the FCC to do away with the original premise of the Entrepreneurs Band, then Omnipoint needs time to adjust to this massive policy decision and to restructure its fundraising accordingly. This is impossible to achieve in less than 90 days.

5. I have read the foregoing "Request for Stay." I am familiar with the facts stated therein and they are true and accurate to the best of my knowledge and belief.

Douglas G. Smith

Douglas G. Smith

Sworn to before me this 24 day of July, 1995.

Phyllis L. Quander

Notary Public

My commission expires:

Phyllis L. Quander
Notary Public, District of Columbia
My Commission Expires Jan. 31, 1998

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