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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	PP Docket No. 93-253
Deferral of Licensing of	)	GN Docket No. 90-314
MTA Commercial Broadband PCS	)	

To: The Commission

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PETITION TO DENY
AWARD OF PIONEER PREFERENCE LICENSE
TO OMNIPOINT CORPORATION

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List ABCDE

TABLE OF CONTENTS

Page

SUMMARY ii

BACKGROUND 2

THE STATUS OF OMNIPOINT'S PIONEER'S PREFERENCE LICENSE 4

THIS PETITION TO DENY IS PROPERLY FILED 9

ARGUMENT 10

THE OMNIPOINT PIONEER'S PREFERENCE LICENSE SHOULD BE DESIGNATED FOR EVIDENTIARY HEARING AND SUBSEQUENTLY DENIED 10

A. Omnipoint's Emergency Motion for Stay Constitutes An Impermissible Strike Petition. 11

1. Omnipoint's Petition Could Not Have Been Better Timed to Thwart Potential Competitors in the C Block . . . 12

2. Omnipoint Has Experienced Economic and Competitive Benefit 13

3. Omnipoint Has Acted in Bad Faith 18

4. As a Result of Omnipoint's Actions, There Will Be Fewer Number of Antenna Sites and Other Technical Facilities Available to its Competitors in the New York MTA 19

B. Omnipoint Does Not Hold The Threshold Character Qualifications For License Ownership 20

1. Omnipoint Has Made Contradictory Arguments and Concealed Its True Intentions 21

2. Omnipoint Has Abused the Commission's Processes to Curtail Competition for Block C Licenses . . . 24

C. Denying Omnipoint's License Will Serve The Public Interest 25

CONCLUSION 25

SUMMARY

Omnipoint Corporation, has been conditionally granted a pioneer's preference license to provide Personal Communications Services (PCS) in the New York MTA. After the license grant, however, Omnipoint undertook to delay the beginning of the Block C auction in an attempt to obtain economic advantage in servicing the New York area. By stalling the Block C auction, Omnipoint has caused significant hardship to those entities preparing to compete in the auction and thereafter in the wireless industry.

The primary motivation behind the filing was to delay the Commission's Block C auction and thereby reduce potential competitors. Moreover, the resulting delay affords Omnipoint significant economic and competitive benefit. As the Commission has observed, the Company's delay tactics were instituted in bad faith and intended to "advance its own economic position in the New York market." Accordingly, Omnipoint's filings have been tantamount to a "strike petition" impermissibly abusing the Commission's processes to gain an unfair competitive advantage.

Furthermore, since the pioneer license grant has yet to become final and Omnipoint has not submitted its first installment payment, it is properly the province of the Commission to explore how these colorable deliberate acts of misconduct impacting the company's standing as a licensee. Petitioners thus ask the Omnipoint license be designated for evidentiary hearing and subsequently denied.

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Whitestone Wireless, L.P.; Southern Personal Communications Systems; and Minco, P.C.S. (hereinafter "Petitioners"), by and through the undersigned special counsel and pursuant to §§ 307 and 309 of the Communications Act of 1934 and § 73.3584 of the Federal Communications Commission's ("Commission") Rules, hereby petitions the Commission to designate the license for evidentiary hearing[1], and thereafter deny the final grant of the pioneer's preference license for the Block A Major Trading Area ("MTA") Personal Communications Service (PCS) license in New York to Omnipoint Corporation ("Omnipoint"). Although the Commission conditionally granted the license on December 13, 1994, Omnipoint has yet to pay the agreed purchase price or satisfy any of its construction or operations obligations, and thus, has not obtained a vested interest in the license. Furthermore, Omnipoint has undertaken deliberate actions to abuse the Commission's processes, curtain competition and trample the public interest.

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[1] Petitioner's supportive declarations are appended hereto as Exhibit 1. These declarations establish that Petitioners have standing under Office of Communications of the United Church of Christ v. FCC, 359 F2d 994 (D.C. Cir. 1966). Petitioner also has standing as an injured competitor under Sanders Brothers Radio Station v. FCC, 309 U.S. 470 (1940).

Petitioners were formed to bid on PCS licenses to be auctioned by the FCC and to build and operate PCS systems. Each Petitioner individually has total assets of less than $500 million, and gross revenues of less than $125 million, and thus qualifies to bid as a small business in the FCC Block C PCS auction and intends to do so. See Affidavits of Petitioners, attached. Whitestone Wireless, L.P.("Whitestone") with its principal offices in New York, was established to bid for and win licenses in the C Block auction, particularly for licenses in the Basic Trading Areas ("BTAs") within the New York Major Trading Area ("MTA"). Southern Personal Communications Systems ("SPCS") has extensively studied the PCS industry and planned to bid for licenses in BTAs, including but not limited to, mid-sized markets in New Jersey, New York, and Connecticut. Minco PCS ("Minco") has developed innovative technologies such as the "Wireless Roadside Assistance Service" and planned to seek licenses in many BTAs along the east and west coast. Each of Petitioners has suffered harm as a result of Omnipoint's anticompetitive actions as described herein.

For the reasons set forth below, Petitioners request that the Commission designate the Block A New York MTA pioneer preference license for hearing and ultimately deny the grant of the MTA license to Omnipoint in light of material facts and information presented below.

BACKGROUND

The Commission obtained the right to award licenses for spectrum-based communications services through auctions following Congress' amendment on August 10, 1993 of the Communications Act of 1934. See Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. Section 309(j)(3)(B). The Commission has sought to implement auction rules to award licenses

to provide Personal Communications Services ("PCS").[2] These licenses include three sets of licenses for 30 Mhz spectrum bands. One auction was held between December 5, 1994 and March 13, 1995 for 99 MTA licenses for operations on frequency Blocks A or B. Licenses were granted to the winning bidders in Blocks A and B on June 23, 1995.

The auction for Basic Trading Area ("BTA") licenses in Block C is to be limited to small businesses or entrepreneurs and initially was scheduled to commence in May 1995, just two months following the completion of the MTA auction. However, the Block C auction has been stayed twice by the D.C. Circuit Court of Appeals. Telephone Electronics Corporation v. FCC, Case No. 95-1015 (March, 1995) and Omnipoint v. FCC, Case No. 95-1374, (Stay entered July 27, 1995).[3]

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[2] Notice of Proposed Rule Making in PP Docket No. 93-253, 8 FCC Rcd 7635, 58 FR 53489 (Oct. 15, 1993), (NPRM). In the First Report and Order in PP Docket No. 93-253, FCC 94-32, released February 4, 1994, 59 FR 09100 (Feb. 25, 1994); Third Report and Order in PP Docket No. - 93253, 9 FCC Rcd 2941, 59 FR 26741 (May 24, 1994) (Third Report and Order); Fourth Report and Order in PP Docket No. 93-253, 59 FR 24947 (May 13, 1994) (Fourth Report and Order); Fifth Report and Order in PP Docket No. 93-253, FCC 94-178, 59 FR 37566 (July 15, 1994) (Fifth Report and Order); Sixth Report and Order in PP Docket 93-253, GN Docket No. 90-314, GN Docket No. 93-253 (July 18, 1995).

[3]On September 11, 1995, however, Congress intervened and ordered the Commission to commence the C Block auction by December 4, 1995. The full House Commerce Committee added the following provision in the Budget Act:

> (d) Completion of C-Block PCS Auction.--The Federal Communications Commission shall commence the Broadband Personal Communications Services C-Block auction described in the Commission's Sixth Report and Order in the DP Docket 93-253 (FCC 93-510, released July 18, 1995) not later than December 4, 1995. The Commission's competitive bidding rules governing such auction, as set forth in such Sixth Report and Order, are hereby ratified and adopted as a matter of Federal law."

To inspire technological advancement and rapid deployment of the PCS industry, the Commission authorized "pioneer preference" licenses to be granted to those entities demonstrating significant innovations permitting the delivery of existing and new advanced paging, messaging and telephonic services in a spectrum efficient manner. See, Pioneer's Preference Rules, 8 F.C.C. Rcd. 7692 (1993). Under these rules, four "pioneers" were granted licenses without being subject to mutually exclusive competing applications.[4] Initially, the Commission interpreted the Communications Act as exempting a pioneer preference grantee from paying for that license since no mutually exclusive applications were submitted. See, Pioneer's Preference Review Notice of Proposed Rule Making, citing Pub. L. No. 103-66, Section 6002(a), 8 F.C.C. Rcd. 7692 (1993). However, the Commission and Congress later determined that the pioneers would be required to pay a discounted fee for their licenses.

THE STATUS OF OMNIPOINT'S PIONEER'S PREFERENCE LICENSE

The General Agreement on Tariffs and Trade (GATT) legislation requires any licenses awarded pursuant to the Commission's pioneer's preference program in services utilizing a competitive bidding or auction process to pay 85 percent (85%) of the average price paid for comparable licenses. Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, at 801, 108 Stat. 4809, 5050 (1994), codified at 47 U.S.C. Section 309 (j) (13) (GATT Legislation). That amount may be made in a single lump sum payment or in installments over a period of five years. The GATT legislation directed the Commission to permit guaranteed installment payments over a period of 5 years with payment only of interest on unpaid balances during the

[4] The four "pioneers" awarded PCS licenses were American Personal Communications, Cox Enterprises and Omnipoint for broadband facilities and M-tel for nationwide narrowband facilities.

first two years. 47 U.S.C. § 309 (j)(13)(E)(iii). Payment by the pioneers was to begin no later than the later of (i) 30 days after award of the pioneer's preferences, or (ii) the date of completion of the auction of the comparable licenses. The fair market value of the New York MTA license (estimated at $440 million) was not charged to Omnipoint; instead it is currently to pay approximately $347 million. Omnipoint has yet to make its first installment payment.

Following the passage of GATT, the Commission sought comment on the implementation of the section 309 (j) (13) (c) installment payment provision. Second Report and Order and Further Notice of Proposed Rule Making, ET Docket No. 93-266, 10 F.C.C. Rcd. 4523 (1995). Specifically, the Commission sought comment on whether eligibility for installment payments should be limited to "small business" pioneers only. The Commission proposed that, if a pioneer preference licensee was deemed eligible for installment payments, that company would be able to pay for its preference license in installments under similar terms and conditions as other licensees in that service. See, Pioneer's Preference Review (Third Report and Order), ET Docket No. 93-266, 78 Rad. Reg. 2d (P&F) 37 (June 8, 1995).

Omnipoint commented that the payment terms proposed should be much more liberal for small businesses and entrepreneurs. Indeed, Omnipoint recognized that "small businesses will face extreme challenges in raising capital for license payments, and that small business non-pioneers will compete directly in the service market with small business pioneers." Pioneer Preference Rules, 78 Rad. Reg. 2d at 41. Omnipoint sought a five-year deferred installment payment plan for small business pioneers whereby the company would only be obligated for a single payment at the end of five years. Omnipoint maintained that it should be allowed to focus

its resources on the cost of build-out and continued research and development early in its license term.[5]

Omnipoint also argued that a small business pioneer (like itself) should be guaranteed lower installment payments than designated entity licensees to give the small business pioneer an incentive to pursue the risks of innovation. 78 Rad. Reg. 2d (P&F) at 41. The Commission disagreed because the pioneer's preference and designated entity programs were designed to address different goals.[6]

The Commission further rejected Omnipoint's request for a total deferred payment plan for small business pioneers. Recognizing the financial difficulty for small business pioneers to build out their systems during the first five years, the Commission nonetheless held that "if an entity receiving a pioneer's preference would be eligible for installment payments in the auction for that service, the entity could pay for its pioneer's preference license in installments under comparable terms and conditions to similarly situated licensees over a period not to exceed five years." Id. Section 1.402(g) provides:

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[5] Section 309(j)(13)(c) provides that the Commission shall require pioneer's preference grantees to pay the sum required by the GATT payment formula either in a lump sum or in guaranteed installment payments over a period not to exceed 5 years.

[6] The Pioneer's preference program was designed to reward a provider for those innovations contributing to a new or existing service, while the designated entity program was intended to "promote economic opportunity and competition by disseminating licenses among a wide variety of applicants and to increase participation in spectrum-based telecommunications services by entities that lack access to substantial amounts of capital and that face economic disadvantages in obtaining licenses in a competitive bidding environment, such as small businesses." 78 Rad. Reg. 2d (P&F) at 41. The key distinction between the two licensees is that a pioneer is conditionally guaranteed a license in the service (provided it meets numerous qualifying standards) and a designated entity (ie. minority or women-owned) is not. Id.

> In services in which licenses are awarded by competitive bidding, a pioneer that qualifies as a designated entity will be eligible for installment payments under the same terms and conditions as other designated entities in that service, except that in all services the pioneer's payments must be completed within a five year period that will begin 30 days after the auction for comparable licenses has concluded or 30 days after the pioneer's license grant becomes final, whichever is later.

The future payment of pioneer's preference licenses may generate as much as $701,780,374 to the United States Treasury. Of the three preference grantees, Omnipoint Corporation, Cox Communications, Inc., and American Personal Communications, L.P., Omnipoint was assessed the largest fee totalling $347,518,309, since the New York MTA is the nation's most populated market. Omnipoint was granted the 95 million dollar discount for its development of equipment that utilizes advanced techniques that will facilitate the continued development and implementation of PCS services and technologies. 1995 FCC Lexis 1692 (Appendix).[7] In the Matter...of Initial Authorizations in the Broadband Personal Communications Service, 10 F.C.C. Rcd. 1101; 76 Rad. Reg. 2d (P&F) 1174 (December 13, 1994) (Omnipoint Authorization Order).[8] Specifically, in addition to all other qualifications

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[7] WirelessCo., L.P. comprised of Sprint Telecommunications, Inc., Cox and Comcast acquired the Block B license for the New York MTA during the auction for $442,712,000. 1995 F.C.C. Lexis 1731. See list of MTA winners and prices paid by market for bidders and pioneers.

[8] Petitions to deny Omnipoint's application were filed by Bell Atlantic, ACT and Cablevision Systems Corporation on September 26, 1994. Those petitions, however, were rendered moot by the enactment of the GATT Act. See Omnipoint Authorization Order, 76 Rad. Reg. 2d (P&F) 1174; see also Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 94-304, Memorandum Opinion and Order, 9 F.C.C. Rcd. 1. The instant pleading is, of course, not moot because it is based upon Omnipoint's individual actions which occurred since GATT was adopted.

required of a Commission licensee, the application of Omnipoint for a pioneer's preference license was granted subject to the following conditions:

> 1. This authorization requires that Omnipoint Communications, Inc. shall construct a 30 Mhz broadband Personal Communications Services system on Frequency Block A (1850-1865 Mhz/1930-1945 Mhz) in the New York MTA that substantially uses the design and technology upon which the pioneer's preference award to Omnipoint Communications, Inc. was based.[9] This condition expires upon meeting the five-year build-out requirement in 47 C.F.R. §24.203(a);
>
> 2. This authorization requires that Omnipoint Communications, Inc. shall retain control of the license for at least three years from the initial license grant date or until the grantee has met the five-year build-out requirement of 47 C.F.R. § 24.203(a);
>
> 3. This authorization requires that Omnipoint Communications shall pay to the United States Treasury an amount equal to eighty-five percent (85%) of the adjusted value of its license calculated in accordance with Section 801 of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Title VIII, 105 Stat. 4809 (enacted Dec. 8, 1994) (to be codified at 47 U.S.C. § 309(j)(13)) and with a subsequent order specifying payment procedures and amounts thirty (30) days after this Memorandum Opinion and Order and the order granting Omnipoint Communications a pioneer's preference become final orders, that it, the orders are no longer subject to administrative reconsideration or judicial review, appeal, or stay.

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[9] Omnipoint's lack of compliance with this and other conditions has been asserted by other parties in other pleadings and should also be investigated at the hearing requested herein. For instance, Bell Atlantic argued that Omnipoint was unqualified financially to hold the New York MTA license. See Petition to Deny of Bell Atlantic Personal Communications, Inc., In the Matter of...Application of Omnipoint Communications for Initial Authorization, at p.5 (September 26, 1994). Bell Atlantic further alleged that Omnipoint did not provide the requisite technical information to determine whether it will "substantially use" the technologies upon which the preference was based since its application contained no technical description whatsoever of the Omnipoint system, nor a description of the services Omnipoint intends to provide. Bell Atlantic Petition to Deny at 15. Finally, Bell Atlantic challenged the award to Omnipoint of a preference license in the New York MTA rather than the smaller BTA - sized license which Omnipoint originally had requested. Id.

Omnipoint Authorization Order at 8.

On July 5, 1995, the three preference licensees APC, Cox and Omnipoint intervened in Freeman Engineering Associates v. F.C.C. No. 95-1185 (filed March 30, 1995) in the United States Court of Appeals for the D.C. Circuit challenging, among other issues, the calculation of payment of the pioneer license fees, the terms of the installment payments, and the requirement for payment of a license fee at all. That case is pending before the Court[10] and thus the pioneer licensees' obligation to make a payment is delayed until the case is resolved.

THIS PETITION TO DENY IS PROPERLY FILED

The Commission's Rules permit a party to contest the filing of an application for a license to operate on a specified frequency by filing a "petition to deny" the application. See, Communications Act of 1934 § 309. Pursuant to § 309(d) of the Act, the Commission shall conduct a two-tiered analysis of petitions to deny. First, the threshold test is whether Petitioners raise specific allegations of fact sufficient to show that the grant of the application to Omnipoint would be "prima facie inconsistent with" the public interest. Second, Petitioners must raise "substantial and material questions of fact" under § 309(d)(2) such that a hearing would be required. See In re Applications of USA Mobile Communications, Inc. II and Paging USA, Inc., 7 F.C.C. Rcd. 4879 (July 31, 1992); see also Pass Word, Inc., 61 F.C.C. 2d 410 (1976).

[10] The other petitioners in the case are Pacific Bell, Bell Atlantic Personal Communication, Inc., Advanced Cordless Technologies, Inc., Cablevision Systems Corporation, Suite 12 Group, Paging Network, Inc. and QUALCOMM, Incorporated. Intervenors' initial briefs are due on November 27, 1995 and final briefs are due January 24, 1996. Oral argument is scheduled for February 23, 1996. See Clerk's Order to schedule oral argument [133679-1] (July 5, 1995)

As more completely demonstrated below, Petitioners raise substantial and material questions of fact concerning Omnipoint's deceitful, anticompetitive conduct that establishes a case that the company has acted in a manner inconsistent with the public interest. This pleading was triggered by newly discovered evidence surrounding Omnipoint's Emergency Motion for Stay. Thus, Petitioners were unable to develop full information as to Omnipoint's character qualifications until after the statutory period for filing. Indeed, it is recently that Omnipoint has showed its true colors and has subverted and abused the Commission's process contrary to the public interest. Omnipoint has yet to satisfy the conditions imposed by the Authorization Order and thus its rights have not vested. Therefore, the window for contesting the conditional grant of the license remains open, particularly in light of information set forth herein.

ARGUMENT

I. THE OMNIPOINT PIONEER'S PREFERENCE LICENSE SHOULD BE DESIGNATED FOR EVIDENTIARY HEARING AND SUBSEQUENTLY DENIED

The Commission has made clear, and the Communications Act confirms, that in addition to judging the threshold qualifications of a PCS applicant, the Commission must affirmatively find that a grant would serve the "public interest, convenience, and necessity" before issuing a PCS license. See Order, Application to Provide Broadband PCS, File No. 00002-CW-L-95; Call Sign KNLF205 at ¶ 9 (adopted and released June 23, 1995); Communications Act §§ 309(a), 309(d)(2). It is fundamental to the system of licensing that the Commission know the character of whom it has licensed. See Lorain Journal Company v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied sub nom. WWIZ, Inc. v. FCC, 383 U.S. 967 (1966).

A disqualifying issue must be designated where an applicant has concealed material facts so as to obtain from the Commission a benefit not otherwise available. See, e.g., Northhampton Media Associates, 3 F.C.C. Rcd 5164, 5170-71 (Rev. Bd. 1988), review denied, 4 F.C.C. Rcd 5517 (1989). "Applicants before the Commission are held to a high standard of candor and forthrightness." WHW Enterprises, Inc., 753 F.2d 1132, 1139 (D.C. Cir. 1985). As the court in WHW Enterprises recognized, "[t]he Commission must license more than 10,000...stations in the public interest, and therefore relies heavily on the completeness and accuracy of the submissions made to it." Id., citing RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) ("RKO"). Thus, "applicants... have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." WHW Enterprises, 753 F.2d at 1139, quoting RKO, 670 F2d at 232.

The Commission should either dismiss Omnipoint's application and grant this petition immediately, or alternatively conduct an investigation to uncloak all of the material facts behind Omnipoint's intentions, motivations and actions concerning the delay of the Block C auction. In this initial pleading, Petitioners establish their preliminary case; additional information supporting these claims will be gathered through discovery. At this opening stage of the dispute, the Commission recognizes that it would be peculiar to require, as a precondition for a hearing, that Petitioners fully establish those facts which the hearing's purpose it is to discover. See Bilingual Bicultural Coalition on the Mass Media, Inc. v. FCC, 595 F.2d 621, 629-30 (D.C. Cir. 1978). See also Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1975).

A. Omnipoint's Emergency Motion for Stay Constitutes An Impermissible Strike Petition.

Through its "strike application" policy, the Commission forbids the filing of an application designed to obstruct or delay action on a competing application. Kaltrim Broadcasting Co., 45 Rad. Reg. 2d 1080 (1979). That policy also has been applied to petitions to deny. State College Communications Corp., 58 F.C.C. 2d 462 (February 18, 1976). Applying the "strike petition policy" to Omnipoint's recent actions is entirely proper. A party shall not be permitted to abuse the Commission's processes by falsely claiming to act in the public interest while actually seeking to delay proceedings which will have a pro-competitive effect in the marketplace. In re Applications of Radio Carrollton and Faulkner Radio, Inc., 45 Rad. Reg. 2d 1273 (1979). Omnipoint's actions immediately prior to the commencement of the C Block auctions were intended to delay the auction and to weaken potential PCS competitors in the New York MTA. The Commission has long held that such anticompetitive behavior will not be tolerated. Licensees may not place their own private interests over the public interest. See Television Corporation of Michigan, Inc. v. F.C.C., 294 F.2d 730 (D.C. Cir 1961). The Commission's longstanding policy is clear -- those parties filing petitions which are "primarily" intended to delay the Commission's processes will be severely penalized. Radio Carrollton, 45 Rad. Reg. 2d at 1279; see Stockton Mobilephone, Inc. & Michael Lipper, Mimeo No. 6318 (August 13, 1986).

Moreover, colorable allegations of anticompetitive conduct is an area of legitimate Commission concern and should be investigated through a hearing on the merits of the allegations. See, Dubuque T.V. Ltd. Partnership and Sage B/casting Corp of Dubuque, Iowa, 66 Rad. Reg. 2d 88 (1989).

The Commission, in evaluating Omnipoint's actions under the "strike petition policy", must examine four factors: 1) the timing of the petition; 2) the economic or competitive benefit accruing to Omnipoint; 3) whether Omnipoint acted in good faith and 4) questions involving frequency selection or site location. Kaltrim Broadcasting Co., 45 Rad. Reg. 2d 1080 (1979) citing Grenco, 28 F.C.C. 2d 166, 21 Rad. Reg. 2d 560 (1971). These factors, however, are merely instructional, and the Commission must examine the totality of the circumstances to determine whether there exists improper motive or intent sufficient to impose sanctions. Maine Paging, Inc., 6 F.C.C. Rcd. 2189, 2191 (April 22, 1991); Community Service Broadcasting, Inc., 7 F.C.C. Rcd. 5652; 71 Rad. Reg. 2d (P & F) 700 (September 4, 1992).

1. Omnipoint's Petition Could Not Have Been Better Timed to Thwart Potential Competitors in the C Block

The principle motive or purpose of Omnipoint's filing was to obstruct or delay Commission proceedings. There is no doubt that Omnipoint's petition has stagnated the entire C Block auction process. The Commission's MTA license auction was held between December 5, 1994 and March 13, 1995 at frequency Blocks A and B. Licenses were granted on June 23, 1995.

Omnipoint first received its conditional pioneer's preference license on December 13, 1994. Omnipoint filed its Motion for Stay on July 24, 1995. This filing occurred three days prior to the FCC's deadline to receive form 175s for the C Block. It was not a mere coincidence that Omnipoint's petition was filed just as competing potential applicants were finalizing financing arrangements in preparation for bids in Block C. Prior to filing its Emergency Motion for Stay, Omnipoint contacted many other potential applicants to see if any were going to seek

a stay. At the last moment, (after it determined that no other entity was, at that time, prepared to seek a stay) Omnipoint sought a stay.

Evidence that the timing of Omnipoint's petition was more than merely fortuitous is obvious. Omnipoint had to act when it did or lose the opportunity to delay the auction. The timing of the pleading was admittedly intended to halt the proceeding. The need for a hearing and aggressive discovery becomes even more paramount when this timing factor is viewed in conjunction with other indicia of bad faith discussed below.

2. Omnipoint Has Experienced Economic and Competitive Benefit

The second prong of the "strike petition" test examines the extent to which the petitioner will experience economic or competitive benefit from the filing. Grenco, 21 Rad. Reg. 2d 560 (1971). As Omnipoint earlier admitted to the Commission, "small business non-pioneers will compete directly in the service market with small business pioneers." See page 5 supra. As a direct result of the delay of the Block C auction, Omnipoint benefits competitively. Specifically, potential competitors for Block C spectrum have suffered and will continue to suffer irreparable economic harm. Many of those small companies seeking to participate in the Block C auction were formed for the sole purpose of applying for C Block PCS licenses, and their very existence is now threatened by Omnipoint's stay.[11]

Congress charged the FCC with devising policies and incentives to foster competition for PCS licenses by applicants lacking the financial resources of established communications companies. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A)(B), 107 Stat. 312, 392 (1993). The Commission, in fulfilling that directive, determined that the C Block auction should be scheduled and completed as soon as possible following the award of the A and B block licenses. Fourth Memorandum Opinion and Order, 9 F.C.C. Rcd. 6858, 6864 (1994).

The uncertainty and delay caused by Omnipoint's action, however, is leading many investors to cancel conditional commitments, thus making it unlikely that these small businesses will be able to raise the necessary financing to participate in the auction for the larger markets (i.e., New York), timely construct their systems or ultimately compete successfully with

[11] See affidavits from Petitioners, attached.

the A or B Block licensees. See affidavits from Petitioners, attached. The Commission has recognized that the potential C Block participants "face the most formidable barriers to entry, foremost of which is lack of access to capital." Reconsideration Order, 10 F.C.C. Rcd. 403, 405 (November 23, 1994). Each week of delay is costing the small business industry tens of millions of dollars in lost investment and opportunity. Thus, many small businesses and entrepreneurs, who already would have had difficulty competing against the more entrenched telecommunications companies, will not submit bids for Block C licenses in the major markets. As potential strong competitors are driven from the capital intensive New York market, the likelihood that Omnipoint will ultimately have a weak under-capitalized competitor operating on the C Block frequency increases considerably.[12]

Furthermore, the longer the auction is delayed, the more likely Omnipoint will be able to economically leverage a winning bid in the BTAs adjacent to its MTA in New York. Omnipoint is a large company compared to most small businesses competing in the Block C auction.[13] Its pioneer's preference license gives it a $400,000,000 asset (and nearly 100 million in discounted equity) to assist in obtaining capital for the Block C auction.

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[12] Omnipoint already has one major competitor in the New York MTA. Sprint Communications was awarded the B Block license. The timely licensing of a third major competitor in Block C could severely hinder Omnipoint's competitive edge. Omnipoint should be required to compete head-to-head with its competitors without the benefit of delay tactics, anticompetitive devices or marketplace manipulation.

[13] Douglas Smith, President and Chairman of the Board of Directors of Omnipoint, has averred that Omnipoint and its "affiliates" have gross revenues of less than $125 million. Affidavit of Douglas G. Smith dated July 24, 1995 attached to Omnipoint Emergency Motion for Stay. It is estimated that Omnipoint has revenues totalling between 100 - 125 million dollars.

In addition to driving away potential competitors by causing artificial delay of the auction process, Omnipoint has obtained further operational advantages. The Commission recognized that by holding the A and B Block auctions before the C Block auction, the A and B Block licensees would get a head start in providing a "rapid introduction of [PCS] service to the public." Fourth Memorandum Opinion and Order, 9 F.C.C. Rcd. at 6864. Because the C Block winners will be licensed for areas in which the A and B licensees are also located, the C Block winners in the 27 BTAs that comprise the New York MTA will vie against Omnipoint in direct competition. Thus, potential C Block licensees in the New York MTA will lag behind Omnipoint in access to the area's technical resources and customer base.

Specifically, Omnipoint will be able to enter into purchase or lease agreements for prime base station equipment and locations thereby preventing C Block licensees from obtaining access to them. That potentially may prevent C Block licensees in the large New York MTA from serving that geographical area with an efficient system design. Moreover, as Omnipoint's omnipresence in the New York MTA becomes more entrenched, the company can enter into exclusive distribution, resale and other marketing agreements with preferred business establishments in the area. Finally, and perhaps most importantly, by orchestrating its head start in the New York PCS market, Omnipoint will be able to develop a substantial customer base prior to the operation of the C Block licenses.[14] The severe competitive disadvantage C Block licensees inevitably will face is the identical result the Commission's strike petition policy was designed to prevent.

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[14] Omnipoint has begun making definitive basic plans for marketing, branding, system design and site selection which potential C Block bidders are unable to undertake.

The Commission has repeatedly recognized these obstacles created by delaying the C Block and has reiterated that:

> the winners of C Block licenses may be unable to compete effectively with cellular providers and A and B Block licensees, whose superior access to capital and substantial head start will give them a considerable competitive edge.

See, Opposition of Federal Communications Commission to Emergency Motion for Stay, Telephone Electronics Corporation v. F.C.C., No. 95-1015 (filed February 17, 1995) at 17. Even in the instant inquiry, the Commission has stated:

> The C Block licensees already will be entering the market years behind the cellular competitors, and months behind A and B Block licensees. Thus, the C Block winners will be the fifth wireless competitor -- behind two cellular operators and the much larger A and B Block winners -- in most markets. Any further delay as a result of a stay [of the C Block auction] inevitably would put the C Block winners "at a greater disadvantage" vis-a-vis existing wireless service providers. Id. Indeed, such further delay ultimately might foreclose completely the opportunities of some C Block licensees to break into this competitive market.

Federal Communications Commission's Opposition to Emergency Motion for Stay and Emergency Motion for Administrative Stay, Omnipoint Communications, Inc. v. F.C.C., No. 95-1374 (Filed July 25, 1995) at 18.

Because Omnipoint has not yet paid for its pioneer's preference license, and in fact may pay a price almost $100 million dollars less than the actual value, there is also the patent risk that Omnipoint could cross-subsidize its buildout and entry into a market reserved for those small businesses and entrepreneurs not having the technological resources which afforded Omnipoint its preference.

Furthermore, because of the reduced cost and delayed payment of Omnipoint's pioneer's preference license, there exists the very real risk that Omnipoint's rates for users of Block A frequencies will be substantially lower than those of its competitors. The very ability of Omnipoint to stave off the competition should disqualify it from bidding in the auction reserved for smaller competitors. In other words, Omnipoint should not be permitted to leverage its bidding power obtained as a "pioneer" against other truly "small businesses".[15]

3. Omnipoint Has Acted in Bad Faith

Omnipoint must demonstrate that it acted in good faith. See Little Rock Telephone Co., Inc., 50 Rad. Reg. 2d 1535 (1982). Here, Omnipoint attempts to position itself as the champion for the interests of other C Block PCS applicants. The company argues that the 49% equity option should not be extended to all small business entrepreneurs because such a modification would "disempower all entrepreneurs" and push the limits of control toward impermissible levels. Letter from M. Tauber and M. O'Connor, Omnipoint Counsel, to the General Counsel of the FCC , June 22, 1995 at 2. Nonetheless, Omnipoint has not indicated that it will seek to take advantage of the option and also hopes that competitors will not. Omnipoint's motives are not to be the Commission's watchdog to assure that impermissible shams or fronts are prevented in the C Block auction. On the contrary, the company is convinced that by delaying the C Block auction, it will gain significant competitive advantage

[15] Omnipoint has layered an insidious web to stifle potential competitors. The company argues emphatically against the 49% equity option alleging that the potential benefit to minority-owned businesses will cause it to be unable to compete on equal ground. Unfortunately, the result of Omnipoint's actions effectively preclude the meaningful participation of minorities in the auction process. Moreover, it would also preclude full participation of non-minority and male applicants as well. The result of Omnipoint's actions would limit competition in the Block C auction wherein the Commission sought, as its ultimate goal, the encouragement of robust competition.

in the New York MTA. In fact, the Commission itself has come to the conclusion that Petitioners now assert. In its brief on the merits before the D.C. Circuit, the Commission concluded:

> ...that Omnipoint raised its equal protection argument [and sought a stay of the auction] not out of any actual desire to take advantage of the 50.1% option or on account of a genuine belief that the Commission was treating white males unfairly, but in order to delay the auction to advance its own economic position in the New York market. When the Commission had avowedly race conscious rules, Omnipoint did not challenge them, which suggests that its current equal protection attack was primarily inspired by TEC's success in obtaining a stay. And as we have noted, Omnipoint, the holder of the A block license for the New York MTA, is unique among potential C block bidders because it has an incentive to impede the C block auction.

Brief of Federal Communications Commission in Omnipoint v. F.C.C., No. 95-1374 at 43-44 (emphasis added). Omnipoint's argument is a carefully crafted ruse primarily intended to foster its further entrenchment in the New York market.

The significance of the Commission's astute determination regarding Omnipoint's bad faith in this matter should not be diminished. It should now designate Omnipoint for a hearing on its qualifications as a Commission licensee.

4. As a Result of Omnipoint's Actions, There Will Be Fewer Number of Antenna Sites and Other Technical Facilities Available to its Competitors in the New York MTA

The broadband PCS spectrum is extremely valuable, valued at hundreds of millions of dollars per megahertz. Pioneers received a 30 megahertz license to service the potential users in the large New York MTA, Omnipoint must install over 1,000 antennas to assure maximum signal coverage. The company will have to negotiate for each proposed real estate site. The competition for prime locations for land mobile antenna sites is formidable.

Moreover, other radio service providers potentially will vie for the same prime locations. As the direct result of the delay in the Block C auction, there will be fewer competitors for these valuable sites. Furthermore, by virtue of its self-generated head start in New York, Omnipoint has the opportunity to solidify its acquisition of these prime property locations and thereby place the Block C licensees at even a greater disadvantage by causing a delay in construction and inefficiencies in system design.

In applying the four Grenco strike application factors, (timing, competitive advantage, bad faith and technical matters) the Commission should be mindful of the seriousness of Omnipoint's misconduct. Although blatant in its motivation to delay, the company's actions are camouflaged as being in the public interest. Moreover, since Omnipoint has been designated by the Commission as a "preferred" licensee, (and has received a $100 million discount) the company should be held to an even higher standard, and should be expected not to abuse the Commission's process.

With the advent of the public auction process came also the potential to introduce new types of anticompetitive abuses into the marketplace. It is at this early stage of the Commission's auction experience that clear rules and sanctions must be established to discourage licensees from abusing the auction process to gain competitive advantage. Action (or inaction) by the Commission in this matter will set crucial precedent for future auctions. The Commission must investigate Omnipoint's anticompetitive, abusive actions and send a clear signal to the industry that such abuse is intolerable.

B. Omnipoint Does Not Hold The Threshold Character Qualifications For License Ownership

The Communications Act requires an applicant for a communications license to demonstrate certain citizenship, character and financial and technical capabilities. In assessing an applicant's character, the Commission considers a variety of factors especially misrepresentation in pleadings before the Commission. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986). The Communications Act likewise requires licensees to provide truthful written statements to the Commission. See 47 C.F.R. Section 73.1015. When it had "believed that an applicant's general integrity and future reliability were in doubt due to its past misrepresentations or lack of candor, the Commission denied the application before it." In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing 59 Rad. Reg. 2d (P & F) 801, 913, January 14, 1986. The Commission has clarified that misrepresentation "involves false statements of fact," while lack of candor "involves concealment, evasion, and other failures to be fully informative." Nonetheless, both misrepresentation and lack of candor "represent deceit", and deceit is equated with fraud. Id.

1. Omnipoint Has Made Contradictory Arguments and Concealed Its True Intentions

Omnipoint sought and obtained a Stay in the D.C. Circuit Court citing the Supreme Court's decision in Adarand Contractors, Inc. v. Pena, 115 S. Ct. 2097 (1995). Omnipoint Corporation v. F.C.C., No. 95-1374 (D.C. Cir. July 27, 1995). In obtaining the Stay, Omnipoint made blatant misrepresentations before the Commission and the Court in an effort to conceal its true intentions.