

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Deferral of Licensing of)
MTA Commercial Broadband PCS)
)
)

PP Docket No. 93-253
GN Docket No. 90-314
DOCKET FILE COPY ORIGINAL

OPPOSITION OF OMNIPONT CORPORATION TO PETITION TO DENY

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Date: October 4, 1995

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Introduction And Summary

Omnipoint Corporation ("Omnipoint")¹ files this opposition to the Petition to Deny (the "Petition") dated September 21, 1995 of Whitestone Wireless, L.P., Southern Personal Communications Systems, and Minco, P.C.S. (the "Petitioners").² The Petition is improper, unauthorized, and profoundly abusive.³ Any further Commission action on the basis of the Petition would be similarly illegal. Omnipoint urges the Commission to dismiss the Petition.

¹ Omnipoint is the parent company of Omnipoint Communications, Inc. ("OCI"), the PCS licensee of KNL202 (New York MTA).

² While the Petition is grossly out of time and in every way inadequate, Omnipoint has chosen to respond in accordance with 47 C.F.R. §§ 24.830(a), 1.45(a).

³ We also note that the Petition is apparently a prohibited written *ex parte* presentation, in violation of the Commission's rules, 47 C.F.R. § 1.1208(a). The initial licensing application proceeding, FCC File No. 15002-CW-L-94, became "restricted" for *ex parte* purposes on September 24, 1994 with the filing of timely petitions to deny. *See, id.*, at § 1.1208(c)(1)(i)(B). Due to pending litigation at the D.C. Circuit over the licensing order (Advanced Cordless Technologies, Inc. v. FCC, No. 95-1003 (and consolidated cases)), the proceeding remains "restricted" to this day. This opposition is filed in accordance with the Commission's rules allowing a timely response to petitions to deny, and thus it meets a specific *ex parte* exemption, 47 C.F.R. § 1.1204(b)(1). A copy of this pleading and the Petition is this day being delivered to the Commission's Managing Director, in accordance with 47 C.F.R. § 1.1212(c).

Argument

I. Petitioners' Allegations of Impropriety Are Entirely Fallacious.

Petitioners allege that Omnipoint's participation in the rulemaking process leading to the Sixth Report and Order, FCC 95-301, 60 Fed. Reg. 37786 (July 21, 1995), *appeal pending*, Omnipoint Corp. et al. v. FCC (D.C. Cir. No. 95-1374), and its subsequent motion to the D.C. Circuit for stay of certain rules in that order, amount to a "strike petition" and evidence of bad character. Petitioner makes an inordinate number of unsubstantiated allegations, to the effect that "Omnipoint . . . has subverted and abused the Commission's process contrary to the public interest . . ." and that "Omnipoint made blatant misrepresentations before the Commission and the Court in an effort to conceal its true intentions." Petition at 10, 22. Contrary to all of this, Omnipoint's position on the difficult rulemaking issues involved in the Block C auction has been consistent, and it has fully explained to the Commission its objectives on the record. It has in no way concealed some secret agenda.

A. Omnipoint's position on the 49% Equity Exception has been consistent and fully explained in the public record.

All of Petitioners' claims seem to coalesce around a single allegation: "[i]n obtaining the Stay, Omnipoint made blatant misrepresentations before the Commission and the Court in an effort to conceal its true intentions," Petition at 22, and "Omnipoint's deceitful, anticompetitive conduct establishes a case that the company has acted in a manner inconsistent with the public interest." Petition 10. But, the Petition fails to substantiate its highly inflammatory rhetoric. Omnipoint offers the following synopsis of its actions and position before the Commission and the Court to put to rest these allegations. As explained fully below, Omnipoint's actions demonstrate that it has taken a consistent position on the Commission's rulemaking decisions in response to Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), its motive was never to inhibit Block C competition in the New York MTA, and it has never misrepresented or concealed its motives.

Since the release of the Adarand decision on June 12, 1995, Omnipoint has consistently argued to the Commission that (1) the expansion of the 49% equity exception is a bad policy decision and (2) the Commission needs to allow all parties an adequate amount of time to adjust to rule changes. These propositions are fully consistent with one another and Omnipoint has never wavered from them.

In its July 7th comments to the Commission, Omnipoint argued exactly these two points. Omnipoint suggested that the expansion of the 49% equity exception to all applicants was contrary to the goal of keeping large companies out of the Entrepreneur's Band, that the entire purpose of the limited 49% equity rule -- to encourage investment in minority applicants -- was seriously jeopardized by Adarand, and that the expansion of the rule would have devastating unintended effects on all auction participants. It argued that the proposed rule would only help large ineligible companies to participate surreptitiously as investors in the band and that it would hurt bona fide small businesses trying to hold onto three 25% equity passive investors. Because the Commission's rulemaking orders had previously found that 25% equity was generally adequate to attract large passive investors, Omnipoint argued that an expansion of the 49% exception to all applicants was not justified under the record before it.

Omnipoint also noted another possible unintended consequence of the expansion of the 49% equity exception -- "harm [to] minority applicants, as their investors could pull out of existing deals." Omnipoint Comments at 9. This point stands to reason because the Commission's purpose for the limited 49% exception -- as a lure for investment to minority firms -- was eviscerated by the expansion of the rule to all parties. Therefore, some minority applicants may be expected to lose their financing, as was sadly the case with QTEL.⁴ Instead,

⁴ That some minority applicants may be unintentionally harmed in the process does not in any way contradict Omnipoint's equal protection claim later argued to the D.C. Circuit. That argument rests on the propositions that (1) the Commission intended to favor certain minority

(Footnote continued to next page)

Omnipoint recommended that the Commission meet the demands of Adarand and justify its preferences under strict scrutiny, or alternatively, face the realities of Adarand and simply eliminate the 49% equity exception.

Finally, it urged the Commission to give an adequate time for all parties to adjust to rule changes.

Omnipoint takes particular umbrage at the Petitioners' callous allegations that Omnipoint somehow hid its true intentions and objectives from the Commission. In fact, Omnipoint made its position perfectly clear to the Commission and to the public before pursuing judicial relief. Prior to filing the lawsuit, Omnipoint met with Commission staff and the General Counsel's office on *several* occasions to work out the issues and to convey, in unambiguous terms, that it was prepared to go to court over the Commission's disastrous plan. Attached hereto as Exhibit 1 are *ex parte* letters from Omnipoint, placed in the Commission's public files, evidencing that Omnipoint met on two separate occasions with senior staff to the Commissioners and informed them that Omnipoint was seriously considering legal action if the FCC went forward with its then-proposed expanded 49% equity exception. On July 11, Omnipoint met with the General Counsel's office to reiterate that message. *See* Exhibit 1. Prior to this, Omnipoint's *ex parte* contacts reflect its abundant efforts to resolve the dispute through either one of two proposed compromises, *one of which was offered by Commission staff*.

Exhibit 2 hereto contains several more *ex parte* letters reflecting Omnipoint's active pursuit of a compromise with the Commission staff which would have eased the disastrous impact of the 49% equity exception. Finally, on July 13 -- nine days before it sought judicial review -- Omnipoint sent to the General Counsel, and placed in the public file, a letter stating

(Footnote continued from previous page)

interests (not those that were unintentionally harmed) and (2) the Commission's actions would reasonably cause that racially discriminatory effect

that Omnipoint is "seriously considering legal action should the Commission go forward with the expansion of the '49% equity exception,' as proposed. Such legal action would likely involve both APA and Fifth Amendment equal protection claims " *See Exhibit 3*. Once again, Omnipoint strongly urged the Commission to adopt an alternative to the 49% equity exception, *suggested by Commission staff, that would have avoided the court challenge entirely*.

In the Sixth Report and Order the Commission largely ignored Omnipoint's substantive arguments and efforts at compromise. Therefore, one business day after the order was placed on Federal Register notice, Omnipoint filed its Petition for Review and Emergency Motion for Stay with the D.C. Circuit. The substance of Omnipoint's argument to the Court was the same as that raised to the Commission. Omnipoint's primary argument to the D.C. Circuit was that the Commission's expansion of the 49% equity exception was arbitrary and capricious because it represented a significant departure from its precedent in the Fifth Report and Order, 9 FCC Rcd. 5532 (1994) and the Fifth Memorandum Opinion and Order, 10 FCC Rcd. 403 (1994), for which the Commission failed to provide an adequate rationale. Omnipoint also objected to the lack of reply comments and thirty-day notice prior to the effective date of the rules, as required by the Administrative Procedure Act, and as iterated to the Commission in Omnipoint's *ex parte* letters and comments. Finally, Omnipoint argued that the Commission's intentional failure to provide adequate time for non-minority and male applicants to take advantage of the expanded 49% equity exception violated Equal Protection principles of the Fifth Amendment. This argument was raised by Omnipoint in its comments and reiterated to the Commission in its July 13, 1995 *ex parte* letter. Omnipoint's arguments to the Court were not in any way inconsistent with its position in the rulemaking process and, while not required to do so, it had fully informed the Commission of its intentions.

B. Omnipoint Has Not Engaged in a "Strike Application."

Petitioners allege that Omnipoint has violated the Commission's "strike application" policy. Petition at 12. On its face, this allegation is simply erroneous. "A strike application is

an application which is filed to impede, obstruct or delay the grant of a competing application." Little Rock Radio Tel. Co., Inc., 50 RR 2d 1535, 1539 (1982). While Omnipoint has been active in the rulemaking and has brought its case to the D.C. Circuit pursuant to its statutory and constitutional rights, it has simply not filed any competing applications against Petitioners or any other prospective Block C participant, nor is there any application pending to which it could be accused of opposing. *See, e.g.*, USA Mobile Communications, Inc., Memorandum Opinion and Order, 7 FCC Rcd. 4879-80 (CCB 1992) (no substantial or material questions raised where alleged "strike application" was filed before petitioners' application and petitioner supported its claims on "bald and unsubstantiated assertion.>").

Even if considered on the merits, the vague assertions that Omnipoint's motion for a stay amounts to a "strike application" are also unavailing. For example, Petitioner alleges that the timing of Omnipoint's Petition for Review and Motion for Stay at the D.C. Circuit evidences bad motive.⁵ But, this allegation is preposterous given that Omnipoint filed its case at the first available opportunity: only one day after Federal Register public notice of the Sixth Report and Order, in accordance with 28 U.S.C. § 2344 and 47 C.F.R. §1.4(b)(1). *See Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985) ("§ 2344 imposes a jurisdictional bar to judicial consideration of petitions filed prior to entry of the agency orders to which they pertain"). Since it was Omnipoint's contention in the case that the 49% equity exception, as expanded by the order under review, would do it irreparable harm *as a Block C applicant* on and after short-form applications were filed, the stay was intended to prevent that harm -- it was never brought for the

⁵ Further, the fact that five other parties -- New Wave, Central Alabama Partnership, Mobile Tri-States, QTEL, and Radiofone -- all filed petitions for review within days after Omnipoint's filing undermines Petitioners' allegations that Omnipoint was motivated by anticompetitive concerns, and not legitimate rulemaking issues. The fact that these parties also filed suggests that there is substantial controversy in the industry as to the legality of the Sixth Report and Order.

purpose of inflicting delay on others. In fact, allegations of delay are undermined by Omnipoint's many *ex parte* contacts to convince the Commission staff prior to the release of the Sixth Report and Order against adoption of the proposed rule.

Moreover, Omnipoint's extensive efforts at settlement with the Commission, both before and after the stay motion had been granted -- which Petitioners' counsel was involved in, are completely inconsistent with Petitioners' unfounded assertion that Omnipoint's objective was delay. Clearly, Omnipoint's actions demonstrate both its earnest conviction that the expanded 49% equity exception is bad policy and its efforts to *avoid* delay.

In addition, the Court's decisions in the case substantiate that Omnipoint's arguments were anything but frivolous. The D.C. Circuit agreed with Omnipoint's arguments and found that its motion for stay had "satisfied the stringent standards for a stay " Omnipoint Corp. v. FCC, No. 95-1374, Order (D.C. Cir. July 27, 1995). On August 18, 1995, the Court confirmed that Omnipoint's arguments were meritorious, and denied a motion to vacate the stay (which the Commission itself failed to support). Omnipoint Corp. v. FCC, No. 95-1374, Order (D.C. Cir. Aug. 18, 1995). While the Court dissolved the stay on September 28, 1995, even in that decision, one senior member of the D.C. Circuit dissented and, in her separate statement, agreed with Omnipoint's objection to the 49% equity exception. In sum, Petitioners' argument to the effect that Omnipoint used "the Court's process to raise a specious issue, simply to facilitate the delay of the auction," Petition at 25, is not borne out by the Court's review of the issues.

In the same way, Petitioners' allegations that Omnipoint filed its stay motion in order to reap economic and competitive benefit do not measure up to the evidence. Omnipoint already has formidable competitors in the New York market, including two incumbent cellular providers and WirelessCo., and so delaying a future Block C competitor does nothing to shield Omnipoint from competition in the New York MTA. While the Petitioners claim (at 17-18) that Omnipoint obtained an advantage because the stay afforded it access to site locations and other headstart benefits in the New York MTA, the Block C applicant's competitive disadvantage in New York

and throughout the country is the result of the Commission's rulemaking decision to stagger the licensing of broadband PCS entrants, it is not related to the 61-day court stay.⁶ In fact, as a small business like Petitioners, Omnipoint also suffers from the Commission's decision to stagger the Block C auction. Petitioners' argument that Omnipoint gained a net economic advantage by staving off an incremental amount of competition from potential Block C applicants, while the same action deprived it from entering all of the Block C markets outside of the New York MTA, simply defies reason.

C. Petitioners Have Presented No Litigable Character Issues.

As summarized above, Omnipoint has not in any way "made contradictory arguments and concealed its true intentions." Petition at 22. In four separate letters to the Commission, Omnipoint informed the Commission of its grave concerns with the 49% equity exceptions. *See* Exhibits 2 and 3. It explicitly urged the Commission to avert some of the dangers of the expanded rule by adopting either the option suggested by Omnipoint or that proposed by Commission staff. When the Sixth Report and Order was released, it took those same arguments to the D.C. Circuit at the earliest opportunity. While Omnipoint respects that the Commission and others do not agree with Omnipoint's policy positions, there is simply nothing contradictory or deceitful about Omnipoint's continued objection to the expanded 49% equity exception.⁷

Petitioners also allege that Omnipoint's motion for stay exhibits "deceitful, anticompetitive conduct," Petition at 10, and thus demonstrates bad character. As described above, Omnipoint's continuing efforts for resolution of the dispute and its unique position as a

⁶ For the same reason, any economies of scale that Omnipoint may have from acquiring licenses in other markets are a result of the Commission's policy of staggered licensing/auctions.

⁷ Moreover, even if Omnipoint had altered its arguments to the court from those presented to the Commission -- which it did not -- this is not a character issue for which the Commission holds licensees accountable.

Block C applicant completely undermine Petitioners allegations of intentional delay. Omnipoint's motive is and has always been to argue against the 49% equity exception. Further, Petitioners are incorrect as a matter of law when they argue that "colorable allegations of anticompetitive conduct is an area of legitimate Commission concern and should be investigated through a hearing." Petition at 12. In fact, the very Commission precedent the Petitioners cite for this proposition holds just the opposite. In Dubuque TV Ltd. Partnership, 66 RR 2d 88, 89 (1989), the Commission held that allegations of anticompetitive conduct must be supported with an adjudicative determination of a violation of state or federal anti-trust or anti-competition law. Petitioners' failure to do so in this case "is fatal . . . for the adjudicated status is essential to the relevance of a charge of economic misconduct under our basic qualifications criteria." *See also* Character Qualifications in Broadcast Licensing, 102 FCC 1179, 1202 (1985), *recon. denied*, 1 FCC Rcd. 421 (1986).

II. The Petition Should Be Dismissed As Improper and Unauthorized.

The Commission should simply dismiss the Petition. It requests action that is contrary to the statutory mandates of Section 309(j)(13)(E) of the Communications Act, is grossly out of time according to the Communications Act and the Commission's own pleading rules, and is abusive of the Commission's processes. What the Petitioners hope to accomplish by this aberrant request is not apparent.⁸ However, a brief review of the OCI license grant should make clear the outright impropriety and illegality of the Petition.

⁸ We also note that the Petitioners have chosen to file their Petition in a proceeding entitled "In the Matter of Deferral of Licensing of MTA Commercial Broadband PCS," PP Dkt. 93-253 and GEN Dkt. 90-314, that considered whether to stop the issuance of MTA licenses allocated through the MTA auction process. *See Memorandum Opinion and Order*, PP Dkt. 93-253, ET Dkt. 92-100, DA 95-1410 (WTB, released June 23, 1995), *appeal pending*, NABOB, et al. v. FCC, (D.C. Cir. No. 95-1392). It has nothing to do with Omnipoint's license allocated in the pioneer's program. Indeed, Omnipoint's license had been issued prior to the commencement of that proceeding. As the Petitioners well know and the face of the Licensing Order shows, the

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On May 4, 1992, OCI and 55 other companies filed an application for a PCS pioneer's preference pursuant to the Commission's rules, 47 C.F.R. § 1.402. After several rounds of pleadings on the issue, OCI was granted a final preference on December 23, 1993 for the New York MTA. Third Report and Order, 9 FCC Rcd. 1337 (1993); Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd. 7794 (1992).

On February 25, 1994, the Commission invited OCI and the other two broadband PCS pioneer's preference grantees to file applications for their preference licenses. On April 28, 1994, OCI filed its license application and, on August 25, 1994, the Commission announced that it had accepted the application. See, FCC Public Notice, "Common Carrier Public Mobile Services Information, Announcement of Acceptance of Broadband PCS Applications," Report No. CW-94-1 (released Aug. 25, 1994). By September 26, 1994, the final day for timely oppositions to OCI's application, the Commission had received three oppositions, to which OCI fully replied on October 6, 1994.

In December, 1994, the Communications Act was modified to require the Commission to award a pioneer's license to OCI and the other two pioneer's preference grantees and not to entertain challenges to those awards:

the Commission shall not reconsider the award of the preferences in such Third Report and Order, and the Commission shall not delay the grant of licenses based on such awards more than 15 days following the date of enactment of this paragraph, and *the award of such preferences and licenses shall not be subject to administrative or judicial review.*

47 U.S.C. § 309(j)(13)(E)(ii) (emphasis added). Pursuant to the statutory mandate, the Commission granted OCI's pending license application on December 14, 1995, and held that all

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consideration of OCI's license application was taken up in an adjudicative proceeding, FCC File No. 15002-CW-L-94, not in the context of the referenced rulemaking proceeding. Petitioners attempt to create a rulemaking issue, that OCI's license has nothing to do with, is plainly inappropriate.

pending oppositions to the applications were rendered moot by the above-quoted statute. In the Matter of American Personal Communications, *et al.*, Memorandum Opinion and Order, 10 FCC Rcd. 1101, 1102 (1994) ("Licensing Order").

A. The Petition Is Improper Because It Requests the Commission To Act Contrary To The Mandate of Section 309(j)(13)(E) of the Communications Act.

OCI respects that it is a Commission licensee, and that it is obligated to meet the conditions of its license and operate in accordance with the Commission's rules just like any other PCS licensee. It agrees with the Commission's holding that if it "fails to comply with [the] . . . conditions of [its] license[], the Commission has available to it the full range of sanctions, including, for example forfeiture and/or license cancellation." Licensing Order at ¶ 5. However, the Petitioners do not challenge OCI on these matters, rather they request that the Commission reopen the OCI's *application* proceeding, Petition at 9-10, including issues presented in the timely petitions to deny, although they recognize that those issues were rendered moot by GATT. *Compare*, Petition at n. 9, *with, id.*, at n. 8.

The Communications Act expressly forbids the Commission from reopening the *application* proceeding: "the award of such preferences and licenses shall not be subject to administrative . . . review." 47 U.S.C. § 309(j)(13)(E)(ii). As the Commission made clear in the Licensing Order at ¶ 5, "the GATT Act [now codified as cited above] has rendered moot any petitions to deny filed against the applications of APC, Cox and Omnipoint." Petitioners' attempt to reopen the application proceeding is, according to the Communications Act and the Commission's own ruling, impermissible. In short, the Petition is simply not a proper vehicle for challenge of OCI's license because it requests the Commission to act contrary to Section 309(j)(13)(E) and because it fails to demonstrate how OCI is not operating in accordance with its license.

B. The Petition is Unauthorized Because It Was Filed 360 Days After the Filing Window Closed.

As stated above, OCI's application was placed on public notice on August 25, 1994. Petitions to Deny were due on September 26, 1994. 47 C.F.R. § 24.830(a)(4) (petitions to deny application must "[b]e filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application . . .") Therefore, because the Petition was filed on September 21, 1995, it is 360 days late. There is simply no rational reason for the Commission to excuse the Petitioners' obviously inappropriate pleading, and it should not be accepted for filing. Memorandum Opinion and Order, 9 FCC Rcd. 7805, 7807 (1994) (Commission dismisses as untimely a petition for reconsideration filed 73 days after the statutory filing window closed). Even worse, the Petitioners do not seek a waiver of these filing rules. 47 C.F.R. § 1.3.

Consideration of the Petition would also violate Section 309 of the Communications Act. Under Section 309(d)(1), interested parties may file a petition to deny a license application only "prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing."⁹ The statute does not permit the Commission to accept petitions to deny nearly one year *after* that application has been granted. In fact, the statute only permits the Commission to narrow the petition to deny filing window by regulation, so long as that period is

⁹ In this way, the introductory statement at page 1 of the Petition that it is filed pursuant to Section 309 is clearly wrong. Further, Petitioners allegation that they act pursuant to 47 C.F.R. § 73.3584 is also inapposite -- that rule section refers to petitions to deny AM, FM, and TV broadcast license applications. Finally, Petitioners claim that the Petition is filed pursuant to Section 307 of the Communications Act, but that section has nothing at all to do with petitions to deny.

"no less than thirty days following public notice." The Commission simply lacks statutory authority to entertain such a petition.

III. Consideration of the Petition is Contrary to the Public Interest.

The essence of the Petition is that the Commission should punish OCI because its parent, Omnipoint Corporation, brought suit in the D.C. Circuit and obtained a 61 day stay of the 49% equity exception, which caused the Commission to defer the Block C auction short-form filing.¹⁰ However, to punish Omnipoint for seeking relief from the court is contrary to the Communications Act and to fundamental tenets of the Constitution.

Section 402(a) of the Communications Act was enacted expressly to permit the appeal of Commission rulemaking orders by interested parties to the U.S. Courts of Appeal, including the D.C. Circuit, for expert judicial review of the agency's rulemaking orders. As the D.C. Circuit noted nearly 25 years ago, the process of judicial review stems from "an awareness that agencies and the courts together constitute a 'partnership' in furtherance of the public interest, and are 'collaborative instrumentalities of justice.'" Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970) (footnotes omitted), *cert. denied*, 403 U.S. 923 (1971). Petitioners' request asks the Commission to set a course against that partnership by persecuting those who dare to take the Commission's decisions to the courts. In addition, action against Omnipoint would be contrary to Section 402, as *it would deter all Commission licensees from pursuing judicial review*.

Petitioners and their counsel obviously have little regard for the integrity of the judicial review process. For example, the PCS Fund, of which Petitioners Minco PCS and Southern

¹⁰ As the Commission and Petitioners are well aware, the D.C. Circuit lifted the stay on September 28, 1995 and the Commission has announced that the auction will commence on December 11, 1995. *See*, FCC Public Notice, "FCC Sets Auction Date of December 11, 1995 for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band," (September 29, 1995).

Communications are members, offered to the Commission their own "solution" to Adarand and claimed that its adoption would avoid judicial delay because any party with a right to challenge it "would not be timely enough to . . . obtain a stay from the D.C. Circuit." Comments of PCS Fund and NPPCA, PP Docket No. 93-253, at 9 (filed June 19, 1995). Sadly, the Petition represents yet another effort by these parties to convince the Commission to act in a manner designed to thwart the right to judicial process.

However, the right to seek judicial relief is a fundamental constitutional right of all aggrieved parties. *See, e.g., Chambers v. Baltimore and O.R.R.*, 207 U.S. 142, 148 (1907) ("In an organized society [the right to sue] is the right conservative of all other rights, and lies at the foundation of orderly government."); *Wolff v. McDonald*, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."). Further, access to the courts implicates First Amendment rights. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right to petition."). To proceed against OCI's license because Omnipoint took the Commission to court is flatly contrary to these fundamental constitutional values.

To punish Omnipoint for seeking judicial protection of its constitutional and statutory rights is so adverse to the public interest that the Commission and its agents may reasonably be held liable for deprivation of federal rights, under 42 U.S.C. § 1983. *See, e.g., Harrison v. Springdale Water & Sewer Comm'n*, 780 F.2d 1422, 1427-28 (8th Cir. 1986).

Conclusion

For the foregoing reasons, Omnipoint urges the Commission to dismiss the Petition.

Respectfully submitted,

OMNIPOINT CORPORATION

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FEDERAL COMMUNICATIONS COMMISSION

Re: PP Docket No. 93-253; GEN Dkt. No. 90-314; GEN Dkt. No. 93-252
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber, of Piper & Marbury L.L.P., and I met today with Rudolfo Baca, Legal Advisor to Commissioner Quello. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, as articulated in Omnipoint's comments filed in the above-referenced dockets on July 7, 1995. We also expressed our view that several participants are publicly committed to enter the auctions, and that the proposed expansion of the "49% equity exception" would threaten the very purpose of the Entrepreneur's Band.

We expressed our support for the alternative to the proposed extension of the "49% equity exception" that would permit applicants to enter the auction under the "49% equity exception" but then require any auction winners to conform to the "25% equity exception" within a set period of time after the auction.

We also conveyed that Omnipoint is strongly opposed to the 49% equity exception as proposed, and that it is considering court action should the Commission adopt the proposed rule.

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Mr. William F. Caton
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In accordance with the Commission's rules, I hereby submit one original and five copies of this letter, for inclusion in each of the above-referenced docket.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Rudolfo Baca

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

Re: PP Docket No. 93-253; GEN Dkt. No. 90-314; GEN Dkt. No. 93-252
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Mark Tauber, of Piper & Marbury L.L.P., and I met today with Peter Tenhula of the Commission's General Counsel's Office. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, as articulated in Omnipoint's comments filed in the above-referenced dockets on July 7, 1995. A two-page sheet (two copies attached hereto), largely summarizing Omnipoint's comments, was provided to Mr. Tenhula.

As an alternative to the "49% equity option" available to all entrepreneurs, we proposed in the meeting that the Commission permit all applicants to qualify only under the "25% equity option," but allow minority- and women-owned applicants to offer options of an additional 24% to large non-qualifying investors. The Commission could then proceed with the auction and concurrently make the showing necessary to meet the "strict scrutiny" standard; once that showing has been made, the 24% option could be exercised. In this way, existing deals, which seem to be the Commission's primary concern, would not be materially jeopardized, and yet this proposal would not encourage the use of "fronts." We also generally supported the idea of requiring "49% equity

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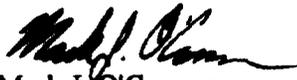
option" auction winners to conform to the "25% equity option" within a set period of time.

In addition, we questioned whether existing deals would really be threatened by an elimination of the 49% equity option, and whether the record evidence supports that existing deals were dependent on the 49% equity option.

Finally, we stated that Omnipoint is strongly opposed to the 49% equity option as proposed, and that it is considering court action should the Commission adopt the proposed rule.

In accordance with the Commission's rules, I hereby submit one original and one copy of this letter for each of the above-referenced dockets.

Sincerely,


Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Peter Tenhula

OMNIPONT CORPORATION

I. The 49% Option Will Encourage The Use Of Fronts Both Pre- and Post-Auction

- The 49% option will undermine the very purposes of the entire entrepreneur's band. The band was meant for minorities, women and small businesses, but this rule change only helps large companies.
- A single 49% partner can push the applicant to the very line of de facto control. Rules should deter applicants from going to the very lower limit of control.
- 25% equity limit allows the applicant to offset investors' demands for control, and keeps the band more independent
- The Commission previously determined that it would not be in the public interest to make the 49% equity exception available to non-minority and male-owned firms.
- 49% Equity Exception was only intended to offset gender and racial discrimination.
- With the 49% exception in place, fronts can be formed at any time. The fact that the auction rules will be implemented just days before the short-form date does not prevent a large company from investing in the applicant during or after the auctions close.

II. Extending the 49% Equity Exception Undermines the Existing Deals Formed Under the 25% Equity Exception.

- Investors in 25% equity deals will want "out" in order to obtain an additional 24% equity. However, the applicant with investors under the 25% option cannot feasibly transform into a 49% equity structure.

III. The Commission Should Either Justify the 49% Equity Exception Under Strict Scrutiny or Eliminate It.

- The proposed rules are only superficially race-neutral. The FNPRM establishes that the rules were intended to favor minority applicants.

- If the Commission is committed to minority preferences, it should make the required strict scrutiny showing and retain the existing rules. If not, it should make the necessary changes to the rules so that all parties are treated equally.

IV. The Commission Does Not Need to Expand the 49% Option

- 49% equity deals that have been struck can be re-negotiated. If the Commission goes to a 25% exception for all, parties with existing deals can renegotiate.
- Existing minority deals are put in jeopardy as investors seek new deals. In effect, the extension to all applicants negates the advantage that minorities had to counteract the access to capital problems caused by racism, sexism.

V. The Commission Should Set the Short-Form Filing Date To Permit Enough Time For Applicants To Absorb Any Rule Changes and Avoid Legal Challenges.

- With no final rules expected until mid-July, the July 28 short-form date is patently unreasonable.
- Some parties will have had one year to negotiate for the 49% option, partnering with many of the investors interested in pre-auction strategies. To allow other applicant only a few days, after other parties have had one year, is grossly unequal treatment.
- The fact that these two groups are divided on the basis of race and/or gender, and that the Commission intends this result, makes the plan constitutionally suspect.

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FEDERAL COMMUNICATIONS COMMISSION
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HAND DELIVER

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Dear Mr. Caton:

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