

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

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REPLY OF PETITIONERS TO OMNIPOINT
CORPORATION'S OPPOSITION TO PETITION TO DENY

Whitestone Wireless, L.P.; Southern Personal Communications Systems; and Minco, P.C.S. (hereinafter "Petitioners"), by and through undersigned special counsel hereby file this Reply to Omnipoint Corporation's ("Omnipoint") Opposition to Petition to Deny. The original petition requested the Commission to designate the Omnipoint pioneer's preference license for evidentiary hearing and thereafter to strip Omnipoint of that license for bad faith abuses of the Commission's processes. Petitioners maintain, as does the Commission, that Omnipoint improperly sought to impede the Block C Personal Communications Service ("PCS") auction for the purpose of gaining a competitive advantage in the New York Major Trading Area ("MTA"). The recent action by the D.C. Circuit Court of Appeals in lifting the stay supports Petitioners' position that the stay was unwarranted and abusive. Petitioners urge the Commission to delve into Omnipoint's motivations and delay tactics and to send a potent message to the industry that future abuses will not be tolerated in the PCS auction process or in any other Commission licensing proceedings. Moreover, Petitioners urge that alleged procedural deficiencies should not protect Omnipoint from the Commission's scrutiny.

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I. THE STRIKE APPLICATION POLICY IS APPLICABLE TO OMNIPOINT'S DELAYING THE C BLOCK AUCTION

The procedure by which Omnipoint was granted its pioneer preference license was not subject to competing applications, comparative hearings or even petitions to deny¹. Given the lack of formal challenges available to those contesting Omnipoint's qualifications as a licensee, the conduct of the company must be closely scrutinized to protect the public interest.

Omnipoint argues that it is "simply erroneous" that it violated the Commission's "strike application" policy, citing Little Rock Radio Tel. Co., Inc., 50 Rad. Reg. 2d 1535, 1539 (1982). Of course, a technical reading of the strike application policy therein established confirms that no competing applications are at issue here. However, the policy underlying the strike application rule has been expanded beyond the strict confines of "competing applications." The policy, for example, has similarly been applied to petitions to deny. State College Communications Corp., 58 FCC 2d 462 (February 18, 1976). Regardless of the context in which a motion, pleading or other paper might be filed, the well-rooted 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., Mimeo No. 6318 (August 13, 1986)². The factors used to determine whether a party has engaged in strike motivated

¹ While petitions to deny filed by Bell Atlantic, ACT and Cablevision Systems Corporation were timely filed following the placing of the application on public notice, the merits of those challenges were never explored since the GATT Act effectively silenced those claims.

² Omnipoint contends that Petitioners ask the Commission to "persecut[e] those who dare to take the Commission's decisions to the courts," Omnipoint Opposition at 13, and that action against Omnipoint "would deter all Commission licensees from pursuing judicial review." Id. Such is not the case. Petitioners are not concerned with Omnipoint's constitutional right to seek redress in the Courts of Appeal, but rather with the motives underlying the filing. Omnipoint challenges the Commission's race conscious incentives, an opportunity it has long held. It is only

behavior are merely instructional, and the Commission must examine the entire circumstances to determine whether sanctions are warranted. Community Service Broadcasting, Inc., 7 FCC Rcd. 5652 (1992); Maine Paging, Inc., 6 FCC Rcd. 2189, 2191 (1991). When the totality of the circumstances are considered -- the suspicious timing of Omnipoint's petition, the overwhelming incentive existing for the company to delay the C Block auction, the competitive advantages experienced by Omnipoint in the New York MTA, and the underlying evidence of bad faith motives -- the Commission must protect the public interest by holding Omnipoint accountable for its chicanery. At a minimum, the company should be required at a hearing to explain its anticompetitive conduct.

Curiously, Omnipoint chooses to deny only those allegations that the timing of its petition for stay evidenced bad faith. In that regard, Omnipoint argues that its "many ex parte contacts to convince the Commission staff prior to the release of the Second Report and Order against adoption of the rule," undermine that evidence; and that its settlement efforts are inconsistent with a motivation to delay the auction. Those ex parte contacts and settlement efforts, however, did not convince the Commission that the motivation for seeking a stay was for anything but delay purposes³. Moreover, Omnipoint's questioning of industry colleagues, including TEC, as to their own intentions to seek a stay is more consistent with the intent to delay.

now that it is positioned to competitively benefit from an extended delay of the Block C auction that Omnipoint suspiciously seeks to be heard.

³ The Commission determined that Omnipoint's actions were not designed to provide it the opportunity to utilize the equity percentage option but rather to "delay the auction to advance its own economic position in the New York market." Brief of Federal Communications Commission in Omnipoint v. FCC, No. 95-1374 at 43-44. Specific evidence of how that economic position has been advanced is only available through a hearing.

Also conspicuous is Omnipoint's rather brief effort to discount the competitive benefits it has received in the New York MTA. That it already competes with WirelessCo. and two other unnamed cellular providers in the market is its only defense. In fact, Omnipoint does not at all deny that it has been afforded advantageous access to prime antenna site locations, base station locations, technical resources, and the largest single-area customer base in the country. Omnipoint arrogantly contends that the Commission's decision to stagger the licensing of broadband PCS entrants has caused the Block C applicants' competitive disadvantage and not the delay which it initiated. It is utterly untenable that the company also claims that it was, itself, deprived of the opportunity to enter all of the Block C markets outside of New York. Having surreptitiously orchestrated an economic coup in the largest and most highly valued PCS market in the country, Omnipoint now claims to be slighted by the very delay it caused. The Commission should force Omnipoint to divulge at a hearing the extent to which its delay has improved its position in New York. The Commission also should assess an appropriate penalty either on Omnipoint's Block A license itself, or on any future attempts by Omnipoint to bid in Block C. This issue similarly was raised in the Court of Appeals at oral argument.

II. THE ISSUES RAISED BY THE PETITION MUST BE CONSIDERED

Omnipoint contends that the Petition To Deny is an "aberrant request" that is improper and unauthorized since the "Communications Act was modified to require the Commission to award a pioneer's license to OCI. . . and not to entertain challenges to those awards." Omnipoint Opposition at 10. Petitioners also are accused of asking the Commission to reopen the application proceeding in contravention of Section 309(j)(13)(E). Finally, Omnipoint contends

that the window for filing a petition to deny has closed, and that because Petitioners did not request waiver of the filing rules contained in 47 C.F.R. section 1.3 that the issues raised by the petition are barred. Petitioners disagree. The issues raised by the Petition are reviewable by the Commission.

The enactment of the GATT Act (47 U.S.C. section 309(j)(13)(E)) rendered moot any petitions to deny filed against the application of Omnipoint. Petitioners, however, do not in this or related pleadings contest the application of Omnipoint. Instead, Petitioners challenge the company's conduct since its preference license was conditionally granted. See section 1.106(c) of the Commission's Rules. The Commission held that "nothing in the GATT Act, however, has eliminated the conditions that the Commission. . . impose[d] upon. . . Omnipoint." Omnipoint Authorization Order, 10 FCC Rcd. 1101 n.19 (December 14, 1994). Implicit in those conditions is the requirement imposed on every Commission licensee to operate in a forthright manner without subverting the Commission's processes. Omnipoint has violated that implicit condition. Essentially, Omnipoint is not protected from post-grant challenges to subsequent conduct.

In fact, Omnipoint itself recognizes that "the Commission has available to it the full range of sanctions including, for example, forfeiture and/or license cancellation." Omnipoint Authorization Order at para. 5. (emphasis added). The emphasized language only buttresses Petitioners' contention that Omnipoint's anticompetitive actions are open for challenge and scrutiny through means not limited to forfeiture or cancellation. Petitioners did not request waiver of the filing rules because the actual application of Omnipoint was not at issue -- only the company's bad faith conduct as recently exhibited.

Omnipoint makes much ado over the allegation that the Petition is not a proper vehicle

for raising the objections of Petitioners. Regardless of how the petition might be styled, the argument remains the same. Omnipoint subverted the Commission's process to advance its own economic position in the New York market. Omnipoint's Opposition is unresponsive to the specific claims raised by Petitioners. The Commission must take very seriously the evidence of misconduct irrespective of how it is brought to the Commission's attention.

Omnipoint contends that Petitioners did not raise issues such as revocation or other procedural vehicles. However, a petitioner cannot raise these issues directly against a licensee. Section 312 of the Act does not create specific rights in third parties to file petitions to revoke or cancel licenses. On the contrary, the Act grants the Commission the discretion to institute revocation hearings on its own motion. See, e.g. MCI Telecommunications Corp., 3 FCC Rcd. 509, 513-14 and n.18 (1988); In re KSDK, Inc. and Multimedia, Inc., 53 Rad.Reg.2d 283 285 (February 23, 1983); Tulsa Cable Television, 68 FCC 2d 869, 877 (1978). Furthermore, even where a pleading might technically be styled as a petition to deny, the Commission has accepted such filings and treated them as informal requests for Commission action, pursuant to section 1.41 of the Commission's rules. Id. at 285: See, e.g. Puerto Rican Media Action and Educational Council, Inc., 51 FCC 2d 1178, 1179 (1975); Radio Para La Raza, 40 FCC 2d 1102 n.1 (1973); and La Flore Broadcasting Co., Inc., 36 FCC 2d 101 n.2 (1972). In fact, the Commission continues to judge a pleading not by its caption, but rather by the nature of the real relief sought. See General Telephone Co. of the Southwest, 67 Rad.Reg. 2d 738, 741 (March 2, 1990) ("although captioned as a petition for declaratory ruling. it seems apparent that the real relief sought. . . is that the Commission revoke Invescom's licenses"). Petitioners consistently have requested that the Commission designate Omnipoint's license for hearing and subsequently strip

the company of the right to serve the public in the New York MTA. Recent Congressional developments, particularly the lifting of the stay, support Petitioners' arguments that Omnipoint's motion for stay lacks merit.

III. OMNIPOINT'S POSITION IS ERRONEOUS

Omnipoint in its Opposition contends that its position on the 49% equity exception evidences its lack of motive to delay the Block C auction. However, Omnipoint's position has not been consistent.

Arguing reverse discrimination, Omnipoint claimed that non-minorities were discriminated against because they had insufficient time to take advantage of a provision allowing bidders to sell off up to a 49.9% interest to a partner not restricted by the small business revenue requirements. See Omnipoint Emergency Motion for Stay, July 24, 1995. Nonetheless, Omnipoint has never acknowledged that it would even use the extra time, and it has yet to confirm an intention that it will avail itself of the 49% equity option.

Omnipoint continues to adopt bipolar positions regarding the 49% rule. In comments filed before the Commission, Omnipoint argued vehemently that extension of the 49% option would "probably harm minority applicants" by causing potential investors to "pull out of existing deals (or near deals) in search of better ones." Omnipoint Comments, PP Docket No. 93-253, July 7, 1995 at 6; see Omnipoint's Emergency Motion for Stay, July 24, 1995⁴. Omnipoint does not adequately explain why, in its arguments before the D.C. Circuit, it trumpeted instead that it was

⁴ Ironically, it is Omnipoint's delay tactics that have harmed minority applicants by causing potential investors to rescind financing commitments.

white males who actually would suffer unconstitutional harm. See **Omnipoint Emergency Motion for Stay** at 16.

Omnipoint attempts to reconcile the two arguments by characterizing the harm to **minority applicants** as an "unintended consequence" that may exist simultaneously with harm to **white applicants**. Omnipoint Opposition at 3 n.4. Omnipoint's hollow explanation ignores the fact that **the two groups are in direct competition for licenses such that an advantage afforded one necessarily disadvantages the other.**

The Commission correctly observed in its brief before the D.C. Circuit, **the agency recognized that "Omnipoint is willing to make any argument it finds useful at the moment." Brief of Commission in Omnipoint v. FCC, No. 95-1374 at 44. The Commission unmasked Omnipoint's specious equal protection argument by recognizing that Omnipoint had never challenged the Commission's "avowedly race conscious rules." Id. at 43-44. Only now does Omnipoint raise the issue having obtained status as a unique potential C Block bidder having "an incentive to impede the C Block auction." Id.**

IV. GRANTING THE REQUESTED RELIEF IS NECESSARY TO PROTECT THE PUBLIC INTEREST

Absent from Omnipoint's Opposition is convincing assurance that **viable competition in the New York PCS market will remain robust.** See Reconsideration Order, 10 F.C.C. Rcd. 403 (November 23, 1994). Omnipoint acknowledges the existence of other competitors **in the area.** However, the company does not address the fact that potential newcomers to that market **may be unable** to compete as a result of the self-generated stay. In fact, since Petitioners' **primary argument against the company has been the profoundly anticompetitive nature and effect of its**

actions, both in the New York MTA and throughout the PCS industry, it is telling that Omnipoint devotes so few words in response. The company has not and cannot deny that it has indeed garnered a competitive advantage in the market⁵. The chilling effect on potential C Block bidders has been pronounced. See D. Kaut, "PCS Auction Delay Taking Its Toll on Small Firms", Multichannel News, September 11, 1995. Steven Zecola, president of GO Communications Corporation confirms that key PCS components like tower sites are being "gobbled up" by companies that already have been granted PCS licenses. Id. A diluted building pool has resulted.

Moreover, Omnipoint has yet to divulge the extent to which its head-start in providing PCS service in New York has allowed it virtually to exclusively access the area's technical resources and customer base. It similarly does not adequately address its continuing progress in entering purchase or lease agreements for base station equipment and antenna sites. Nor does Omnipoint address the very real concern that new PCS entrants will be even more challenged to service the New York area with an efficient system design. Hence, even if potential Block C bidders in New York do overcome the financial setbacks occasioned by Omnipoint's self-serving stay, they will nevertheless find it unprofitable to compete with more entrenched entities.

The anticompetitive actions taken by Omnipoint to dilute competition in New York will hinder the bottom lines of PCS hopefuls. What is not as obvious is the effect the diminished competition will have on the customers in New York. The Commission has long held that robust competition yields benefits for the consumer in the form of lower rates, improved service, and

⁵ At oral argument, Omnipoint counsel admitted that it certainly has not been disadvantaged by the Block C delay. Transcript of Oral Argument at 321.

more varied choices. Customers in New York will not be unable to benefit from any advantages small business entrepreneurs might offer, nor will they have the opportunity to choose to patronize small or minority-owned businesses. Unfortunately, we cannot determine with certainty the vast scope the negative impact of diluted competition will have in the New York PCS market. One thing is assured -- the customer is the ultimate loser.

In addition to the effects on the marketplace Omnipoint has wrought, the public interest has also been compromised by the company's actions. The public and Petitioners have the right to question the motives of Omnipoint since it is an operating licensee in the largest single-area PCS user population in the country. Allegations that the company has engaged in improper positioning is extremely relevant, and must be explored by the Commission. The public has the right to hold Omnipoint accountable. The Commission, as public trustee, must take the lead in assessing out that accountability.

Omnipoint has yet to answer to the public or to be amenable to challenge. Following the grant of a pioneer's preference in the New York MTA, Third Report And Order, 9 FCC Rcd 1337, 1348 (February 3, 1994), the Commission accepted Omnipoint's application for a subsequent license. The time for public comment elapsed pursuant to the Rules, and three oppositions had been filed. The merits of those oppositions, however, never were addressed following the implementation of the GATT Act, 47 U.S.C. section 309(j)(13)(E). Thus, Omnipoint escaped accountability. Since the pioneer's preference rules do not provide for a comparative hearing process, Pioneer's Preference Review (Third Report and Order), ET Docket No. 93-266, 78 Rad.Rad. (P&F) 377 (June 8, 1995), Omnipoint has yet to be the subject of a legitimate adversarial challenge. While Petitioners do not in any manner contest the wisdom of

the Commission or Congress, Petitioners do urge the Commission to require Omnipoint at hearing to answer for its tactics.

The necessity for authoritative Commission action becomes even more crucial since the PCS and other service auction process is in its infancy. The lessons learned and precedent set here will affect future similar auctions. To allow Omnipoint to get away with questionable maneuvering to subvert the auction process and fashion for itself economic advantages to the detriment of small business and minority bidders is contrary to the Act. The Commission now must signal all potential licensees in new services that the integrity of the auction process will be preserved and the public interest upheld. Any entity which abuses the Commission's process for its own economic gain will be severely sanctioned. Only when this occurs will the public interest be protected.

While the immediacy for Commission action remains a high priority, Petitioners are mindful that the pending review by the Court of Appeals may raise additional issues not as yet apparent. Accordingly, the Commission should delay ruling on the instant Petition until a decision by that Court is final. The Commission can then allow the parties to supplement the record.

CONCLUSION

For the foregoing reasons, Petitioners urge the Commission to designate Omnipoint's license for evidentiary hearing and subsequently deny the grant thereof.

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10/16/95

CERTIFICATE OF SERVICE

I, Nathan M. Gundy, III, do hereby certify that a copy of the attached **REPLY OF PETITIONERS TO OMNIPPOINT CORPORATION'S OPPOSITION TO PETITION TO DENY** was served this 16th day of October, 1995 to the following persons by first class mail, postage prepaid:

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