

**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.

Following the Adarand decision, Omnipoint opposed extending the 49% exception to all small business entrepreneurs because, it alleged, that modification would "disempower all entrepreneurs." Ex Parte letter from M. Tauber and M. O'Connor, Counsel for Omnipoint Corporation, to FCC General Counsel, June 22, 1995, at 2. Furthermore, Omnipoint alleged, "Applying a 49% option to all small business applicants would deliver to big investors the ultimate negotiating tool with entrepreneurs. . . Undoubtedly, some will actually force conditions on applicants that step well into the gray areas regarding the limit of control as defined by the FCC." *Id.* Omnipoint further argued to in effect abolish the 49% equity exception by citing the racially disproportionate impact such a rule would engender.

However, Omnipoint has taken the exact opposite position before the Commission. For instance, Omnipoint alleged that "the proposed expansion of the 49% equity exception will probably harm minority applicants, as their potential investors could pull out of existing deals (or near deals) in search of better ones." Comments of Omnipoint, July 7, 1995 at 6. Again spouting contradictory rhetoric, the company told the Circuit Court: "The large, non-qualifying investors interested in a pre-auction 49% investment that have already finalized (or near finalized) their deals had to have done so with minority- or women-owned firms, leaving non-minority and male-owned entities with fewer remaining opportunities under this scheme." Omnipoint's Emergency Motion for Stay, July 24, 1995, at 16.

Omnipoint has reiterated that extending the 49% equity option to all parties would "significantly increase the temptation to create fronts either before, during or after the auction." Omnipoint Comments PP Docket No. 93-25, GN Docket No. 90-314. Omnipoint further contended that the 49% option "aids no one but the large investors and promises to

disenfranchise existing independent entrepreneurs from the Block C." *Id.* at 6. In reality, however, Omnipoint has never indicated that it would take advantage of the 49% option, and only seeks to limit its application in the Block C auction to curtail the number of competing bids it will encounter and to delay competition in New York by new licensees. Its arguments are inconsistent and without merit. Additionally, the 49% rule has not been widely used.

The Commission has agreed that Omnipoint has adopted confoundingly contradictory positions.:

Moreover, last month Omnipoint argued to the Commission -- totally contrary to its argument to this Court -- that extension of the 50.1% option "will probably harm minority applicants, as their potential investors could pull out of existing deals (or near-deals) in search of better ones. In fact, by opening up the 49% exception to all applicants (or all small businesses), investors would not need to partner with minority or women-owned applicants at all." Omnipoint Comments at 6-7 (J.A. \_\_\_). Thus, in July Omnipoint argued that extension of the 50.1% option on a race and gender neutral basis would harm minorities and women, but in August it argued that extension of the 50.1% option unconstitutionally harmed white males. It appears that Omnipoint is willing to make any argument that it finds useful at the moment.

Brief of Commission in Omnipoint v. F.C.C., No. 95-1374 at 44 (emphasis added).

Omnipoint's insistence now that outside investors must be limited to the 25% option conflicts with its earlier proposals that the FCC be more flexible concerning outside investors. Omnipoint argued on reconsideration of the Fifth Report and Order that the FCC should permit non-controlling investors to name 33% of a bidder's directors. See Omnipoint Position for Clarification and Reconsideration at 13, PP Docket 93-253 (Aug. 22, 1994). Omnipoint also requested that the FCC increase the voting equity available to non-controlling investors, to alter its rules so that the assets and revenues of investors are not aggregate, and to

permit unlimited numbers of small businesses to aggregate their assets and revenues in "consortia." Id. at 6-10. These proposals, which largely were rejected by the FCC, see Reconsideration Order, 10 F.C.C. Rcd. at 419, would have permitted large entities to participate in the entrepreneurs' block to a far greater extent than the rules crafted in the Sixth Report and Order.

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

Although the Block C auction was designed to benefit small businesses/entrepreneurs, Omnipoint's anticompetitive actions actually create more of a barrier to small business entry. By creating a fictional need to stay the Block C auction, Omnipoint knowingly created uncertainty and delay, thereby driving away prospective investment and causing the cancellation of conditional investor commitments, precluding the acquisition of base station cell sites, hindering access to distributors and retailers, and draining the market share in the New York MTA. The resulting delay has permanently damaged the ability of petitioners to raise the necessary capital to participate in the auction. Omnipoint knowingly used the Commission's and the Court's process to raise a specious issue, simply to facilitate the delay of the auction and the resulting foreclosure of new competitors. See Emergency Motion of Intervenor Go Communications To Vacate Stay; see also Brief of Federal Communications Commission in Omnipoint v. F.C.C., No. 95-1374 at 43. Such abuse of process is sufficient to disqualify Omnipoint as a licensee. See Policy Regarding Character Qualifications, 102 FCC 2d 1179 (1986).

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

Petitioners request that Omnipoint's anticompetitive behavior and character qualifications be designated for investigative evidentiary hearing, and that its preference license be denied. The Commission can accomplish that without injuring the federal or public interest. First, by denying Omnipoint's license, the federal government will lose no money from the Federal Treasury. Although Omnipoint is obligated to pay almost \$300 million, the company has not made an initial payment. Were the Block A New York MTA license to become available, the Commission could simply re-auction that license at the same time the Block C auction is held. In fact, the Commission already has taken that course of action with other licenses that were previously auctioned. It is currently scheduled to reauction licenses initially granted but subsequently forfeited by Interactive Video Distribution Service ("IVDS") applicants. Reauctioning the Omnipoint license may prove even more financially beneficial to the Treasury since the full fair market value of the license perhaps would be realized. It is appropriate that this license be reauctioned along with the Block C licenses because it was that group of applicants that Omnipoint's actions so severely harmed and thus they should be the beneficiaries of such an opportunity. To be consistent with other Block C licenses, the Commission should consider breaking the New York MTA license into the 27 BTAs that are contained in that region and then auctioning them at the same time as the C Block.

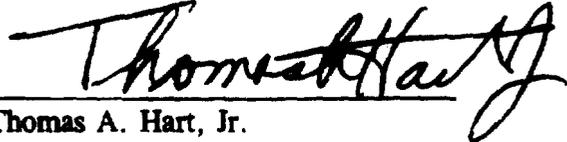
## **II. CONCLUSION**

**Omnipoint has attempted to maliciously undermine one of the most significant initiatives to assist small businesses in this nation's history. They must be held accountable and severely sanctioned.**

**As a result of Omnipoint's misrepresentations of its true anticompetitive intentions, its lack of candor, and its protracted efforts to abuse the Commission's and Court's processes, its pioneer preference license should be denied. The Commission itself concluded that Omnipoint's deliberate attempt to delay the auction process was done in bad faith to "advance its own economic position in the New York market". The resulting erosion of competition in Block C, particularly in the New York MTA, should be viewed as evidence of strike intent, especially in light of the benefits resulting from its unique status as a preference licensee. After stripping Omnipoint of its license, the Commission may exercise a number of options to assure that it will recoup the maximum value from the license, principal among them being to resell the license as part of the C Block auction.**

Accordingly, Petitioners request that the Commission designate for a hearing the license awarded to Omnipoint concerning those issues involving Omnipoint's anticompetitive behavior and ultimately deny its pioneer preference license for the New York MTA.

Respectfully submitted,



Thomas A. Hart, Jr.  
McManimon & Scotland  
1275 Pennsylvania Avenue, N.W.  
Suite 500  
Washington, D.C. 20004  
(202) 638-3100

Attorneys for Petitioners

Whitestone Wireless, L.P.  
Southern Personal Communications Systems  
Minco P.C.S.

September 21, 1995

**APPENDIX**

CITY OF NEW YORK                    }  
  }SS:  
STATE OF NEW YORK                 }

I W. Brian Mallian, being first duly sworn, depose and state as follows:

1. I am Chief Executive Officer of the Whitestone Capital Group, Inc. ("Whitestone"), an investment banking firm established in 1993. Whitestone has affiliated companies including Whitestone Capital Markets, L.P., Whitestone Capital Partners, Inc., and Whitestone Wireles Enterprises, L.P. ("Whitestone Wireles, L.P."). The Principals of Whitestone have extensive and diversified investment banking experience. Specifically, the Principals have: participated in over \$5 billion of financings involving mortgage and asset backed securities, debt and equity securities, and mergers and acquisitions; garnered approximately 80 years of investment banking experience from many of the top firms in the financial services industry; served in senior level positions in virtually all areas of capital markets, sales and trading, and investment banking at major Wall Street firms, commercial banks, and consulting firms; and established long standing personal relationships with senior level officers of investment banks, corporations, investment management firms and government entities. I have personal knowledge of the matters set forth herein.
2. Whitestone Wireles, L.P. has its principal offices in New York and is planning to bid on PCS licenses to be auctioned by the FCC and to build and operate PCS systems. Whitestone Wireles, L.P. has total assets of less than \$500 million, and qualifies to bid as a "small business" in the FCC Block C PCS auction and intends to do so. Furthermore, Whitestone Wireles, L.P.'s "control group," as defined in the FCC rules, will hold a majority of the voting stock of the Company and more than 25% of its equity. A majority of the voting stock of the control group will be held by Whitestone Wireles Enterprises, Inc., a small business and the general partner of the limited partnership. Thus, Whitestone Wireles, L.P. meets the FCC's requirements as a small business.
3. Whitestone Wireles, L.P. was formed to bid for and win licenses in the C Block auction. Raising investment for PCS has proven to be extremely difficult. Whitestone Wireles, L.P. has had some success in raising equity investment and, at the time the Omnipoint stay was granted, was close to obtaining substantial additional equity investment, all of which would have positioned Whitestone Wireles, L.P. to bid for markets well in excess of 50 million in population. Many of the BTA's in the New York MTA are representative of these types of markets. In addition, Whitestone Wireles, L.P. has undertaken measures to enter into agreements with strategic partners for operating support, PCS equipment, and engineering and construction services necessary to completely build out PCS systems and operate in numerous markets. Since the grant of the Omnipoint stay, investor, strategic partner and vendor interest has diminished substantially.

4. **Whitestone Wireless, L.P. has incurred substantial expenses in preparation for the FCC C Block auction including preparing a private placement memorandum, utilizing computers and software to analyze market data, hiring consultants and contractors to perform research and analysis, and retaining other professionals to provide specialized expertise prior to, during, and after the auction. Some of these services were time-sensitive and will have to be repeated when the auction is rescheduled.**

5. **The resulting delay from Omnipoint's stay of the Block C auction has damaged Whitestone Wireless, L.P. The Company's working capital to support operating expenditures must be stretched to cover the period since July 24, 1995. As an investment banking firm, Whitestone has experienced first-hand the apprehension of investors in seeking to finance auction-related ventures. In fact, most investors have become extremely uneasy about the continuing legal disruptions of this auction. The current delay in the auction, caused by the stay requested by Omnipoint, places Whitestone Wireless, L.P. in considerable financial jeopardy and threatens the company's ultimate success.**

6. **Whitestone Wireless, L.P. plans to submit bids for BTA's in the New York MTA. Whitestone Wireless, L.P. plans to compete with Omnipoint in that market, and because of that company's anticompetitive conduct has suffered and will continue to suffer a severe disadvantage.**

7. **The new delay in the Block C auction has caused us to lose a substantial amount of momentum in developing a PCS business. We are a small company without the resources of a major operating company necessary to sustain a lengthy delay. It is urgent to prevent Omnipoint from unfairly gaining further entrenchment in the New York market. Whitestone is located in New York, and has an undeniable interest in owning and operating a PCS system and competing with Omnipoint in the region.**

8. **Furthermore, as an investment banking firm, Whitestone has advised clients concerning investment in telecommunications properties, particularly PCS. Moreover, Whitestone is a potential PCS customer and is thus concerned with the character qualifications of all licensees serving that market. Omnipoint's anticompetitive actions are of particular concern since they will likely cause delay, excessive prices and deficient service to consumers (like Whitestone) in the New York area. I believe Omnipoint has made misrepresentations and displayed bad faith to the Commission, and therefore do not believe the company will serve the public interest by operating its PCS license or licenses in a forthright manner.**

The facts herein are true and accurate to the best of my knowledge and belief.

W. Brian Maillian

W. Brian Maillian

Subscribed and sworn to before me this 21<sup>st</sup> day of September, 1995.

Shirley E. Farnas

Notary Public

My commission expires: 5-14-00

NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires May 14, 2000

**AFFIDAVIT**

CITY OF MEMPHIS

STATE OF TENNESSEE

}  
}SS:  
}

I, George Debbins Jr., being first duly sworn, depose and state as follows:

1. I am President and Chairman of the Board of Directors of Southern Personal Communications Systems ("SPCS"). SPCS was formed to bid in the upcoming Broadband PCS frequency auctions under the Designated Entity (DE) or small business provisions of the Federal Communications Commission ("FCC"), allowing the Company to receive a 25% bidding credit. Under these provisions, SPCS will only have to pay a down payment of 10% of the amount of the winning bid, and will pay interest only for six years at a 10 year treasury note rate. Thus, SPCS has solicited sufficient capital to mount a viable competitive bid. The actions of Omnipoint Communications Corporation ("Omnipoint") have thwarted the realization of that opportunity.
2. SPCS has total assets of less than \$500 million and gross revenues of less than \$125 million, and thus qualifies as a "small business" under the Commission's rules. SPCS retained outside consultants and prepared a detailed business plan for its involvement in PCS industry. We had planned to bid for licenses in Basic Trading Areas (BTAs) including but not limited to Memphis, Nashville, and Knoxville, Tennessee; Knoxville, Alabama; Charlotte and Raleigh, North Carolina; Greenville, South Carolina; and Atlanta, Georgia. We are also considering mid-sized markets in New Jersey, New York and Connecticut. However, following Omnipoint's stay of the auction, these plans have been set aside and jeopardized.
3. The telephone service competition for PCS is in three main areas; cellular, wireline and other PCS companies occupying the same markets. The effect of the Omnipoint stay has been to allow winning bidders in Block A and Block B to progress toward building-out and operating a PCS system at a much faster rate than potential C Block winners. The head-start unfairly afforded Omnipoint, I believe, will make it virtually impossible for C Block winners to compete for antenna sites, technical facilities, and customers in the New York MTA.
4. Based on preliminary engineering data contained in our business plan SPCS is faced with payments including base station, software, engineering, site preparation, maintenance and monitoring, transmission cost, as well as band development and national advertising. Other operating costs include clearing microwave spectrum, rental of cells, and inter-connection to public networks. The capital needed for a small PCS provider like SPCS to build-out and operate a PCS system is formidable. The longer the C-Block auction is delayed, the more difficult it will become for SPCS to retain the interest of investors and ultimately raise capital to submit competitive bids and thereafter build and operate a successful service.
5. I am familiar with the Petition to Deny Omnipoint's license to which this affidavit is attached. I agree that Omnipoint has deliberately delayed the C block auction to gain a

competitive advantage to the detriment of potential bidders including SPCS. I also agree that the FCC should act to make Ornaipoint accountable for its anti-competitive and malicious actions which has caused substantial harm and economic injury to SPCS and other potential C Block bidders.

The facts herein are true and accurate to the best of my knowledge and belief.

  
George Dobbins, Jr.

Subscribed and sworn to before me this 2<sup>nd</sup> day of September, 1995.

  
Notary Public



My Commission expires: 10/10/95

**AFFIDAVIT**

CITY OF LOS ANGELES }  
STATE OF CALIFORNIA } SS:

I, Carl Dickerson, being first duly sworn, depose and state as follows:

1. I am Chief Executive Officer of Minco PCS ("Minco"). Minco was formed to bid on PCS licenses to be auctioned by the FCC. Minco plans to seek licenses in many Basic Trading Areas ("BTAs"). A few may fall within the New York Major Trading Area ("MTA"). Its principals have substantial telecommunications experience as senior executives of a number of telecommunications companies. Many of the principals have direct experience in wireless technologies. Minco's principals have developed innovative technologies such as "Wireless Roadside Assistance Service". The experience and ingenuity of the principals would well serve the company in a fair competition with Omnipoint Communications Corporation ("Omnipoint").

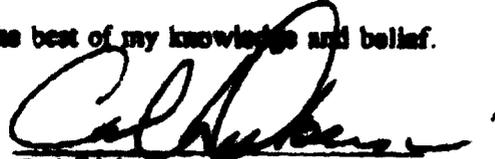
2. Minco is planning to bid for and win licenses in the C Block auction. The company has been active in FCC proceedings related to the auction process, and has filed comments in the Federal Communications Commission proceeding involving implementation of Section 309(j) of the Communications Act - Competitive Bidding. I am convinced that further delaying the Block C auction will have profound negative impact upon small businesses like Minco who plan to bid for PCS licenses. Specifically, already scarce investment capital will all but evaporate since those investing in the C Block bidders remain concerned about the head-start of the A and B block licensees such as Omnipoint. The reduction in the number of small businesses bidding in the Block C auction will hinder competition in the PCS industry.

3. The company has total assets of less than \$500 million, and qualifies to bid as a "small business" in the Block C auction. We do not possess the resources of a major operating company necessary to weather an extended delay of the C Block auction.

4. Minco developed a business plan in preparation for bidding in the C Block. Though raising investment for PCS has proven to be a challenge, at the time the Omnipoint cap was granted, Minco had secured financial commitments of necessary capital to bid in the C Block. These commitments would have positioned Minco to bid for markets well in excess of 28 million in population and would have allowed the company to compete with A and B Block winners. However, Omnipoint's anticompetitive conduct has severely disadvantaged Minco's ability to compete. In addition to increasing the difficulty to maintain adequate financing to make a competitive bid, Omnipoint has fashioned for itself what very well may be an insurmountable head-start in establishing and operating a PCS system in the New York MTA.

5. I am familiar with the Petition to Deny Omnipoint's license to which this affidavit is attached. I agree that Omnipoint has deliberately delayed the C Block auction to gain a competitive advantage to the detriment of potential bidders including Minco. I also agree that the FCC should act to make Omnipoint accountable for its anti-competitive and malicious actions which have caused substantial harm and economic injury to Minco and other potential C Block bidders.

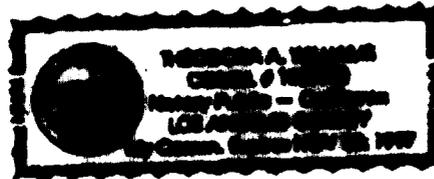
The facts herein are true and accurate to the best of my knowledge and belief.

  
Carl Dickerson

Subscribed and sworn to before me this <sup>20<sup>th</sup></sup> day of September, 1995.

  
Notary Public

My Commission expires: 11-28-97



**CERTIFICATE OF SERVICE**

I, Laura P. Minor, do hereby certify that a copy of the attached PETITION TO DENY AWARD OF PIONEER PREFERENCE LICENSE TO OMNIPOINT CORPORATION was served this 21st day of September, 1995 to the following persons by first class mail, postage prepaid:

**Mark J. Tauber, Esq.  
Mark J. O'Connor, Esq.  
Piper & Marbury  
1200 19th Street, N.W.  
Seventh Floor  
Washington, D.C. 20036  
Counsel for Omnipoint  
Communications, Inc**

**Chairman Reed Hundt  
Federal Communications Commission  
1919 M Street, N.W., Rm. 814  
Washington, D.C. 20554**

**Commissioner Andrew C. Barrett  
Federal Communications Commission  
1919 M Street, N.W., Rm. 826  
Washington, D.C. 20554**

**Commissioner Rachelle Chong  
Federal Communications Commission  
1919 M Street, N.W., Rm. 844  
Washington, D.C. 20554**

**Commissioner Susan Ness  
Federal Communications Commission  
1919 M Street, N.W., Rm. 832  
Washington, D.C. 20554**

**Commissioner James H. Quello  
Federal Communications Commission  
1919 M Street, N.W., Rm. 802  
Washington, D.C. 20554**

**William E. Kennard, General Counsel  
Office of General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Rm. 614  
Washington, D.C. 20554**

**Regina Keeney, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W., Rm. 5002  
Washington, D.C. 20554**

**Robert Pepper, Chief  
Office of Plans and Policy  
Federal Communications Commission  
1919 M Street, N.W., Rm. 822  
Washington, D.C. 20554**

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

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

**OPPOSITION OF OMNIPOINT CORPORATION TO PETITION TO DENY**

Mark J. Tauber  
Mark J. O'Connor

Piper & Marbury L.L.P.  
1200 19th Street, N.W., 7th Floor  
Washington, D.C. 20036  
(202) 861-3900

Its Attorneys

Date: October 4, 1995

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

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

**Introduction And Summary**

Omnipoint Corporation ("Omnipoint")<sup>1</sup> 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").<sup>2</sup> The Petition is improper, unauthorized, and profoundly abusive.<sup>3</sup> Any further Commission action on the basis of the Petition would be similarly illegal. Omnipoint urges the Commission to dismiss the Petition.

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

<sup>2</sup> 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).

<sup>3</sup> 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 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. Pena, 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.<sup>4</sup> Instead.

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<sup>4</sup> 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

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*(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.<sup>5</sup> 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

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<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

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<sup>6</sup> 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.

<sup>7</sup> 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.