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1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430
202-861-3900
FAX: 202-223-2085

BALTIMORE
NEW YORK
PHILADELPHIA
LONDON
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WRITER'S DIRECT DIAL
202) 861-6471

July 6, 1995

HAND DELIVER

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

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JUL 6 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: PP Docket No. 93-253 -- Block C Auction Rules
Ex Parte Presentation

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, this letter is to advise you that Douglas Smith, of Omnipoint Corporation, Mark Tauber and Ronald Plesser, of Piper & Marbury L.L.P., and I met yesterday evening with Jill Lockett, Special Advisor to Commissioner Chong. At the meeting, we discussed Omnipoint's position on the issues raised by the Further Notice of Proposed Rulemaking, released June 23, 1995, in the above-referenced docket. Specifically, we discussed Omnipoint's concern that the proposed extension of the "49% equity exception" to all entrepreneur-applicants will adversely affect entrepreneurs attempting to organize under the "25% equity exception," and increase the likelihood of "front" applicants. Further, Omnipoint discussed the need for all entrepreneurs to have a reasonable amount of time to react to the final rules before the short-form applications are due. Finally, we provided Ms. Lockett with date-stamped copies of two ex parte letters Omnipoint filed on June 21 and June 22, 1995 in the above-referenced docket.

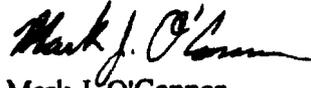
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Mr. William F. Caton
July 6, 1995
Page 2

Because the meeting ended after the Secretary's Office had closed, I am submitting this letter today. In accordance with the Commission's rules, I hereby submit one original and one copy of this letter.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Jill Lockett

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L.L.P.

1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430
202-861-3600
FAX: 202-223-2088

BALTIMORE
NEW YORK
PHILADELPHIA
LONDON
EASTON, MD

WRITER'S DIRECT NUMBER
(202) 861-8471
FAX: (202) 861-3662

June 22, 1995

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JUN 22 1995

FEDERAL COMMUNICATIONS COMMISSION
CHIEF OF BUREAU

HAND DELIVER

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

Re: Omnipoint Corporation
Ex Parte Presentation: PP Docket No. 93-253

Dear Mr. Caton:

In conformity with section 1.1206(a) of the Commission's Rules, enclosed please find two copies of an ex parte presentation to be submitted for inclusion in the above-referenced docket.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

/mjo
Enclosures

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PIPER & MARBURY

L.L.P.

1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430

202-661-3900
FAX: 202-223-2085

MARK J. TAUBER
202-661-3913

BALTIMORE
NEW YORK
PHILADELPHIA
EASTON
LONDON

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JUNE 2 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

June 22, 1995

HAND DELIVER

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614-B
Washington, D.C. 20554

Re: Revision of the PCS Block C Auction Rules
PP Docket No. 93-253: Ex Parte Presentation

Dear Mr. Kennard:

Omnipoint Corporation hereby replies to the letters recently submitted to the Commission concerning the Block C auction rules. As discussed in detail below, Omnipoint generally agrees that, if changes are to be made, it will better serve all entrepreneurs to raise the preferences available to small businesses to levels previously offered only to minority and women-owned applicants, with the exception of an extension of the "49% option" to all small businesses. It also agrees that the public interest would be better served with a full notice, comment, and reply comment procedure to address these very complicated issues facing the Commission.

First, Omnipoint opposes the simple extension of the option allowing large companies to own 49% of an applicant, 47 C.F.R. § 24.709(b)(4), to all small business entrepreneurs, as suggested in some recent ex parte letters to the Commission.¹ While

¹ Letter from Roy M. Hahndorf, President, Cook Inlet Region, Inc., to The Honorable Reed E. Hundt, P.P. Dkt., No. 93-253, at 2 (filed June 14, 1995); Letter from Sherris Marshall of the Marshall Company to The Honorable Reed E. Hundt, P.P. Dkt., No. 93-253, at 1 (filed June 15,

(Footnote continued to next page)

William E. Kennard, Esq.

June 22, 1995

Page 2

such a change may seem at first glance to be similar to extending the 25% discounts and better interest terms to all applicants, Omnipoint believes that, in fact, it will radically disturb the negotiating rules that prospective entrepreneur entities have worked under for the past year, and disempower all entrepreneurs.

The so-called "49% option" was first developed in the *Fifth Report and Order* because the record demonstrated that "women and minorities have especially acute problems in obtaining financing." *Fifth Report and Order*, 9 FCC Red. 5532, 5602 (1994). The record did not support the extension of those same benefits to all small business entrepreneurs. Since the rule was adopted, the only significant event has been the Supreme Court's decision in *Adelman Construction, Inc. v. Penn*, 1995 WL 347345 (dec. June 12, 1995), which cast doubt on the Commission's rules benefiting minorities. The record does not suggest now, any more than it did at the time the *Fifth Report and Order* was released, that the "49% option" must be extended to all small business applicants.

Further, as a practical matter, the fact that every entrepreneur could offer the "49% option" to large companies means that the large companies will require that, as a minimum condition to enter the negotiation process, applicants offer them 49% equity, plus additional rights (such as operating control, brand name, puts, royalties, etc.). In contrast, the existing "25% maximum option" has allowed applicants to maintain substantial control over their own companies by balancing the interests of three 25% non-entrepreneur owners, without the imposition of a dominant 49% owner. This result was intended by the rules: "the 25% limitation on equity investment interest will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset cap." *Fifth Report and Order*, 9 FCC Red. 5532, 5601-02 (1994). That safeguard will be lost if all small business applicants have a 49% equity exception to the attribution rules. The negotiating leverage will shift entirely in favor of the large entities.

Applying a 49% option to all small business applicants would deliver to big investors the ultimate negotiating tool with entrepreneurs. Regardless of the

(Footnote continued from previous page)

1995); Letter from Shelby L. Spencer of AirlinK to Reed E. Hundt, P.P. Dkt. No. 93-253, at 1 (Filed June 16, 1995).

William E. Kennard, Esq.
June 22, 1995
Page 3

Commission's rules against "fronts," the big investor contributing the preponderance of the capital for the applicant will want to control as much of the company operations as is legally possible, through complex management agreements, put rights, royalty arrangements, investor veto rights, and de facto constraints on sales after the lapse of the five year anti-trafficking restriction. 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. While we appreciate that the FCC will review issues of control on a case-by-case basis after the auctions, rules that fortify entrepreneur control from the outset would benefit the objective of ensuring a diversity of licensees, and participation for minorities, women and small businesses. In contrast, a 49% option for all small businesses would only benefit the big investors, as applicants would be forced to meet the market's lowest common denominator, compromise on control issues, and flirt with the very limit of the law in order to attract available investors.

Minority or women-owned entities that have already structured their plans based on the "49% option" would not be materially harmed if required to comply only with a "25% option," while leaving all other arrangements intact. A change from 49% to 25% for the large investor does not affect the non-equity provisions of existing agreements with them, such as brand-name agreements, put rights, roaming arrangements, etc. In fact, if the 49% option is extended to all small businesses, large investors are more apt to break their deals with minority and women applicants to search even more favorable terms among a larger pool of potential applicants.

With the "25% maximum option," any large entities that wanted management rights could still negotiate with any entrepreneur either before or after the auction. The key difference is that the entrepreneur will likely have two other large investors, each with 25% equity, that will have to be convinced that the terms are fair and in accordance with the Commission's rules.

Second, Omnipoint wishes to emphasize that these are highly complicated issues; cutting corners on the rulemaking process, for example, shortening the public comment period or eliminating reply comments, will redound to no one's benefit. As National Telecom pointed out, the designated entity community can survive one, but perhaps only one, more rulemaking process to resolve these issues. Omnipoint generally concurs with Central Alabama Partnership and Mobile Tri-States ("Central Alabama") that an expedited but not an "emergency" rulemaking is the right path. The potential ten days

William E. Kennard, Esq.
June 22, 1995
Page 4

that might be saved are not worth the risk of a court declaring that there was no emergency.

Third, Omnipoint disagrees with the suggestion of Central Alabama that the comments should be limited to only specific proposals and to ten pages. The entrepreneur's rules are staggeringly complex already, to propose significant changes will only raise even more questions and ambiguities. Most applicants have only focused on the rules that applied to their status; if suddenly they are subject to rules that previously never applied to them they will need time to react and a reasonable number of pages to respond. If a page limit is instituted, 25 pages for comments would be reasonable.

In accordance with the Section 1.1206(a)(1) of the Commission's rules, two copies of this letter have been submitted this day to the Secretary's Office for inclusion in the above-referenced docket.

Sincerely,



Mark J. Tauber
Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Honorable Reed Hundt
Honorable James Quello
Honorable Andrew Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Regina Keeney
Dr. Robert Pepper
Kathleen Ham
Donald Gips
Catherine Sandoval
Jonathan Cohen, Esq.
Peter Tenhula, Esq.

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PIPER & MARBURY

L.L.P.
1200 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036-2430
202-861-3900
FAX: 202-223-2088

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BALTIMORE
NEW YORK
PHILADELPHIA
LONDON
EASTON, MD

WRITER'S DIRECT NUMBER
(202) 861-8471
FAX: (202) 861-3882

June 21, 1995

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

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JUN 21 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Omnipoint Corporation
Ex Parte Presentation: PP Docket No. 93-253

Dear Mr. Caton:

In conformity with section 1.1206(a) of the Commission's Rules, enclosed please find two copies of an ex parte presentation to be submitted for inclusion in the above-referenced docket.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

/mjo
Enclosures

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1200 NINETEENTH STREET, N.W.

WASHINGTON, D.C. 20036-2430

202-861-3900

FAX: 202-223-2085

MARK J. TAUBER
202-861-3913

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William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614-B
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: **PCS Block C Auction & the Adams Decision**
PP Docket No. 93-253: Ex Parte Presentation

Dear Mr. Kennard:

Omnipoint Corporation agrees with several commenters¹ that a further rulemaking is the only real alternative for resolving the complicated issues that Adams Constructors, Inc. v. FCC, 1995 WL 34735 (dec. June 12, 1995) ("Adams") has created. Perhaps even more importantly, as National Telecom recommended, a period of adjustment subsequent to the release of the revised rules is essential to permit all prospective applicants to renegotiate with investors.

The Adams decision, released just three days before the June 15 short-form deadline, has left the Commission with very difficult options to be resolved in short

¹ Letter from Elliot J. Greenwald, attorney for Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, PP Dkt. No. 93-253 (filed June 16, 1995); Letter from Elliot J. Greenwald, attorney for Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, PP Dkt. No. 93-253 (filed June 19, 1995); Letter from Jack E. Robinson, President of National Telecom, to Regina Keeney, PP Dkt. No. 93-253 (filed June 16, 1995); Letter from Sherrie Marshall, on behalf of The Marshall Company, to the Honorable Reed Hundt, PP Dkt. No. 93-253 (filed June 16, 1995).

William E. Kennard, Esq.

June 21, 1995

Page 2

order. After reviewing the Adams decision and the Commission's record, it now seems that there is no choice but for the Commission to proceed on a path that involves a further notice of proposed rulemaking, with adequate opportunity for public comment, on how best to proceed. Without such a process, a Commission decision made on the current record will undoubtedly result in appellate court challenges that will add exponentially to the delay for Block C entrepreneurs.

Absent a rulemaking to supplement the existing record, it appears that the Commission has three options available to it, each of which presents intolerable risks for all entrepreneurs. First, the Commission could simply go ahead with its current auction rules claiming they will meet the new strict scrutiny criteria. This alternative would be very risky in light of Adams (particularly its recognition of "forward looking" consequences) and the fact that the Commission justified its minority preferences under the intermediate scrutiny standards set forth in Moran Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).² Second, the Commission could completely strip the minority preferences out of the auction rules.³ However, without public comment on the record, the choice of this option as opposed to others may itself be subject to judicial challenge, since it appears inconsistent with the auction statute.⁴ Third, the Commission could find on its own reconsideration that all entrepreneurs are qualified for the same preferences that were formerly reserved for minorities. This alternative not only raises the same issues as the prior option, it radically changes the nature of the Entrepreneur-Band auction, it undermines the extensive rulemaking process begun in September, 1993, and it is contrary to the Commission's basic notice and comment rulemaking procedure. The status of woman applicants under the last two options, whose preferences are not immediately threatened by the Adams holding, and the statutory mandate to promote

2 Second Report and Order, 9 FCC Rad. 2348, 2398, ¶ 289 (1994); see also FCC, "Opposition to Emergency Action for Stay," at 10 - 12, Tribune Broadcasting Corp. v. FCC, Case No. 95-1015 (D.C. Cir. February 17, 1995) (FCC argues to the D.C. Circuit that intermediate scrutiny applies to non-conscious Block C auction rules).

3 Under this option, the cellular eligibility rules may also have to be modified. 47 C.F.R. § 24.204(d)(2)(ii).

4 47 U.S.C. § 309(j)(4)(C) (Commission is directed to promote economic opportunity for "businesses owned by members of minority groups.");

William E. Kennard, Esq.

June 21, 1995

Page 3

economic opportunities for women further complicate matters. Ultimately, the problem with each of these options is that it fails to reconcile the balance of interests developed over the course of the past year and one-half, no single dramatic shift in the rules accomplishes the careful balance the Commission intended.

Omnipoint believes that the status of the rules must first be resolved in a traditional public notice and comment rulemaking, and then prospective applicants should have a reasonable amount of time to review their eligibility options, negotiate with potential investors under the new rules, and prepare their applications in the face of the new competitive playing field. The Commission's stated intent to announce a short-form filing date this week, prior to the resolution of the issues raised by *Adman*, exacerbates the uncertainty among entrepreneur-based applicants. Further, it is questionable how any applicant could plan its short-form applications when it seems inevitable that there will be new rules for the auction affecting eligibility, affiliation standards, ownership percentages, bid discounts, payment terms, as well as bidding strategy, consortium, and partnering decisions.

Any changes to the eligibility and preference rules change the market economic dynamic under which all applicants and investors have operated and negotiated. For example, investments have been made, and opportunities foregone, on the fact that the attribution exception of the "49% option" applied to some but not all applicants. If the Commission now changes the "49% option" in either direction it will have a profound effect on the participants and the nature of the entire Entrepreneur's-Band auction. Eligible participants have been forced to negotiate under one set of rules for nearly 21 months. After the revised rules are in place, there must be some reasonable period for participants to adjust to the changes.

A notice of proposed rulemaking with comments and reply comments is the best way for the Commission to lay a proper record for whatever course it ultimately decides on. This will make all potential applicants more certain of the validity of the Block C license allocation scheme.

William E. Kennard, Esq.
June 21, 1995
Page 4

In accordance with the Section 1.1206(a)(1) of the Commission's rules, two copies of this letter have been submitted this day to the Commission's Secretary's Office for inclusion in the above-referenced docket.

Sincerely,



Mark J. Tauber
Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: **Honorable Reed Hundt**
Honorable James Quello
Honorable Andrew Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Regina Keeney
Dr. Robert Pepper
Kathleen Ham
Donald Gips
Jonathan Cohen, Esq.
Peter Tenhala, Esq.

EXHIBIT 3

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PIPER & MARBURY

L.L.P.

1200 NINETEENTH STREET, N.W.

WASHINGTON, D.C. 20036-2430

202-861-3900

FAX: 202-223-2085

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GENERAL COUNSEL

BALTIMORE
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PHILADELPHIA
EASTON
LONDON

MARK J. TAUBER
202-861-3913

July 13, 1995

HAND DELIVER

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614-B
Washington, D.C. 20554

Re: Revision of the PCS Block C Auction Rules
PP Docket No. 93-253; GEN Dkt. No. 93-252; GEN Docket No. 90-314
Ex Parte Presentation

Dear Mr. Kennard:

As you know, Omnipoint Corporation is quite concerned that the proposed extension of the "49% equity exception" for all entrepreneur-applicants will have a devastating effect on the entrepreneur's band. We have commented on this issue, and have presented our strong opposition in recent meetings with FCC staff. In fact, Omnipoint is so concerned about this issue that, regrettably, it is seriously considering legal action should the Commission go forward with the expansion of the "49% equity exception," as proposed. Such a legal challenge would likely involve both APA and Fifth Amendment equal protection claims.

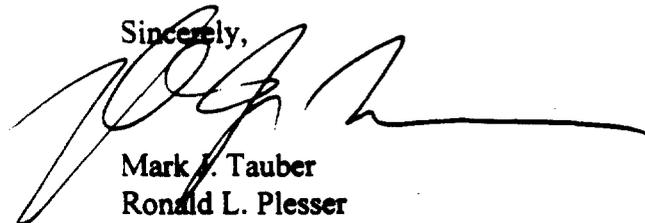
We believe that litigation can be avoided and that viable alternatives exist. As we noted in our comments, we believe the Commission should attempt to justify its Block C rules under a "strict scrutiny" standard. Another alternative that we understand has been discussed among Commission staff would permit applicants to file short-form applications under the 49% equity exception and participate in the auction. If such a party were to win a license, however, it would be required to conform its equity structure to the "25% equity exception" within a reasonable period after grant of the license. Omnipoint supports this alternative because it would effectively minimize the substantial

William E. Kennard, Esq.
July 13, 1995
Page 2

risk of fronts, but still permit existing 49% deals to proceed. Nor would it delay the existing timetable for auctions.

In accordance with the Section 1.1206(a)(1) of the Commission's rules, six copies of this letter have been submitted this day to the Secretary's Office for inclusion in each the three above-referenced dockets.

Sincerely,



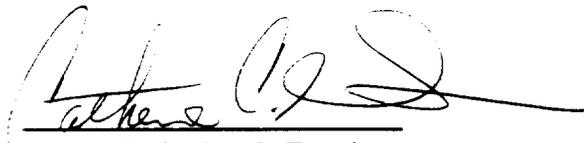
Mark J. Tauber
Ronald L. Plesser
Counsel for Omnipoint Corporation

cc: **Honorable Reed Hundt**
Honorable James Quello
Honorable Andrew Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Ruth Milkman
Rudolfo Baca
Lisa Smith
Jill Lockett
Mary McManus
Regina Keeney
Dr. Robert Pepper
Kathleen Ham
Donald Gips
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Jonathan Cohen
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Jackie Chorney
Andrew Sinwell

Certificate of Service

I, Catherine C. Ennels, a secretary at the law firm of Piper & Marbury, L.L.P., hereby certify that a copy of the foregoing "Opposition of Omnipoint Corporation to Petition to Deny" was this sent this 4th day of October, 1995 via first-class, U.S. mail, postage prepaid, to:

Thomas A. Hart, Jr., Esq.
McManimon & Scotland
1275 Pennsylvania Ave., N.W.
Suite 500
Washington, D.C. 20036.



Catherine C. Ennels