

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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Federal Communications Commission  
Office of Secretary

In the Matter of	)	
	)	
Omnipoint Communications, Inc.	)	File No. 15002-CW-L-94
New York MTA	)	
Frequency Block A	)	
	)	
Amendment of the Commission's Rules	)	GEN Docket No. 90-314
to Establish New Personal	)	PP-58
Communications Services	)	

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MEMORANDUM OPINION AND ORDER

Adopted: August 9, 1996

Released: August 23, 1996

By the Commission:

INTRODUCTION

1. By this action, the Commission addresses a petition for declaratory ruling filed by The Wireless Communications Council (WCC).<sup>1</sup> WCC requests that the Commission clarify the meaning and scope of the "substantial use" condition placed on the above-captioned pioneer's preference license, awarded to Omnipoint Communications, Inc. (Omnipoint), in the broadband Personal Communications Service (PCS).<sup>2</sup> We find that WCC has not demonstrated the existence of a controversy or uncertainty sufficient to warrant exercise of our discretion to issue a declaratory ruling on this issue. For this reason, we deny WCC's petition.

<sup>1</sup> The WCC petition is styled as a "Petition for Clarification." Because the petition essentially asks the Commission to issue a declaratory ruling defining in greater detail the meaning and scope of the "substantial use" condition placed on pioneer's preference licenses, we are treating it as a petition for declaratory ruling pursuant to 47 C.F.R. § 1.2.

<sup>2</sup> In opposition to the petition, on January 31, 1996 Omnipoint filed a pleading styled "Response of Omnipoint to Wireless Communications Council's Petition for Clarification" ("Omnipoint Opp."). On February 7, 1996, WCC filed a reply.

## BACKGROUND

2. In the *Third Report and Order (Third R&O)*<sup>3</sup> in GEN Docket No. 90-314 (the broadband PCS proceeding), we awarded broadband PCS pioneer's preferences to American Personal Communications (APC), Cox Enterprises, Inc. (Cox), and Omnipoint. We directed the Wireless Telecommunications Bureau (Bureau) to condition the broadband PCS licenses received by APC, Cox, and Omnipoint upon each licensee building a system that substantially uses the design and technologies upon which its preference award is based. Specifically, we stated that this condition would apply in the service area for which the preference is being granted and for the initial required five-year build-out period specified in the rules for broadband PCS.<sup>4</sup>

3. Omnipoint was awarded a pioneer's preference for having designed and manufactured a 2 GHz spread spectrum handset and associated base station equipment, and for proposing a viable service with the flexibility to be implemented in a variety of environments with capabilities useful to subscribers.<sup>5</sup> This preference granted Omnipoint the right, if otherwise qualified, to use a 30 megahertz channel block (Block A, 1850-1865 MHz and 1930-1945 MHz) in the Major Trading Area that includes northern New Jersey (New York MTA).<sup>6</sup> On December 13, 1994, the Bureau granted a pioneer's preference license to Omnipoint, on condition that "Omnipoint ... shall construct a ... system ... that substantially uses the design and technology upon which the pioneer's preference award ... was based," and on condition that Omnipoint retain control of the license for three years or until it has met the five-year build-out requirement, whichever is the first to occur.<sup>7</sup>

4. On January 16, 1996, WCC submitted the instant petition, urging the Commission to clarify the "substantial use" condition, as specified in the pioneer's preference license awarded to Omnipoint. WCC asserts that public evidence indicates that Omnipoint will initially use Global System for Mobile Communications (GSM) equipment for its New York PCS network, rather than the IS-661<sup>8</sup> technology for which the Commission awarded Omnipoint a preference. Specifically, WCC attaches the statement of its consulting engineer, Charles Jackson, who asserts

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<sup>3</sup> See Establishment of New Personal Communications Services, *Third Report and Order*, GEN Docket No. 90-314, 9 FCC Rcd 1337 (1994), *recon. denied, Memorandum Opinion and Order*, 9 FCC Rcd 7805 (1994), *appeal pending sub nom. Freeman Engineering Associates, Inc. v. FCC*, D.C. Cir. No. 94-1779 (filed December 28, 1994).

<sup>4</sup> *Third R&O*, at ¶ 8.

<sup>5</sup> *Id.*, at ¶¶ 7 and 74.

<sup>6</sup> *Id.*, at ¶ 80.

<sup>7</sup> See Omnipoint Radio Station Authorization, Commercial Mobile Radio Services, File No. 15002-CW-L-94, issued December 21, 1994, reproduced at WCC Pet., Att. 1.

<sup>8</sup> IS-661 is a radio frequency access technology that Omnipoint states can be integrated with existing networks, such as GSM, offering in essence an upgrade path for GSM systems.

that he has reviewed the publicly available information and believes that Omnipoint is currently constructing a GSM system with only minor use of IS-661 technology. WCC requests the Commission to clarify the extent to which Omnipoint must use its own technology to retain its preference award and asks several questions, including whether the substantial use condition requires Omnipoint to use its IS-661 interface from the inception of its broadband PCS operations pursuant to its license.

5. On January 31, 1996, Omnipoint submitted a response, in which it argues that WCC's petition should be dismissed or denied on five grounds.<sup>9</sup> Omnipoint first states that "WCC has failed to articulate who it is, whom it represents, or how it or its membership, if any, is affected by Omnipoint's activities in the New York MTA."<sup>10</sup> Omnipoint notes that the Commission's rules permit requests for clarification of a decision only when the petitioner demonstrates the existence of a genuine decisional controversy or uncertainty, and argues that WCC has failed to make such a demonstration.<sup>11</sup> Second, Omnipoint contends that WCC's petition is in substance not a petition for clarification but an untimely filed petition for reconsideration of the *Third R&O*. Third, Omnipoint addresses WCC's substantive allegations. Omnipoint avers that in the deployment of its New York MTA PCS system, it is, in fact, substantially using the IS-661 technology for which it received a preference. It adds that other companies are "licensing and commercializing" this technology.<sup>12</sup> Omnipoint stresses that it is deploying and using its IS-661 technology in conjunction with GSM,<sup>13</sup> and that such use of multiple technologies is similar to the practices of most cellular and other broadband PCS licensees. Omnipoint concludes that WCC is unfairly asking the Commission to prohibit only Omnipoint from using multiple technologies in deploying a broadband PCS system. Fourth, Omnipoint submits that WCC's petition is not ripe for consideration because there is no Commission requirement that pioneers

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<sup>9</sup> Omnipoint also cursorily characterizes WCC as lacking candor by not identifying its interests in this proceeding -- in particular, the economic interest of WCC's president in a competitive, CDMA technology. Omnipoint adds that WCC's petition "attempts to use the Commission to harass and vilify Omnipoint . . . and . . . is an abuse of process." See Omnipoint Opp. at 10-11. Based on our review of the pleadings, we find that, though Omnipoint has properly raised a question as to WCC's standing, which we discuss below, it has not raised a *prima facie* lack of candor or abuse of process issue against WCC.

<sup>10</sup> See Omnipoint Opp. at 9-10.

<sup>11</sup> Omnipoint Opp. at 8 & n.8, citing 47 C.F.R. § 1.2 ("The Commission may . . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."). See also 5 U.S.C. § 554(e) (Commission, "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.").

<sup>12</sup> See Omnipoint Opp. at 1.

<sup>13</sup> In addition to deploying its technology in creating its own system, Omnipoint states that it is integrating the IS-661 RF access technology into existing networks, creating an upgrade path for GSM systems. Omnipoint points out that, as it has often stated, its plan is to build out both technologies in the New York MTA, deploying its own technology in addition to and in conjunction with GSM technology, in order to promote national roaming and interoperability. See Omnipoint Opp. at 4-6.

demonstrate compliance with the substantial use condition prior to the expiration of the five-year build-out requirement. Hence, Omnipoint argues that it should be afforded five years to comply fully with the condition in the New York MTA. Finally, Omnipoint states that the substantial use condition is not vague and does not need to be clarified by an order that could inadvertently delay the rapid deployment of pioneers' systems.

6. On February 7, 1996, WCC submitted a reply to Omnipoint's response in which it contends that Omnipoint offers no information to suggest that WCC's petition for clarification is unwarranted. WCC states that it is not arguing that Omnipoint must use only IS-661 technology in the New York MTA, but is asking merely that the Commission define the substantial use condition associated with Omnipoint's pioneer's preference license. WCC also states that Omnipoint does not attempt to clarify the extent to which Omnipoint will use its IS-661 technology in the New York MTA, either initially or over a five-year period.

## DISCUSSION

7. The Commission has discretionary authority to issue a declaratory ruling to "terminat[e] a controversy or remov[e] uncertainty."<sup>14</sup> The doctrine of standing was developed by the courts as an analytic tool to determine whether the exercise of jurisdiction by a court over a given case would exceed the limitation of "the scope of the federal judicial power to the resolution of 'cases' or 'controversies.'"<sup>15</sup> This jurisdictional limitation is set forth in Article III of the U.S. Constitution.<sup>16</sup> Although this limit on jurisdiction is not directly applicable to administrative agencies such as the Commission and there are no statutory or regulatory standing requirements applicable to the Commission in the declaratory ruling context, we believe that the presence or absence of standing is a useful factor to consider in determining whether a "controversy" or "uncertainty" exists in a form sufficiently crystallized to warrant our consideration in the context of a declaratory ruling.

8. To establish standing in the context of federal appellate proceedings, a petitioner must satisfy a three-pronged test. That is, the petitioner must allege (1) a "distinct and palpable" personal injury-in-fact that is (2) "fairly traceable" to the respondent's conduct and (3) redressable by the relief requested.<sup>17</sup> By analogy, in considering similar factors in the declaratory ruling

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<sup>14</sup> 47 C.F.R. § 1.2. See also 5 U.S.C. § 554(e).

<sup>15</sup> *Branton v. FCC*, 993 F.2d 906, 908 (D.C. Cir. 1993), cert. denied, 114 S.Ct. 1610 (1994).

<sup>16</sup> See also Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

<sup>17</sup> *Branton*, 993 F.2d at 908, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984), and *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

context, our review of the pleadings indicates that WCC has not identified itself, its membership, or its interest in the Omnipoint application. Though WCC has alleged a general concern that the "substantial use" condition should be clarified to "ensure that Omnipoint is in full compliance with the condition[] . . . , and that it is deserving of the substantial financial benefits attached to its license,"<sup>18</sup> it has not alleged how it personally would be injured if Omnipoint were not to comply with the "substantial use" condition. Its general allegations of potential harm to Omnipoint's competitors and to the U.S. Treasury are not distinct and palpable injuries personal to WCC.

9. In addition, although ripeness concerns addressed by federal courts in the context of Article III do not apply to agency declaratory rulings,<sup>19</sup> concepts of ripeness can also provide a useful analogy in determining whether the Commission should exercise its discretion to issue declaratory rulings.<sup>20</sup> We conclude that this is not an appropriate case to issue such a ruling because the question of the extent to which technology must be deployed in order to satisfy the "substantial use" condition is not ripe for our consideration at this time and no unusual and compelling circumstances are present. A finding of "substantial use" entails a judgment of the degree and/or nature of deployment and use, which can be affected by the nature and extent of other technologies with which the pioneer's preference technology is entwined, the effect of market forces, the effect of ensuing technological advancements, and other factors. Such judgments are best made on a case-by-case basis. No precise formula for "substantial use" can productively be set forth at this time, and any effort to do so would only serve to delay unnecessarily the deployment and use of pioneer's preference technology. In the instant case, Omnipoint's broadband PCS system in the New York MTA is still under construction, and Omnipoint has until the five-year build-out date specified in its license authorization, December 13, 1999, to meet its build-out requirements.<sup>21</sup> Therefore, the issue of substantial use is not yet ripe for Commission review.

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<sup>18</sup> WCC Reply at 4; see also WCC Petition at 12. WCC recites that Omnipoint will pay \$347.5 million for the New York MTA Block A license, whereas the successful bid for the Block B license in that market was \$442.7 million. WCC concludes that Omnipoint's pioneer's preference award resulted in its reaping a discount of 21.5%, or \$95.2 million, plus installment payment terms not accorded non-pioneer licensees. WCC Petition at 10 n.26.

<sup>19</sup> *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995).

<sup>20</sup> *Cf. Fox Television Stations, Inc.*, 8 FCC Rcd 5341, 5343-5344 (1993) (possibly unripe question addressed where warranted by "unique and severe financial situation"), *aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154 (D.C. Cir. 1995).

<sup>21</sup> However, if Omnipoint wishes to transfer control of its license prior to that date, it must demonstrate compliance with the five-year build-out requirement prior to any transfer. See Omnipoint's Radio Station Authorization, *supra* note 7.

10. Therefore, for these reasons, we decline to exercise our discretion to issue a declaratory ruling here. Accordingly, IT IS ORDERED that the petition for declaratory ruling filed on January 16, 1996 by The Wireless Communications Council IS DENIED.

**FEDERAL COMMUNICATIONS COMMISSION**

**William F. Caton  
Acting Secretary**