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

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314

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OPPOSITION OF OMNIPOINT CORPORATION

Omnipoint Corporation, by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby opposes the "Petition for Partial Reconsideration" filed by Radiofone, Inc. (the "Radiofone Petition") on July 31, 1996. Omnipoint objects to Radiofone's self-serving position that non-wireline cellular incumbents (like Radiofone) should be entitled to a 55 MHz CMRS spectrum cap, while all other CMRS operators, including new small business entrants with no incumbent spectrum or existing facilities, should be subject to a 45 MHz cap. Further, Omnipoint objects to Radiofone's contention that Block C licenses should be counted as attributable assets for Block F qualification purposes. Such a proposal is contrary to the Commission's long-standing entrepreneur-band rules, and would subvert key policy objectives to assure that small businesses have viable opportunities in PCS.

Background

In its June 24, 1996 Report and Order,[1] the Commission responded to several issues, and public comments, concerning in-region cellular eligibility and the rules for the Block D, E, and F

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1 Report and Order, WT Dkt. No. 96-59, GN Dkt. No. 90-314, FCC 96-278, 61 Fed. Reg. 33859 (July 1, 1996) ("R&O").

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auction, which commenced on August 26, 1996. In relevant part, the Commission eliminated the temporary (until the year 2000) 35 MHz CMRS spectrum limit on cellular licensees on the basis of a Herfendahl-Hirschman Index ("HHI") analysis conducted internally by Commission staff. The Commission also eliminated the 40 MHz PCS spectrum cap, retaining the single CMRS spectrum cap of 45 MHz. R&O at ¶¶ 94-107. In addition, the Commission substantially maintained its existing rules for Block F eligibility, finding that Block C licenses (even after they are issued) should not be counted in an applicant's "total assets" for purposes of the Block F licenses. R&O at ¶¶ 25-27.

Radiofone seeks reconsideration of both decisions. Radiofone contends that the Commission's 45 MHz spectrum cap arbitrarily prohibits a non-wireline cellular company from acquiring a 30 MHz PCS license in addition to its 25 MHz cellular license, in order to hold 55 MHz in a single market. Radiofone also argues that the Commission should attribute to Block F applicants the value of Block C licenses won in the most recent PCS auction. Omnipoint urges the Commission to deny or dismiss the Radiofone Petition.

Discussion

I. The Commission Should Reinstate its Cellular In-Region 35 MHz Spectrum Cap; It Should Not Permit Incumbent Cellular Licensees To Obtain 55 MHz In-Region

The practical result of Radiofone's request that the Commission lift its 45 MHz spectrum cap would be that Radiofone and other incumbent non-wireline cellular licensees would be the only operators able to obtain 55 MHz of spectrum in every market in the country. Radiofone attempts no justification for why new CMRS entrants such as Block A and B PCS licensees or the small business Block C or F licensees should be so disadvantaged. Instead, Radiofone argues that the Commission's HHI analysis underestimated the true level of competition facing cellular carriers. While Omnipoint certainly agrees that the Commission's analysis in the R&O was flawed, one of the major mistakes made was in failing to incorporate the very obvious market reality that incumbent cellular operators currently dominates every mobile market in the country. Thus, the Commission's analysis significantly underestimated the threat that cellular's spectrum

expansion holds for the policy of promoting a more viable competitive market, as the Commission had sought since 1993.

Each of Radiofone's criticisms of the Commission's HHI analysis are inapposite. First, Radiofone argues that the Commission included too few competing services in its analysis. It contends that the Commission failed to temper its HHI analysis with the competitive impact of such services as wireline telephone service, payphone service, paging services, and even services that do not exist in the marketplace, such as satellite-based mobile radio, GMRS and GWCS. What Radiofone fails to acknowledge is that the R&O, at ¶ 100, accounted for all of those services (except payphones) in its evaluation. In fact, the Commission added at least eight additional services that even Radiofone would not consider: " . . . unlicensed PCS, 220 MHz service, air-ground service, maritime service, . . . interconnected private radio systems, CB radio and other "low end" services, government radio systems, resellers of the foregoing services . . . ". Id.

The Commission included all of these tangential services in an effort to mitigate the results of its HHI analysis, which indicated a "highly concentrated market." Id. In fact, services such as CB radio, maritime service, private radio, and government radio do not add *any* competitive pressures on incumbent cellular operators. If they did the mobile communications market would have already been competitive prior to PCS, which it is not. First Report, 10 FCC Rcd. 8844, 8866-67 (cellular "is not the model of perfect competition").[2] Congress also determined that the mobile services market dominated by cellular disserved the American public. For that reason, it mandated that the Commission auction PCS spectrum with an eye toward

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2 Similarly, Radiofone states that "the cumulative effect of available alternatives would be sufficient to defeat a hypothesized collusive price increase." Radiofone Petition at 7. It offers no support for this prediction; given that cellular operators are the only commercially available source of mobile two-way voice service in almost every market today, it is highly doubtful that it can support its premise.

"avoiding excessive concentration of licensees." 47 U.S.C. § 309(j)(3)(B). The fact that the Commission resorted to such noncompetitive services when its own analysis indicated a dangerous level of concentration argues for *more* strict spectrum caps for the cellular incumbent duopoly on reconsideration, not less.

Second, Radiofone claims that market share should be measured by "the number of channels available or by the number of calls or consumers that can be accommodated." Radiofone Petition at 10. It offers no explanation as to why it is inappropriate to use total sales. The fact that no other competitor in the wireless market enjoys a substantial customer base compared to cellular only underscores the reality that cellular is currently the dominant provider. As such, the Commission's HHI analysis should have looked to the current market when it evaluated the short-term in-region cellular spectrum cap. Total sales are a valid, widely used measure for such an analysis. 1992 DOJ/FTC Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) at ¶ 1.21; U.S. v. General Dynamics Corp., 415 U.S. 486, 501 (1974). Use of a total sales measure again leads to the conclusion that the 35 MHz spectrum cap should be reinstated.

Radiofone's argument that alleged capacity and technology differences, and not actual sales in the marketplace, are the best measure of the market falls flat. While Radiofone claims that "[c]ellular companies will be unable to use their cellular spectrum to offer the same scope of services as offered by PCS," Radiofone Petition at 14, cellular operators *are* able to convert to PCS or fixed wireless services at any time, even without notice to the Commission. 47 C.F.R. § 22.901(d) ("Licensees of cellular systems may use alternative cellular technologies and/or provide fixed services on a co-primary basis with their mobile offerings, including personal communications services . . . on the same spectrum within their assigned channel block.").[3]

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3 Nothing but cellular's own reluctance to innovate (which itself is indicative of a monopoly provider) keeps cellular from converting its analog customer equipment to digital.

Third, Radiofone argues that "other competitive pressures" mitigate against the "highly concentrated market" results of the Commission's HHI analysis. It argues, for example, that, while the newspaper business in a one-newspaper town may appear to be highly concentrated, other media sources and the public appearance of "price-gouging" keep newspapers in check. Radiofone's example is inapposite. A newspaper faces direct competition from several information sources (national papers, neighboring local papers, television, radio, electronic newspapers on the Internet). A cellular operator does not because, for the past ten years, it has had a federally authorized duopoly to provide commercial two-way mobile service. Similarly, Radiofone's argument that "C Block licensees in overlapping MSAs and RSAs will prevent anticompetitive conduct" misses the point. Radiofone incorrectly assumes that the number of licensees in the market, including cellular and PCS operators, will make collusion very difficult. However, because cellular operators are currently the entrenched providers, and PCS operators must start from the ground-up even before they obtain an operational commercial system, the threat of cellular obtaining PCS spectrum for anticompetitive purposes is very real.

Fourth, Radiofone argues that the spectrum cap contravenes the public interest because it inhibits competition in the telephone market. The problem with Radiofone's position is that further advantages for the cellular incumbents only diminish competition in mobile service. In addition, while Radiofone asserts that cellular can and will compete head-to-head with incumbent wireline LECs, one questions why the cellular incumbents like Radiofone have for ten years failed to do so, and voluntarily "balkanize" their service from wireline service. It appears that the American public could use new competitors to take on the wireline incumbents.

In sum, Radiofone's request for yet more cellular dominance of the mobile service market should be denied. On reconsideration, the Commission must retain the short-term 35 MHz spectrum cap on in-region cellular operators in order to give new PCS entrants an opportunity to establish a more competitive market.

II Block C Licenses Are Not "Assets" for Purposes of Block F Eligibility

Radiofone argues that Block C licenses, when issued, should be attributable as "assets" for an applicant's Block F eligibility. Radiofone Petition at 23-24. It claims that, because the Block C licenses will eventually be issued, a Block F licensee that is also a winning bidder in the Block C auction will have to take this into account for purposes of maintaining its eligibility. Further, Radiofone contends that counting Block A or B licenses as "assets," but not Block C licenses, is arbitrary. Omnipoint strenuously disagrees and believes that Radiofone misconstrues the Commission's Block F eligibility rules. Further, as a policy matter, the Block C licenses should not be counted toward Block F eligibility.

A. Under The Commission's Rules, Block C Licenses Do Not Affect Block F Eligibility

The Commission's entrepreneur-band eligibility rules, as established from the Fifth Report and Order and through the R&O, have never taken the position on "total assets" that Radiofone now posits. Indeed, Radiofone's argument could well be considered an untimely petition for reconsideration of those prior orders.[4] The Commission's entrepreneur-band rules have always provided that an applicant's "total assets" are properly measured according to the most recent audited financial statements "at the time the applicant's short-form application (Form 175) is filed." 47 C.F.R. §§ 24.709(a)(1); id. at § 24.720(g) ("total assets" is defined as the applicant's property, "as evidenced by the most recent audited financial statements."). In the case of the D, E, and F Block auction, the short-form applications were filed by July 31, 1996 and, given that the Block C license applications have yet to be granted and so would not be included as assets in any applicant's most recent audited financial statements, it is beyond question that the Block C licenses fall outside the definition and are not relevant to Block F auction eligibility.

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4 These rules were established in the Fifth Report and Order, PP Dkt. 93-253, 9 FCC Rcd. 5532, 5639, 5646-47 (1994).

Radiofone also suggests that Block C licenses, when issued, could adversely affect a Block F licensee's obligation to maintain eligibility. Radiofone simply misconstrues the Commission's rules for maintaining entrepreneur eligibility, which clearly state that "a licensee's (or other attributable entity's) increased gross revenues or increased total assets due to . . . business development, or expanded service shall not be considered."[5] 47 C.F.R. § 24.709(a)(3). Obviously, an entrepreneur that obtains Block F licenses to be used in conjunction with other licenses has no other aim or purpose than for "business development" and "expanded service." Radiofone implies that entrepreneurs should not be allowed to grow and should not acquire a significant spectrum footprint through the Block C and F licenses set aside for entrepreneurs. Yet, nothing could be further from the Commission's objectives: "[w]e emphasize that *we have a strong interest in seeing entrepreneurs grow and succeed* in the PCS marketplace. Thus, normal projected *growth of gross revenues and assets, or growth such as would occur . . . as a result of a licensee acquiring additional licenses . . . would not generally jeopardize continued eligibility* as an entrepreneurs' block licensee." Fifth Memorandum Opinion and Order, PP Dkt. No. 93-253, 10 FCC Rcd. 403, 420 (1995) (emphasis added). Radiofone fails to reconcile its position on reconsideration with these Commission decisions.

Moreover, Radiofone's position would have very little practical impact because it also contradicts the Commission's rules and policies on transfers and assignments of Block C or F licenses. Even prior to the liberalization of the three-year anti-trafficking period, R&O at ¶ 83, the Commission's rules permitted transfers and assignments of entrepreneur licenses if "the proposed assignee or transferee holds other license(s) for frequency Blocks C and F and, at the time of receipt of such licenses, met the eligibility criteria set forth in § 24.709." 47 C.F.R.

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5 Radiofone fails to recognize that the Commission's rule on maintaining entrepreneur eligibility, is substantively different than the rules regarding eligibility to participate in the auction, which are measured at the time of filing of the applicant's short-form application.

§ 24.839(d)(2). Thus, a qualified Block C licensee may be assigned or transferred a Block F license just after the auction, consistent with the Commission's policy to encourage the growth and independence of small businesses in PCS. Radiofone, contrary to the Commission's eligibility rules, seeks to make it impossible for that same assignee or transferee to actually participate in the auction directly for the Block F licenses. There simply is no public policy served in denying an entrepreneur access to the auction when it can achieve the same result through the post-auction assignment process.

B. Radiofone's Proposal Is Contrary To The Public Policy of Promoting Entrepreneurs in PCS

The Commission has consistently linked the Block C and F licenses by stressing the potential for a single entrepreneur to aggregate *both* licenses through the auction process;[6] it is appropriate to consider the Block C and F auctions as part of one allocation process. Indeed, the Commission had first proposed to license the two in a single auction, [7] and a substantial number of likely auction winners for the Block F licenses will have participated in the Block C auction.

While all Block C participants undoubtedly will face increases in nominal "paper" assets as a result of receiving a Block C license or raising the capital necessary to pay for and build-out such a license, the Commission has recognized that. Fifth Report and Order, 9 FCC Rcd. at 5572. It would be extremely incongruous to accept that PCS requires enormous assets, and yet

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6 Fifth Report and Order, 9 FCC Rcd. at 5588 (1994) (In designating both the C and F blocks for entrepreneurs the Commission noted that "since the C and F blocks are adjacent, they can be aggregated efficiently by one or more licensees"). *See also* id. at 5579 (PCS band plan was modified on reconsideration by creating a contiguous licensed segment "in part to bolster the ability of designated entities to obtain more competitively viable licenses.").

7 Fifth Report and Order, 9 FCC Rcd. at 5546-47.

disqualify the very licensees the Commission intended to launch into PCS.[8] Rather, an entrepreneur's expansion to meet the enormous financial demands of actual PCS operation can only be deemed "normal growth." Radiofone's position would undermine these policy goals and fractionalize the entrepreneur community by preventing successful Block C entrepreneurs from using an additional 10 MHz to initiate service rapidly and to avoid some immediate costs of incumbent microwave relocation.[9]

Moreover, Block C participants reasonably relied on the expectation that they would be permitted to participate fully in the entrepreneur's band. If the Block C and F auctions had been held simultaneously, as initially decided, the assets of legitimate small businesses resulting from the debt incurred through the auction process itself or the capital raised to build-out and pay for those licenses would not be counted against them. This result should still hold, despite the Commission's decision to hold the entrepreneur auctions sequentially for purposes of administrative convenience. Otherwise, an entrepreneur in the D, E, and F auction that did not participate in the Block C auction (or one that dropped out) could apply the $500 million asset cap *solely to bidding dollars*, without consideration of asset-value of the D, E, and F Block licenses, whereas the successful Block C bidder would be penalized by the licenses it won.

Block C bidders have also reasonably relied on the expectation that they would be able to "fill in" markets after the Block C auction by obtaining Block F licenses, and build independent

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8 The Commission has set a policy objective of encouraging the emergence of strong, independent and long-term entrepreneur competitors. Fifth Report and Order, 9 FCC Rcd. at 5573 (FCC creates entrepreneur's band to "increase the likelihood that designated entities who win licenses in the auction become strong competitors in the provision of broadband PCS service"), & 5579 (entrepreneur's band auction rules are to "designed to promote strong, long-term bona fide competitors.").

9 Memorandum Opinion and Order, GN Dkt. No. 90-314, 9 FCC Rcd. 4957, 4981 (1994) ("we believe that some new entrants may need to acquire 40 MHz to fully realize their business plans . . . ").

PCS systems owned by small businesses as the Commission promised. In this regard, we note that Block A and B licensees can and will do the same, but it is patently unfair to force successful Block C applicants to compete against those telecom giants simply because of "normal growth."

Conclusion

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

Respectfully submitted,

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Date: August 28, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Omnipoint Corporation was this 28th day of August, 1996, mailed, postage prepaid, to: Ashton R. Hardy, Hardy and Carey, L.L.P., 111 Veterans Boulevard, Suite 255, Metairie, LA 70005.

Mark J. O'Connor