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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Amendment of Parts 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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REPLY TO OPPOSITION OF OMNIPOINT CORPORATION

Radiofone, Inc. (Radiofone), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby replies to the Opposition of Omnipoint Corporation (Omnipoint) concerning Radiofone's Petition for Partial Reconsideration of the Report and Order (Amendment of Parts 20 and 24 of the Commission's Rules), WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-278, released June 24, 1996.

In its Petition, Radiofone requested the Commission to modify the 45 MHz spectrum cap contained in Section 20.6 of the Commission's Rules so that cellular carriers who are not wireline carriers would be able to obtain 30 MHz of broadband PCS spectrum in their cellular service areas. Radiofone demonstrated that this modification would be consistent with the Commission's stated goals and the mandate of Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752 (6th Cir. 1995) [hereinafter Cincinnati Bell I], and would present a more realistic approach to the issue of horizontal market concentration. In Opposition, Omnipoint does nothing to undercut Radiofone's competitive analysis.

Radiofone also requested the Commission to count C Block licenses as assets for F Block eligibility purposes. Omnipoint opposes this request. But Omnipoint does not explain why an entity that spent over $750 million on PCS licenses, including C Block licenses, should be considered an "entrepreneur" for F Block eligibility purposes.

These issues are discussed below.

I. Omnipoint's Request to Reinstate the PCS/Cellular Cross-Ownership Rule Is Meritless

Omnipoint makes erroneous assertions about Radiofone's competitive analysis concerning the 45 MHz spectrum cap, and then, inexplicably asks the Commission to reinstate the PCS/cellular cross-ownership rule.

Omnipoint attempts to challenge Radiofone's proposal using an antitrust argument that is based on a faulty premise which infects its entire analysis. Omnipoint argues that Radiofone is seeking "further advantages" which will prevent new, non-cellular competitors from competing in the market. Omnipoint Opp'n at 5. This assertion is completely wrong. Radiofone seeks no advantages, nor does it seek to exclude competitors. On the contrary, Radiofone merely seeks to avoid unfair and arbitrary exclusion from an important segment of the market. It seeks the same right as Omnipoint and many other firms to compete for 30 MHz of PCS spectrum. As noted previously by Omnipoint, the Commission determined that 30 MHz of PCS spectrum is necessary to compete in the mobile services market. Omnipoint Reply Comments, dated April 25, 1996, at 6-7. Omnipoint does not explain why Radiofone should be prohibited from obtaining that amount of PCS spectrum.

Additionally, contrary to Omnipoint's assertions, Radiofone's analysis would not exclude non-wireline competitors from bidding for PCS licenses. Radiofone will not obtain any license at auction unless it outbids Omnipoint and other potential PCS licensees. This is the essence of fair competition -- the license will go to the competitor who bids the most, without artificially excluding one class of potential bidders.

The issue is not whether cellular carriers should be given special advantages, but whether the potential that an incumbent cellular licensee will injure competition by obtaining a 30 MHz PCS license is so unavoidable that all cellular licensees should be prohibited from obtaining 30 MHz of PCS spectrum. For the reasons Radiofone set forth in its Petition, the acquisition of 30 MHz of PCS spectrum by a cellular provider is not so inherently destructive of competition that all cellular licensees should be prohibited from obtaining 30 MHz of spectrum. Where any

individual cellular licensee would injure competition by acquiring a PCS license, that cellular licensee can be excluded pursuant to the Commission's authority under 47 U.S.C. § 314 without the Commission having to impose a blanket prohibition.

The combined ownership of cellular and PCS spectrum is not as dangerous to competition as Omnipoint would have the Commission believe, because there are many other alternative communication services that compete against CMRS. Those alternative services should either be in the market, which would significantly lower the HHI, or they should be considered fringe competitors which lessen the significance of an apparently high HHI. Either way, there is competition that should be addressed, but is not. Omnipoint circumvents this issue by asserting that the Commission "accounted for all of those services," citing the Report and Order, para. 100. Omnipoint Opp'n at 3. But that is not accurate. The Commission recognized the alternative services (other than wireline) in that paragraph, but never accounted for their competitive effects. In other words, the Commission noted that these services provide competitive alternatives, but they were not included in the market definition, and they were ignored in the HHI analysis. This omission is especially egregious in light of the fact that in previous decisions (ignored by Omnipoint), the Commission explicitly found competition from a wide variety of sources. See Radiofone Pet. at 7-8.

Omnipoint next disputes the use of capacity as a measure of market share rather than current sales. Omnipoint Opp'n at 4. It asserts that sales are a normal measure of shares, and contends that Radiofone gave no explanation for the use of capacity. It is not disputed that sales are often used to measure market shares. That is typical because sales are easy to measure and can provide a picture of future competitive significance. Horizontal Merger Guidelines at § 1.41. However, where current sales do not accurately portray future competitive significance, other measures must be used. Guidelines § 1.41. Here, current sales offer a misleading portrayal of future competitive significance for precisely the reason Omnipoint stresses: PCS licensees typically have no current sales. Market share based on

current sales will thus indicate that PCS licensees have no competitive significance. But that is plainly incorrect. PCS licensees have immense competitive significance because they have the capacity and practicable ability to garner a large share of the communications market. Capacity is indisputably a better indicator of future significance than current sales. For example, MCI announced that it is purchasing 10 billion minutes of airtime from NextWave Telecom. MCI Buys PCS Time from NextWave in Major Wireless Move, Communications Daily, Aug. 27, 1996, at 2. Thus, although NextWave has no current sales because its licenses have not been awarded, NextWave's capacity will quickly turn into market share.

Omnipoint ignores the share measurement issue raised by Radiofone -- that is, whether capacity can be measured by spectrum allocation, or whether some more sophisticated analysis of capacity to carry simultaneous calls or capacity to serve consumers is a better measure. For the reasons Radiofone provided in its Petition, spectrum allocation is not a valid measure of capacity. Radiofone Pet. at 9-11.

As discussed above, the competing communications services and other competitive factors assure competitive functioning of the market even if (as Radiofone denies) the market is highly concentrated. Radiofone Pet. at 11-16. Omnipoint disputes this in a way that proves Radiofone's point. Omnipoint concedes that one-newspaper cities nonetheless are competitive, due to "national papers, neighboring local papers, television, radio, electronic newspapers on the internet." Omnipoint Opp'n at 5. None of these alternatives is fully competitive for all purposes. For example, local news cannot be found in national newspapers, or even in neighboring local newspapers; movie listings and classified advertising cannot be found on television or radio; most consumers are not yet able or willing to read newspapers on the Internet, and the Internet cannot easily be read on the subway or over breakfast. Nonetheless, as Omnipoint agrees, the constellation of these imperfect substitutes prevents the publisher of the sole local newspaper from charging anticompetitive prices. The same is true with respect to the communications market. None of the alternatives addressed in Radiofone's Petition is

a perfect substitute for cellular, PCS or SMR,[1] but the cumulative effect of all of the imperfect substitutes provides a significant constraint preventing anticompetitive behavior.

Other competitive factors, which are completely ignored by Omnipoint, also ensure competitive functioning of the market irrespective of market shares and concentration. These include the rapid pace of technological development, the overlapping geographic markets served by the various classes of licenses, the differing cost structures faced by the various types of service providers, and the efficiencies that would be achieved by joint cellular and PCS ownership. Radiofone Pet. at 11-16.

Omnipoint ends its competitive argument by making an entirely unsupported request for the Commission to "retain" the PCS/cellular cross-ownership rule. Omnipoint provides no justification for its request. Its entire argument concerned Radiofone's requested change to the 45 MHz spectrum cap. Omnipoint said nothing about the PCS/cellular cross-ownership rule, and certainly failed to provide the justification for retaining the rule in response to the Commission's Notice of Proposed Rulemaking in this proceeding. Thus, its request to "retain" the PCS/cellular cross-ownership rule should be denied.

II. Licenses Are Assets

In addition to requesting a modification to the 45 MHz spectrum cap, Radiofone requested the FCC to count C Block licenses as assets for F Block eligibility purposes. Radiofone Pet. at 23. Omnipoint's opposition to this request contains many fallacies.

First, Omnipoint attempts to explain away the FCC's decision not to count C Block licenses by the happenstance that the auction began before the C Block licenses were granted. Omnipoint Opp'n at 6. But the sequencing of the auction and the C Block license grants will

[1] Indeed, cellular, PCS and SMR are not perfect substitutes for each other. They are nonetheless correctly included in the same market because they compete and impose competitive restraints on each other. Similarly, other alternative communications services compete with CMRS and restrain the cumulative market power of the CMRS providers. Thus, the other services should be in the same market although imperfect substitutes.

be irrelevant if, as is likely, the Commission is required to reauction any of the F Block licenses, or if an entity attempts to purchase a license from an F Block licensee, because under such circumstances, the C Block licenses likely would have been awarded before the reauction or acquisition. Moreover, Omnipoint's argument in this regard is inconsistent with its rather nonsensical assertion that C Block licenses should not be counted as assets because if the C and F Blocks had been auctioned simultaneously, the C Block licenses would not have existed (and therefore would not have been considered assets) at the time of auctioning. Omnipoint Opp'n at 9. Assuming, for the sake of argument, that this latter argument makes sense, the fact is that Omnipoint cannot have it both ways -- it cannot argue that the scheduling of the F Block auction before C Block licenses are awarded justifies not counting C Block licenses as assets, and then turn around and say that the scheduling of F Block auction after the C Block auction should not be considered in determining whether the C Block licenses are assets. The Commission's decision on whether the licenses should be considered as assets should not depend on the auction schedule. PCS licenses either are assets or they are not. A and B Block licenses are considered assets. C Block licenses should also be considered assets.

Second, Omnipoint incorrectly characterizes Radiofone's request as an untimely petition for reconsideration of the Fifth Report and Order. Omnipoint Opp'n at 6. But Radiofone's request is not untimely. The issue of which licenses should be considered as assets for the F Block auction was raised by the Commission in the Notice of Proposed Rulemaking, para. 33, and addressed in the Report and Order, paras. 26-27.

Third, Radiofone noted that counting the A and B Block licenses as assets, while not counting the C Block licenses, is arbitrary and capricious. Radiofone Pet. at 24. Omnipoint does not address this inconsistency.

Fourth, Omnipoint asserts that the purchase of C Block licenses should be considered "normal business growth." Omnipoint Opp'n at 7. However, "normal business growth" surely does not apply to Omnipoint's exponential evolution as a startup PCS operator with PCS

purchases totalling over $750 million.

Fifth, Omnipoint asserts that under Radiofone's request, a C Block licensee that could not obtain an F Block license at auction, could still obtain an F Block license by purchasing it after the auction. Omnipoint Opp'n at 8. Omnipoint claims that "[t]here simply is no public policy served" by such a result. Id. Omnipoint obviously doesn't get it; the Commission's goal, recognized by Omnipoint, is to serve the public interest by encouraging entrepreneurs to participate in PCS. Id. at 7. By restricting F Block license eligibility to those entities who have assets of less than $500 million, the Commission will promote the participation of entrepreneurs and thus serve that public interest.

Finally, Omnipoint's reliance arguments, Omnipoint Opp'n at 9, have no merit, because Omnipoint cannot provide one single citation to a Commission order promising C Block licensees that their licenses would not be counted as assets for F Block eligibility purposes.

CONCLUSION

Omnipoint's assertions concerning Radiofone's request to modify the spectrum cap do nothing to undercut Radiofone's competitive analysis, and do not support its extraneous request to reinstate the PCS/cellular cross-ownership rule. Furthermore, Omnipoint's opposition to counting the C Block licenses as assets fail to explain why an entity that has already spent more than $750 million on PCS licenses should still be considered an "entrepreneur" for F Block eligibility purposes, regardless of when the F Block license is obtained.

For the foregoing reasons, Radiofone respectfully reiterates its request that the Commission: (a) modify the 45 MHz spectrum cap so that cellular carriers, who do not provide wireline services in their cellular service areas, may obtain, or otherwise have an attributable interest in, 30 MHz of PCS spectrum; (b) eliminate the 49% equity exception for the F Block; (c) adopt the C Block affiliation exclusion for the F Block; and (d) count C Block licenses as assets for F Block eligibility purposes.

Respectfully submitted,
RADIOFONE, INC.

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CERTIFICATE OF SERVICE

I, Ashton R. Hardy, a member of the firm of Hardy and Carey, L.L.P., certify that on this 11th day of September, 1996, I have caused one copy of the foregoing to be sent via first class U.S. Mail, postage prepaid the following:

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