

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

RECEIVED  
OCT 11 1996  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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

DOCKET FILE COPY ORIGINAL

**REPLY OF OMNIPOINT CORPORATION**

Omnipoint Corporation ("Omnipoint"), by its attorneys, hereby replies to the August 28, 1996 Opposition of the Cellular Telecommunications Industry Association ("CTIA") to Omnipoint's July 31, 1996 petition for reconsideration (the "Petition") of the Commission's Report and Order.<sup>1</sup>

CTIA's Opposition fails to address Omnipoint's primary point on reconsideration -- the Commission's reliance on a flawed HHI analysis.<sup>2</sup> Since the articulated rationale for the rule change was plainly flawed, it is equally clear that the elimination of the cellular eligibility rule based on that rationale was arbitrary. As CTIA infers, the Cincinnati Bell<sup>3</sup> decision demands that the Commission articulate a sound economic rationale on remand; the HHI analysis,

---

<sup>1</sup> Report and Order, WT Dkt. No. 96-59, GN Dkt. No. 90-314, FCC 96-278 (rel. June 24, 1996) ("Report and Order").

<sup>2</sup> Omnipoint explained its basis for concluding that the HHI analysis was flawed in its Petition (at 6-11) and its September 10 Reply (at 4-7).

<sup>3</sup> Cincinnati Bell Telephone Co. v. FCC, 69 F.3d 752 (6th Cir. 1995).

however, failed to meet that standard.<sup>4</sup> It is not sufficient for the Commission to simply eliminate the rule. Its rationale for elimination of that rule must meet the same standard of reasoned decisionmaking that would have been required if the Commission upheld the rule on remand. Motor Vehicle Manufacturers Ass'n v. State Farm Mut., 463 U.S. 29, 43 (1983); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280-81 (D.C. Cir. 1971). When parties have expended vast resources in reliance on the stability of the Commission's rules, as Omnipoint and others have relied on the stability of all aspects of the PCS band plan, including the cellular eligibility restriction, the Commission is especially bound to weigh carefully the impact of abandoning its rules. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 220 (1988) (J. Scalia, dissenting). The Commission's decision to abandon the cellular eligibility restrictions after parties have relied on the rules, and at a time when new PCS competition is just beginning to emerge, merits significant rethinking.

CTIA's Opposition does nothing more than reiterate the main points of the Report and Order and express CTIA's opinion that was a good decision.

CTIA accuses Omnipoint of taking "gratuitous swipes" at the cellular industry. CTIA Opposition at 4. However, the Omnipoint Petition did nothing more than demonstrate cellular's dominating market advantages vis-a-vis new entrant PCS providers. If CTIA found those remarks "gratuitous," then it misunderstands the Commission's statutory responsibilities to promulgate rules that "avoid[] undue concentration of licenses," and promote "economic opportunity and competition" and "an equitable distribution of licenses."<sup>5</sup> See also Cincinnati Bell, 69 F.3d at 762 (Commission has statutory authority to impose spectrum caps "to promote competition and avoid undue concentration of licenses."). In addition, the concerns raised by the

---

<sup>4</sup> Oddly, CTIA downplays the significance and accuracy of the HHI analysis generally. See CTIA Opposition at 3-4 (HHI analysis is not generally "binding on the FCC in this rule making proceeding"). Once the Commission decides to justify its rule change on an HHI analysis, however, as it did in this proceeding, the analysis articulated by the Commission *is* binding as a matter of APA law.

<sup>5</sup> 47 U.S.C. § 309(j)(3)(C)&(4)(C).

Petition are the same issues that were among the most important to virtually all of the hundreds of new PCS industry participants that commented throughout the PCS allocation and service rule making process since 1989. It is disrespectful of the Commission's processes, and the many industry participants who worked to forge viable compromises for the PCS band plan, to mischaracterize these critical CMRS issues as "gratuitous swipes" against cellular.

**Conclusion**

The CTIA pleading does not advance the discussion. It can and should easily be disregarded. Omnipoint urges the Commission to grant its Petition.

Respectfully submitted,

OMNIPOINT CORPORATION

By:



Mark J. Fauber

Mark J. O'Connor

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

Its Attorneys

Date: October 11, 1996

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing "Motion to Accept Late-Filed Reply" and "Reply of Omnipoint Corporation" were mailed, postage prepaid, this 11th day of October, 1996 to:

Ashton R. Hardy  
Hardy and Carey, L.L.P.  
111 Veterans Boulevard, Suite 255  
Metairie, LA 70005.

John T. Scott, III  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2595

Cathleen A. Massey  
Vice President - External Affairs  
AT&T Wireless Services, Inc.  
1150 Connecticut Avenue, N.W.  
Suite 400  
Washington, D.C. 20036

Howard J. Symons  
Sara F. Seidman  
Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo  
701 Pennsylvania Ave., N.W., Suite 900  
Washington, D.C. 20004

Michael Altschul  
Randall S. Coleman  
CTIA  
1250 Connecticut Ave., NW  
Suite 200  
Washington, D.C. 20036



---

Mark J. O'Connor