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Federal Communications Commission
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20541

In the Matter of)	
)	
Amendment of the Commission's)	WT Docket No. 97-82
Rules Regarding Installment Payment)	
Financing For Personal Communications)	
Services (PCS) Licenses)	
)	

**PETITION FOR RECONSIDERATION AND
CLARIFICATION OF OMNIPOINT CORPORATION**

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Introduction and Summary

Omnipoint Corporation ("Omnipoint"), by its attorneys, hereby petitions the Commission for reconsideration and clarification of the Second Report and Order¹ ("Second R&O") in the above-captioned proceeding. Omnipoint, through its subsidiaries, was the fourth most active high bidder in both the initial Block C auction and the Block F auction. It holds 18 Block C broadband PCS licenses for which it bid a net price of \$509 million, and it also holds 108 Block D, E and F licenses for which it bid a net price of \$181 million (including 50 Block F licenses at a net price of \$74 million). Omnipoint also bid on and lost many licenses in the Block C and Block D, E, and F auctions. The Second R&O significantly affects Omnipoint's participation in the Block C auction and

¹ In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, Second Report and Order and Further Notice of Proposed Rule Making, WT Dkt. No. 97-82, FCC 97-342, 62 Fed. Reg. 55348 (Oct. 24, 1997).

its business of providing innovative, entrepreneurial wireless telecommunications in markets throughout the United States.

The Commission and the wireless industry should seek to maintain the overwhelming success of the Entrepreneur's Band. Today, there are more than 130 different companies holding Block C or F licenses. Nearly every city in the country has an Entrepreneur with a licensee who did not request auction debt restructuring. Thanks, in large part, to the Commission's PCS auction allocation scheme, the country can look forward to full-service, wireless competition among six to eight competitors in every market, even without debt restructuring. Consumer prices for wireless services have dropped dramatically in the last six months in every city where there are four or more wireless operating competitors. The initial policy concern that the need for a "fifth" competitor requires the Commission to "save" a few over-extended Block C bidders is woefully inaccurate. The Entrepreneurs from the Block D, E, and F auctions, as well as operating Block C Entrepreneurs, are more than fulfilling the policies of competition in wireless services for the benefit of the American consumer. Significant regulatory changes to the Block C must now be scrutinized, to avoid regulatory decisions that merely favor a few specific bidders over others. The governing principle must be fairness to all parties.

Omnipoint has consistently argued in this proceeding that, if the Commission grants relief from Block C auction payment obligations at this time, those measures should be equitable for all parties, including unsuccessful bidders in the Block C auction, licensees who have substantially built-out their Block C systems, and Block D, E, and F winning bidders. Omnipoint appreciates that the Second R&O did not embrace many of the more irresponsible and drastic rule changes advocated by some parties. However, in the Commission's effort to accommodate the insistent needs of a few licensees, Omnipoint is concerned that the approach taken in the Second R&O is subject to

considerable legal challenge. Omnipoint asks that the Commission now clarify and give additional consideration to whether the approach of the Second R&O -- in granting three new methods for Block C licensees to avoid the bargain they struck in the auction and obtain debt forgiveness -- is correct as a matter of law and advisable as a matter of policy.

At a minimum, the Commission should modify and clarify the Second R&O on reconsideration to ensure that its relief mechanisms are not themselves the cause of further business disadvantage to Entrepreneurs (both Block C and Block F) who attempted to bid responsibly and play by the auction rules. Specifically, if such changes are implemented, Omnipoint urges the Commission to (1) clarify that, under the "built-out" exception, a built-out licensee has the same opportunities as other licensees, and thus may surrender 15 MHz of its built-out license through the disaggregation option; (2) avoid a "prisoner's dilemma" for Block C licensees by requiring NextWave, as by far the predominant licensee (with 28 of the top 50 BTA markets) that will shape the entire scope of the re-auction, to make its Block C option election before any other licensee, and (3) provide licensees an equivalent credit for moneys paid regardless of whether they choose the prepayment option (which currently provides for a 70% credit on deposit) or the disaggregation option (which currently provides for no credit on deposit); (4) provide entrepreneurs that acquired Block D, E and F spectrum with the same three "return options" as the Block C licensees, after the Block C re-auction is completed.

Discussion

I. At A Minimum, the Second R&O Should be Clarified and Modified To Ensure Fairness To Those Parties That Played by the Auction Rules

As explained above, Omnipoint is concerned that the Commission, in its effort to balance the needs of a few licensees, may have adopted provisions of the Second R&O that are suspect to legal challenge. If the Commission decides to maintain the basic framework of the order, however, it must clarify and modify aspects of the order to

ensure that it does not cause additional harm to the very auction participants and Block C licensees that have played by the auction rules, and who were prepared to pay in accordance with the pre-existing auction payment obligation. As the Commission noted, it "has an interest in minimizing the competitive impact of the changes it makes to the auction rules" Second R&O at ¶ 57.

A. Clarify that "Built-Out" Exception Permits Disaggregation

At ¶ 57 of the Second R&O, the Commission provided for a "built-out" exception for those licensees that have pressed forward with substantial service to the public and have met the five-year build-out test.² A built-out exception is necessary because built-out licensees are in a different position than other licensees. Operational licensees have obligations to public subscribers, millions of dollars invested in system hardware and equipment, market-specific and binding contractual commitments to other parties, and a growing base of employees and community commitment. For these reasons, a built-out operational licensee cannot simply give back its license in amnesty. An operational built-out licensee is in a position significantly different than a licensee that has simply a modest infrastructure investment in one or more markets. An *operational* licensee cannot simply turn off service to the public. In addition, as the Commission notes, encouraging and not penalizing Block C licensees that have met the five-year build-out test also fulfills paramount policy goals of the Communications Act for "the rapid provision of service to the public."³

² 47 C.F.R. § 24.203(a). We note that the built-out exception is only provided for in the amnesty option, which is an option that never existed prior to the Second R&O.

³ Second R&O at ¶ 57.

Unfortunately, while the Second R&O dramatically alters the license cost of other bidders, it provides virtually no relief for those licensees, like Omnipoint, that have met the build-out test for some licenses. Instead, the order prevents an operational built-out licensee from reducing the cost of the license through a re-auction, while providing choices to every other licensee that has not built-out any licenses. Obviously, an operating licensee cannot surrender its license in amnesty and inform its customers to wait a year in the hopes that the operator will buy the license back in a re-auction. However, the "built-out exception" in the Second R&O (at ¶ 57) only provides the operational licensee with the option of surrendering licenses *outside of the MTA* containing the built-out license(s); it completely prevents that licensee from obtaining a debt reduction offered to all other licensees through the disaggregation option.

To ensure that "built-out" licensees have the same opportunity for disaggregation as other licensees, the Commission should clarify that the "built-out" exception permits the licensee to disaggregate and surrender 15 MHz of its spectrum. Otherwise, the "built-out" exception merely allows the licensee to divest all other Block C licenses outside of its built-out MTA, but forces it to keep the very auction debt that will be significantly more burdensome than that of others. Omnipoint's bid of \$50/pop for the Philadelphia BTA was not made in the abstract, but rather was made in the context of the simultaneous Block C auction. During that auction, virtually every other major BTA market in the U.S. was higher than \$50/pop. However, if the prices in a re-auction are significantly lower, then only the built-out licensees will be forced to carry a license price that was driven to artificially high levels by irresponsible bidders who, in the re-auction, will have obtained debt relief. That result discriminates against the built-out exception licensee because it provides that licensee with no realistic opportunity to put the simultaneity back into the simultaneous re-auction. Unlike all other licensees, who can fully participate in

either the amnesty option or the disaggregation option, the "built-out" licensee does not have the same choices.

The disparate treatment accorded built-out licensees in the Second R&O is also demonstrated by the Commission's treatment of licensees under the "prepayment option." The "prepayment option" has the contradictory statement that bidders cannot "cherry pick" BTAs within an MTA, unless the licensee cannot "afford" to pay for more than a subset of BTA licenses within an MTA.⁴ Conversely, the Commission does not permit a licensee that has built-out some BTAs in an MTA to turn back other BTAs in that same MTA. Again, the Second R&O seemingly traps the built-out licensee with artificially higher priced markets.

B. Modify Election Procedures So that NextWave "Goes First."

At ¶ 70 of the Second R&O, the Commission notes that all Block C licensees must make their elections on January 15, 1998. While this would apparently set a level playing field for all, the reality is that NextWave's single election decision -- with its dominance of 28 of the top 50 Block C licenses -- will dramatically affect the choices made by all other licensees.⁵ Whether NextWave chooses to retain its existing licenses (or chooses the bankruptcy option), to disaggregate some or all of its licenses, to surrender all of its licenses, or to prepay for some licenses and surrender others will, in of itself, have a dramatic impact on the relative value of the election decisions that all other licenses are required to make. NextWave's dominance is so great that a re-auction *without* a return of NextWave's licenses bears no resemblance at all to a re-auction *with*

⁴ Id. at ¶ 67.

⁵ We also note that, through its Block D, E, and F licenses, NextWave holds PCS spectrum in 41 of the top 50 markets.

its licenses returned. The election decision of no other Block C licensee holds so much significance.

Therefore, Omnipoint believes it is appropriate to establish NextWave's election date to be a relatively short period of time (e.g., 10 days) prior to the election decision of all other Block C licensees. In this way, licensees will be made aware of NextWave's decision and can more rationally judge what is their best payment/license surrender option. This staggered election should result in no material disadvantage to NextWave because it does not face another Block C licensee that can so unilaterally change the import of the election decision, as NextWave's election will do for others. Moreover, NextWave and its affiliates have been among the most vociferous proponents for dramatic alterations to the payment rules, and so they can hardly complain of this small change to the election process that makes it more rational for other Block C bidders, many of whom never asked for any auction debt relief.

Finally, an election process where NextWave "goes first" would improve other Block C licensees' ability to make rational election decisions in preparation for the Block C re-auction. It is critical for the Commission's fairness and efficiency goals to strive for a *simultaneous* re-auction of all potentially available Block C spectrum. A simultaneous auction resolves the marginal price versus average price problem inherent in sequential auctions. However, the re-auction is seriously jeopardized if all licenses are not *returned* simultaneously.

Without knowing NextWave's election, the simultaneous return of licenses becomes more difficult to achieve because all other Block C licensees are put in a "prisoner's dilemma." Stated differently, a single January 15 election date for all parties provides NextWave with the advantage of knowing that it alone governs the scope of the re-auction, to the detriment of all other Block C licensees. For example, if a licensee returns its spectrum, but NextWave unilaterally decides not to return spectrum, the

returning licensee will be one of very few subject to a re-auction, and the bidder returning license(s) cannot defend itself the way it could in the initial Block C auction. Such a re-auction is materially different than the initial simultaneous Block C auction because the returning licensee does not have the ability to counterbid on a variety of other licenses in a simultaneous format, as the bidder could do in the initial auction. For that reason, every Block C licensee (except NextWave) will be more reluctant to turn in spectrum. With the knowledge of NextWave's election, however, the Commission promotes a more simultaneous and fair re-auction.

The Commission can only ensure a fair simultaneous re-auction by requiring NextWave to "go first" in the election process (for example, January 5) so that other bidders may make a rational determination of what licenses, if any, they should return on January 15.

C. Licensees Choosing Either the Prepayment or the Disaggregation Options Should Receive the Same "Credit," If Any, on Their Deposit

While Omnipoint believes that the "prepayment option" raises significant legal questions, if the option is retained then the "disaggregation option" should also provide an equivalent refund on deposits. Under the prepayment option, the Second R&O (at ¶ 65) provides Block C licensee with a 70% credit for deposits made on the licenses surrendered, but prevents that licensee from bidding in the re-auction for the licenses returned. By contrast, under the disaggregation option, the Commission retains all of "the *pro rata* portion of the down payments applicable to the [surrendered] spectrum." Id. at ¶ 40. Like the prepayment option, the disaggregation option prevents the licensee from bidding in the re-auction on the returned spectrum. Omnipoint believes that parity requires that these two spectrum surrender plans treat the license deposits in an equivalent manner. Thus, if the Commission retains its 70% deposit credit under the prepayment option, it should modify the disaggregation option so that licensees receive a 70% credit

of the down payment made on the disaggregated license. Because the licensee electing the disaggregation option will retain a debt obligation, the 70% credit could be applied to the outstanding, post-disaggregation balance.

D. All Three Return Options Should Apply for Entrepreneurs That Won Licenses In the Block D, E, and F Auction

Some bidders in the Block C auction have argued that relief from Block C debt is necessary because of lower prices, *on average*, in the Block D, E, and F auction. However, this ignores the competitive reality of the two auctions: many Entrepreneurs, who were forced out of the Block C auction by irresponsible bidders, have subsequently acquired competitive spectrum in the same markets through the Block D, E, and F auction. The Second R&O now implements totally unanticipated changes for the Block C licensees that portend to radically change the *relative* values of the Block D, E, and F licenses. For the small businesses that won Block D, E, and F licenses, the Second R&O could radically change their reasonable assessments made during the bidding process regarding the risk/return parameters of the Block D, E, and F auction.

The Commission cannot ignore the potentially profound industry effects that could be caused by the Second R&O. Many Block D, E, and F auction winners would not have bid as high if they had known that, because of regulatory intervention, the Block C licensees would be forgiven their debt and that the Block C licenses would come back for rapid re-auction. Indeed, dozens of licenses in the Block D, E, and F auction sold for a higher price (\$/MHz/pop) than the Block C license in the same market.⁶ Even in markets where the Block D, E, and F prices are not higher than the Block C prices, the

⁶ See, e.g., Ex Parte Presentation of Omnipoint Corporation, Attachment, WT Dkt. No. 97-82 (filed July 16, 1997).

Block C re-auction could result in serious disadvantage to the Block D, E, and F entrepreneurs who had no way of knowing that the Commission would radically change the Block C debt and would encourage a rapid re-auction of Entrepreneur Band spectrum just months after the Block D, E, and F auction closed.

At a minimum, the Commission should make clear that, *after* the simultaneous Block C re-auction, the Block D, E, and F licensees who are Entrepreneurs will be fairly availed of the same "return" options as provided for in the Second R&O.⁷ For example, several Entrepreneurs aggregated two or more 10 MHz licenses in the Block D, E, and F auction in certain markets. The Block D, E, and F licensee should be entitled to amnesty, "disaggregation," or prepayment that is functionally equivalent to that offered in the Second R&O.⁸

II. The Commission Should Further Clarify and Consider the Reasoning and Legal Issues Surrounding the Adoption of Three New Post-Auction Block C Payment Options.

As stated above in Part I, Omnipoint strongly believes that, if payment changes to the Block C debt are implemented, then the Second R&O should be modified and clarified to better ensure that all parties are treated fairly in the process. In this Part II, Omnipoint asks that the Commission continue to consider fundamental auction policy issues as the parties present their arguments. While much has been said and written on

⁷ Cf., Second R&O at ¶ 20 (Commission declines to extend payment options to Block F licensees).

⁸ Under either the amnesty or the disaggregation options, the licensee would be able to return one or more 10 MHz licenses with a 90% refund of moneys paid, in the case of a Block D or E license.

the policies that should guide the Commission in this proceeding, Omnipoint believes that a more fulsome consideration of the auction policy issues is needed.

The Second R&O (at ¶ 2) broadly asserts that the adoption of the three additional payment options of disaggregation, amnesty, prepayment serves the following public interest goals: (1) maintaining the integrity of the auction process; (2) ensuring fairness for all participants in the Block C auction; (3) resolving issues now, rather than "postponing the problem;" (4) meeting the Section 309(j) statutory mandate to ensure meaningful participation for small businesses in the licensing process; and (5) promoting competition and opportunity in the CMRS marketplace. Omnipoint submits that the Commission should further consider whether the post-auction adoption of the three new options truly promotes these policy objectives.⁹

A. Fairness and Integrity of the Auction Process

A fundamental policy of the Commission's allocation by auction rests, in significant part, on the premise that the party who bids the most is the one who is "most likely to deploy new technologies and services rapidly, promote the development of competition . . . , and thus foster economic growth."¹⁰ The allocation by auction, in turn,

⁹ We note, in passing, that it is at least questionable whether the June 2, 1997 Public Notice constitutes a sufficient notice of proposed rule making, as required by 5 U.S.C. § 553(c). It is also questionable whether the Public Notice adequately proposed rules, resulting in a confused array of private proposals, or whether the rule changes were a "logical outgrowth" of anything suggested by the Commission. Moreover, it is questionable whether the alteration of the PCS band-plan, as discussed below, and the relative effect on the Block D, E, and F auction were aspects of the Second R&O that the public was given sufficient notice to comment on.

¹⁰ Second Report and Order, PP Dkt. No. 93-253, 9 FCC Rcd. 2348, 2360 (1994) *modified on recon.*, Second Memorandum Opinion and Order, 9 FCC Rcd. 7245 (1994).

relies on a bidders' assertions, through the auction process, that they value the license most highly. *Id.* at 2360-61. In significant ways, the adoption of the three post-auction options in the Second R&O can unravel the integrity of the auction process because it permits a few bidders to treat their bids as merely "call options" and to escape the risk of default that all other bidders had reasonably undertaken. Unlike the scheme of the auctions, the Second R&O is a *regulatory intervention* into that market-driven process of success or failure (i.e., default). Thus, the plan adopted in the Second R&O creates inherent and significant issues of whether the rule changes were fair, and whether all the consequences of the order have been fully resolved. Moreover, with its regulatory intervention, the Commission cannot know with confidence whether its auction policy goal -- to allocate the license to the entity that values it most highly -- has been implemented in the Block C auction.

In the same way, the Commission has correctly pointed out that it "has an interest in minimizing the competitive impact of the changes it makes to the auction rules . . ." (Second R&O at ¶ 57), and that consideration should include larger issues of how the Block C changes affect the PCS industry as a whole. For example, the disaggregation option, designed to "more efficient use of the spectrum" (Second R&O at ¶ 43), raises issues of the effect on the PCS band-plan,¹¹ as well as issues of fairness for bidders that dropped out of the auction.

B. Reducing Uncertainties for Small Businesses and Resolving Issues Now

Omnipoint wholeheartedly agrees with the Commission that "[c]ertainty is beneficial to all C block licensees" and it is best, when feasible, to "resolve[] issues now."

¹¹ See Second Report and Order, GN Dkt. No. 90-314, 8 FCC Rcd. 7700 (1993), *recon.*, Memorandum Opinion and Order, 9 FCC Rcd. 4957 (1994).

Second R&O at ¶4. What is more troubling is whether the Second R&O offers more certainty and resolution than was provided for in the Part 1 and Part 24 auction rules understood by all bidders at the time of the Block C auction.

For example, the Second R&O does not squarely reconcile the three new payment options with the reality that all licensees have an additional option of Chapter 11 bankruptcy. While the Commission nominally adds some certainty by setting a January 15, 1998 election date and, in effect, a May 31, 1998 payment date, a licensee employing the bankruptcy option undercuts the certainty associated with those deadlines. As long as the Commission remains silent as to its general position to be applied in *every* Entrepreneur Band bankruptcy, each bidder will wonder who will vote on election day, and how they can rationally decide whether to either surrender or retain their licensed spectrum. The Second R&O could have "resolved issues now" in a better manner by defining categorically the Commission's position on bankruptcy: is the Commission's general position as stated in its filings in the Pocket bankruptcy,¹² or is it willing to agree to compromises as the major creditor in a bankruptcy? Without clarification, every licensee is left uncertain as to whether the bankruptcy option is the lowest risk alternative.

In addition, more clarity on the Commission's jurisdiction to engage in debt forgiveness, as contemplated by the Second R&O,¹³ and the administrative process

¹² In re Pocket Communications, Inc., Case No. 97-5-4105-ESD, et al. (Bankr. D. MD).

¹³ The disaggregation option forgives one-half of the licensee's debt to the federal government and, as a "partial amnesty" plan, it forgives default penalties. The amnesty option, of course, forgives the entire federal debt, any unpaid installment payments, and any penalties that would be otherwise applied in the case of default. Finally, the prepayment option is also debt forgiveness for all licenses returned, without default penalty.

involved that such forgiveness entails, is critical.¹⁴ Otherwise, Block C licensees are left with considerable uncertainty both at the January 15 election, and again on the May 31 payment deadline.¹⁵ Answers to these fundamental issues are necessary before any licensee can relinquish tens or hundreds of millions of dollars worth of spectrum assets.

Conclusion

Omnipoint respects the difficulty of the decisions made in the Second R&O, and that compromises are a fact of the regulatory process. On reconsideration, Omnipoint asks that the Commission consider what changes to the Part 1 and Part 24 auction rules are truly necessary, and what cost those changes might entail.

Respectfully submitted,

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¹⁴ It is not apparent on its face that Section 309(j) of the Communications Act vests in the Commission the authority to engage in forgiveness of debt incurred through the auction process, especially since 31 U.S.C. § 3711(a)(2) states that an agency "may compromise a claim of the Government of not more than \$100,000"

¹⁵ Compounding this uncertainty is the fact that the Department of Justice has not publicly concurred with the debt forgiveness and compromise plan in the Second R&O. The Commission provides no assurance that coordination with DoJ has been finalized. Instead, debt forgiveness "*will be subject to coordination* with the Department of Justice" Second R&O at ¶ 53 (emphasis added); *id.*, at n. 123.