

**ORIGINAL**

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

**RECEIVED**

DEC 29 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Amendment of the Commission's )  
Rules Regarding Installment Payment )  
Financing For Personal Communications )  
Services (PCS) Licensees )  
)  
Amendment of Part 1 of the Commission's )  
Rules – Competitive Bidding Proceeding )

WT Docket No. 97-82

**OPPOSITION TO PETITION FOR RECONSIDERATION**

**I. Introduction**

NextWave Telecom Inc. ("NextWave" or the "Company"), pursuant to section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), hereby opposes, in part, Omnipoint Corporation's ("Omnipoint's")<sup>1</sup> petition for reconsideration of the Second Report and Order in the above-captioned proceeding ("Restructuring Order").<sup>2</sup> In that order, the Commission modified its C block spectrum payment program to provide licensees additional options for financing their PCS network build outs or returning spectrum to the Commission for reauction. Omnipoint requests that the Commission force NextWave to publicly select an option before Omnipoint or other licensees, so they

<sup>1</sup> Petition for Reconsideration and Clarification of Omnipoint Corporation, WT Docket No. 97-82, filed Nov. 24, 1997 ("Omnipoint Petition").

<sup>2</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order, WT Docket No. 97-82, FCC 97-342, 62 Fed. Reg. 55375 (Oct. 24, 1997) ("Restructuring Order").

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can “judge what is their best payment/license surrender option.”<sup>3</sup> This blatant and cynical attempt to manipulate the Commission’s rules to personal advantage deserves to be dismissed summarily.

## II. Argument

Omnipoint’s petition states that the Commission’s “governing principle” on reconsideration should be “fairness to all parties.”<sup>4</sup> In other pleadings in this docket, Omnipoint has taken the position that fairness requires equal treatment of all licensees.<sup>5</sup> On reconsideration, Omnipoint takes a different view of fairness. It claims that NextWave does not deserve equal treatment concerning the Commission’s decision to require C block licensees to declare a financing option simultaneously. Instead, Omnipoint wants NextWave to publicly commit to an option before Omnipoint and other licensees, so it can factor that information into its own decision making.<sup>6</sup> This is an unbridled attempt to obtain an early signal of NextWave’s intentions and “game” the auction rules to secure a competitive advantage. Omnipoint does not even try to conceal the absence of any public policy benefit in its proposal. Its petition concedes that the purpose of making NextWave choose first is to secure for Omnipoint and others “a

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<sup>3</sup> Omnipoint Petition, at 7.

<sup>4</sup> *Id.*, at 2.

<sup>5</sup> *See, e.g.*, Comments of Omnipoint Corporation, WT Docket No. 97-82, filed Nov. 13, 1997, at 2 (commenting on the Further Notice of Proposed Rulemaking issued simultaneously with the Restructuring Order).

<sup>6</sup> *See* Omnipoint Petition, at 6-7.

dramatic impact on the relative value of the[ir] election decisions.”<sup>7</sup> Requests that lack a public policy basis, like Omnipoint’s, insult the process and should be rejected out-of-hand.

Moreover, the factual premise of Omnipoint’s request is false. It claims that it and other carriers face a “prisoner’s dilemma” because NextWave’s election decision allegedly will have a controlling effect on all other C block licensees.<sup>8</sup> That simply isn’t true. NextWave is licensed in 63 of the 493 C block Basic Trading Areas, which is approximately 12 percent of the total. Omnipoint itself admits that nearly half of the licenses in the top 50 markets are held by carriers other than NextWave.<sup>9</sup> Those numbers do not create a “prisoner’s dilemma” for anyone, and certainly present no basis for singling out NextWave for discriminatory and unreasonable regulatory treatment. Given its lack of a factual foundation, Omnipoint’s request falls of its own weight.<sup>10</sup>

Omnipoint’s request also should be rejected because its underlying logic could provide a basis for discriminating against many different C block licensees. For example, a public policy argument can be made that *Omnipoint* should be required to choose first. As the beneficiary of a pioneer’s preference for claimed innovations in spread spectrum

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<sup>7</sup> Omnipoint Petition, at 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Omnipoint’s request is even more thoroughly flawed as a legal matter. By urging that NextWave alone be subject to unique licensing treatment, Omnipoint is effectively asking the Commission to take an adjudicatory action in a rulemaking proceeding (*i.e.*, condition the license of a single licensee). The Commission is not empowered to do that under the instant circumstances. *See Sangamon Valley Television Corp. v. US*, 269 F.2d 221 (D.C. Cir. 1959); *see also P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984) (discussion of when conditions may be added to a license).

technology,<sup>11</sup> Omnipoint already has reaped substantial competitive and financial advantage from the regulatory process. The early award of that valuable spectrum enabled Omnipoint to access public capital markets well before the unprecedented financial and regulatory events of the past fifteen months, which have crippled new entrants' efforts to build out their networks. Given Omnipoint's experience in wireless financial markets, advance knowledge of its C block financing election could greatly improve other licensees' understanding of the spectrum marketplace. Smaller carriers, in particular, might then be able to make more informed judgments. The resulting increase in the overall economic efficiency of the election process arguably would further the public interest. Thus, one could argue that if the Commission requires anyone to "choose first," public policy considerations would support putting Omnipoint at the head of the line.

The Commission, of course, should not discriminate against Omnipoint or any other carrier by forcing it to announce its C block payment election in advance of other licensees. In this regard, the Commission's initial decision in the *Restructuring Order* was absolutely correct. Fairness requires equal treatment of all licensees, which means that all should make their elections at the same time.

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<sup>11</sup> As the Commission is aware, questions have been raised as to whether Omnipoint is complying with the condition of license that requires it to "substantially use" the design and technology upon which its preference award was based. See Wireless Communications Council (WCC) Petition for Clarification, File No. 15002-CW-L94, GEN Docket No. 90-314 PP-58, filed Jan. 16, 1996. Evidence has been submitted demonstrating that if Omnipoint's claimed innovations are being used at all, such use is decidedly minor. See *id.*, Statement of consulting engineer Charles Jackson. The Commission dismissed the WCC Petition on procedural grounds, without resolving the substantive issue. See *Omnipoint Communications*, 11 FCC Rcd 10785 (1996).

### III. Conclusion

For the foregoing reasons, NextWave respectfully requests that Omnipoint's petition for reconsideration be denied, to the extent indicated herein.

RESPECTFULLY REQUESTED,

By 

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December 29, 1997

## Certificate of Service

I, Kay Hawkins, hereby certify that on this 29<sup>th</sup> day of December, 1997, a copy of the attached Opposition of NextWave Telecom Inc. was served on the following individuals via U.S.

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