

DUPLICATE COPY ORIGINAL

EX PARTE OR LATE FILED

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

RECEIVED

MAY - 6 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
SBC Communications, Inc. and)
Southern New England)
Telecommunications Corporation)
)
for FCC Consent for)
Proposed Transfer of Control)

CC Docket No. 98-25

Reply of Omnipoint Communications, Inc.
to Joint Opposition of SBC Communications, Inc.
and Southern New England Telecommunications
Corporation to Petitions to Deny and Reply
to Comments

This Reply of Omnipoint Communications, Inc. ("Omnipoint") is filed pursuant to Section 1.45(b) of the Commission's Rules, and responds to the Joint Opposition of SBC Communications, Inc. ("SBC") and Southern New England Telecommunications Corporation ("SNET") to Petitions to Deny and Reply to Comments (hereinafter "Joint Opposition"). Omnipoint has earlier filed a Petition to Deny the requested transfer of control of the subject licenses and Section 214 authorizations, in accordance with the schedule established by the Commission's Public Notice released February 28, 1998.¹

Omnipoint's Petition to Deny raised several areas of misconduct and competitive factors warranting denial of the

¹ SBC Communications Inc. and Southern New England Telecommunications Corporation Seek FCC Consent for a Proposed Transfer of Control, Public Notice, CC Docket No. 98-25, DA 98-381 (February 28, 1998).

No. of Copies rec'd of 12
List ABCDE

proposed transfer of control. These boil down to three arguments: First, SBC's adjudicated federal antitrust violations raise serious licensee qualifications issues which have not been considered with respect to radio licenses owned or controlled by SBC.² The Commission must consider these violations, and SBC must carry the burden of proof that it is a qualified Commission licensee in light of its antitrust violations.³ Second, SBC has engaged in a continuing pattern of anticompetitive conduct against Omnipoint. This includes the refusal of certain billing and collection services to Omnipoint and refusals to permit Omnipoint co-location space for its PCS antennas on the towers of SBC's cellular affiliate in the New England region, where tower space is becoming scarce.⁴ Third, the merger of SNET with SBC will eliminate a major potential entrant into SNET's wireline and wireless markets and will adversely affect competition in SNET's markets.⁵ SBC and SNET's Joint Opposition attack these arguments and urge that the transfer of control applications be granted. As is discussed in greater detail below, Omnipoint believes that SBC and SNET's arguments regarding SBC's qualifications as a Commission licensee, and concerning its pattern of anticompetitive conduct against Omnipoint, merit this brief Reply. Omnipoint does not believe that the Joint Opposition merits a response with respect to arguments

² Petition to Deny, pp. 2-6.

³ Id.

⁴ Id. at pp. 7-11.

⁵ Id. at pp. 11-19.

concerning the proposed merger's effect on competition, and Omnipoint stands on its original pleading.

**SBC's Licensee Qualifications
Must Be Examined in Light of Its
Adjudicated Antitrust Misconduct**

SBC attempts to side-step examination of its adjudicated antitrust misconduct, and violation, by arguing that because of SBC's size, it is "indisputably" qualified as a Commission licensee.⁶ Relatedly, it argues that the Commission has already considered and excused the antitrust violations⁷ in the SBC/Pacific Telesis merger proceeding and that the Commission "need not pause" over the antitrust violations here.⁸

The Commission should not be derailed from its statutory purpose by these arguments. Under section 310(d) of the Communications Act, the Commission must ensure that radio license transferees possess legal and character qualifications necessary to be a Commission licensee. Omnipoint's Petition to Deny discussed the effect of adjudicated antitrust violations upon the Commission's duty to inquire into the transferee's basic character qualifications and the burden of proof that the transferee carries.⁹

⁶ Joint Opposition, pp. 37-38.

⁷ Great Western Directories, Inc. v. Southwestern Bell Corp., 63 F.2d 1378, 1387 (5th Cir. 1995), petition for rehearing en banc granted in part and denied in part, 74 F.3d 613 (5th Cir. 1996), vacated pursuant to settlement, cert. denied, 117 S. Ct. 26 (1996).

⁸ Id. at pp. 39-40.

⁹ Petition to Deny, pp. 2-6.

Contrary to SBC's assertions, this necessary inquiry into SBC's licensee qualifications never took place in the SBC/PacTel merger Order¹⁰ and thus remains outstanding. This failure to consider the antitrust violations in the context of SBC's licensee qualifications is facially evident from the Commission's observation, in the threshold of the Order, that no party raised any qualifications issues against SBC and its finding that it was a qualified Commission licensee.¹¹ The balance of the Order dealt with the "competitive consequences" of the transaction -- not licensee qualifications issues.¹²

SBC's arguments that its size and number of licenses "indisputably" establish its qualifications, or that Omnipoint was incorrect in asserting that the antitrust violations were reviewed under section 214 of the Communications Act,¹³ do not transform the analysis that was missing from the SBC/PacTel merger Order into a

¹⁰ In re Applications of Pacific Telesis Group, Transferor and SBC Communications, Inc., Transferee, Report No. LB-96-32, Memorandum Opinion and Order. 12 FCC Rcd 2624 (1997) ("SBC/PacTel Order").

¹¹ Id. at para 11.

¹² Id. at para 12.

¹³ Joint Opposition, p. 40 (Omnipoint believed that the Commission reviewed the Great Western Directories matter pursuant (inter alia) to its section 214 jurisdiction, given the fully subject status of both parties involved in the merger. See, e.g., In re Declaratory Ruling on the Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies, Memorandum Opinion and Order, 2 FCC Rcd 1750 (1987). Whether the Commission exercised its section 214 jurisdiction or not, the fact remains that the focused and rigorous inquiry, that should have been aimed at SBC's basic character qualifications, never occurred.

legally sufficient one. The effect of SBC's adjudicated anticompetitive conduct upon its licensee qualifications was never considered. Had it been considered, the Commission would have been required to focus specific questions upon SBC, instead of upon the complaining party, as discussed in Omnipoint's Petition to Deny.¹⁴ The Commission should not allow SBC to sweep the matter under the rug again. SBC has not carried its burden of proof as to its character qualifications, and the Commission should deny the proposed transfer of control on this basis.

**SBC'S Continuing Pattern of
Anticompetitive Activity**

Omnipoint's Petition to Deny detailed additional anticompetitive conduct arising since SBC's adjudicated antitrust violations. This conduct includes SBC's refusal to provide Omnipoint necessary information to provide Calling Party Pays ("CPP") service to its customers, in contrast to other Bell Operating Companies and Local Exchange Companies; SBC's refusal to provide Omnipoint conventional billing and collection ("B&C") service while providing it to its cellular affiliate; and SBC's refusals to allow Omnipoint to co-locate antennas on the tower

¹⁴ Petition to Deny, pp. 5-6. SBC argues that Omnipoint's failure to have offered evidence or suggested that SBC's anticompetitive conduct in Great Western has spread beyond Texas is "telling." See Joint Opposition, p. 39. This proposition demonstrates how profoundly SBC misunderstands its obligations as a Commission licensee. The Commission has never stated that licensees get one free antitrust violation -- indeed far from it -- or that third parties carry the burden of proof with regard to license violations. The Commission should reject this argument out of hand.

space of SBC's New England affiliate.¹⁵

Although SBC admits that it has denied Omnipoint CPP service and that it is providing a billing service that allow its CMRS customers to receive a single bill (both for wireless and local services),¹⁶ SBC's Joint Opposition seeks to minimize its discriminatory conduct based on legal arguments. For instance, it argues that it is not required to offer CPP service at all. Moreover, it argues, the self-dealing that now exists vis-a-vis billing for its CMRS customers is immune from section 202 discrimination requirements, given the Commission's 1986 detariffing of B&C services.¹⁷ SBC contends that Omnipoint's claims regarding antenna co-location are similarly undercut by any Commission rule on the subject, that Connecticut has enacted a statute dealing with tower sharing and that, in any event, SBC's wireless affiliate in Boston has allowed Omnipoint to co-locate five antennas in Boston and that space has been leased to Omnipoint in Bolton, Massachusetts.¹⁸

As a threshold matter, Omnipoint does not concede the legality of SBC's self-dealing, or refusal to provide what are in fact essential inputs to Omnipoint regarding CPP billing and the co-location of antenna space. The Commission has recently described the maximization of opportunities for increasing competition and

¹⁵ Petition to Deny, pp. 6-11.

¹⁶ Joint Opposition at 29-30.

¹⁷ Id.

¹⁸ Id. at p. 33

the promotion of competitive entry as "key Congressional priorities" underlying the Telecommunications Act of 1996.¹⁹

Omnipoint submits that it is well within the Commission's broad public interest authority under section 310(d) of the Communications Act to consider SBC's competitively hostile management philosophy and how it will affect competition in SNET's markets. Indeed, in the recent Bell Atlantic/NYNEX merger order,²⁰ the Commission described its public interest standard as a "broad, flexible standard" which encompasses the "broad aims" of Congress' pro-competitive policy as reflected in the Telecommunications Act of 1996. It is not hard to believe that SBC's anticompetitive practices will continue. For instance, contrary to the representations in the Joint Opposition (at 33), SBC's wireless affiliate has not provided tower space for "five antennas owned by Omnipoint." SBC requires a one-for-one trade for PCS antenna space and the Bolton, Massachusetts antenna mentioned in the Joint Opposition²¹ is the only exception SBC has made to this policy.

¹⁹ In re Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 29.5-30.0 GMz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services; Petitions for Further Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Third Order on Reconsideration, CC Dkt. 92-297, 1998 FCC LEXIS 696, at *13-14 (Feb. 11, 1998).

²⁰ In re Application of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, Memorandum Opinion and Order, File No. NSD-L-96-10, 1997 FCC LEXIS 4349, at *1-3 (Aug. 14, 1997).

²¹ Id. at n. 33.

Omnipoint is seeking to gain access to other SBC towers; however, given the fact that SBC's application process generally takes a year for those seeking to share tower space, and the fact that tower space in New England is at a premium, the competitive penalty which Omnipoint will pay is obvious.

Omnipoint recognizes that the Commission in the SBC/PacTel merger order apparently condoned conduct by SBC designed to frustrate competition, because it consisted of "individual act(s)" of protected free speech or "legally permissible" business conduct.²² This policy should be revisited. Since the SBC/PacTel merger Order, SBC has taken the lead in judicially gutting some of the key provisions in the Telecommunications Act of 1996.²³ The Commission should thus declare the prior PacTel merger to be the high-water mark. A similar record of anticompetitive conduct and animus to the 1996 Act does not exist with SNET. The Commission should not compound the damage by allowing SBC to extend its anticompetitive conduct into SNET's markets.

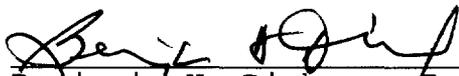
²² SBC/PacTel Order at para. 37.

²³ SBC Communications Inc. v. FCC, 981 F. Supp. 996, 1997 U.S. Dist. LEXIS 20725 (N.D. Tex. 1997).

CONCLUSION

The Commission may not lawfully approve the transfers of control requested by SBC and SNET without conducting an investigation into SBC's basic licensee character qualifications in light of its adjudicated antitrust violation. The fact that no such investigation occurred in the SBC/PacTel transaction, and the fact that SBC has again dodged any substantive discussion of the issues²⁴ leaves the Commission no other choice. Also purely as a matter of the public interest, the Commission should not approve the transaction.

Respectfully submitted,



Benjamin H. Dickens, Jr.
Gerard J. Duffy
Michael B. Adams, Jr.

Blooston, Mordkofsky,
Jackson & Dickens
2120 L Street, N.W.
Washington, D.C. 20037

Attorneys for
Omnipoint Communications, Inc.

Dated: May 6, 1998

²⁴ As noted in Omnipoint's Petition to Deny, the Commission characterized SBC's discussion on the subject in the SBC/PacTel transaction as "notable" in its "brevity". SBC/PacTel Order at para. 61. SBC's two page response here qualifies for like description.

**Declaration Under
Penalty of Perjury**

I, Jerry O'Brien, declare under penalty of perjury under the laws of the United States, that I am Senior Director of Legal and Regulatory Affairs of Omnipoint Communications, Inc.; that I have read the foregoing Reply; and that, with the exception of the facts of which the Commission may take official notice, all facts stated in the Response are true, of my personal knowledge.



Jerry O'Brien
Senior Director, Legal and Regulatory Affairs

Dated: May 5, 1998

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply of Omnipoint Communications, Inc. to the Joint Opposition of SBC Communications Inc. and Southern New England Telecommunications Corporation was served on May 6, 1998 by hand on all of the following persons, with the exception of those outside the Washington, D.C. area, who were served by first-class mail:

Chairman William E. Kennard
Federal Communications Commission
1919 M Street, N.W.
Room 814
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W.
Room 802
Washington, D.C. 20554

Commissioner Susan E. Ness
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

Commissioner Michael Powell
Federal Communications Commission
1919 M Street, N.W.
Room 844
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission
1919 M Street, N.W.
Room 826
Washington, D.C. 20554

Carol Mattey
Acting Chief, Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554 (2 copies)

Michael H. Pryor
Deputy Chief, Policy and Program
Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 5304
Washington, D.C. 20554

Diane J. Cornell
Chief, Telecommunications Division
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554 (2 copies)

Jeanine Poltronieri
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, D.C. 20554

David Furth
Chief, Commercial Wireless Division
Federal Communications Commission
2100 M Street, N.W.
Room 7023
Washington, D.C. 20554

Lawrence Strickling
Acting Chief, Competitive Division
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 658
Washington, D.C. 20554

Troy Tanner
Chief, Policy and Facilities Branch
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 800
Washington, D.C. 20554

Robert Calaff
Senior Legal Advisor
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Room 819
Washington, D.C. 20554

Laura Smith, Attorney
Policy and Rules Branch
Commercial Wireless Division
Federal Communications Commission
2100 M Street, N.W.
Room 7111
Washington, D.C. 20554

David A. Handzo
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005

Lisa B. Smith
Senior Policy Counsel
MCI Telecommunications Corp.
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Frederick M. Joyce
Joyce & Jacobs, LLP
1019 19th Street, N.W.
14th Floor (PH#2)
Washington, D.C. 20036

Scott Blake Harris
Harris, Wiltshire & Grannis, LLP
1025 Connecticut Avenue, N.W.
Suite 1012
Washington, D.C. 20036

Robert L. Hoggarth
Angela E. Giancarlo
The Personal Communications Industry Association
500 Montgomery Street
Suite 700
Alexandria, VA 22314

Mark J. O'Connor
Piper & Marbury, LLP
1200 19th Street, N.W.
Suite 300
Washington, D.C. 20036

Matthew R. Lee
Executive Director
Inner City Press/Community on the Move
and Inner City Public Interest Law Project
1919 Washington Avenue
Bronx, New York 10457

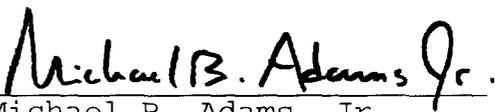
James D. Ellis
Wayne Watts
Joseph E. Cosgrove, Jr.
SBC Communications Inc.
175 E. Houston
San Antonio, Texas 78205

Madelyn M. DeMatteo
Alfred J. Brunetti
Southern New England
Telecommunications Corporation
227 Church Street
New Haven, CT 06510

Philip W. Horton
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004

Kellogg, Huber, Hanson, Todd
& Evans, P.L.L.C.
1301 K Street, N.W.
Washington, D.C. 20005

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C.


Michael B. Adams, Jr.