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

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

PETITION FOR RECONSIDERATION

Omnipoint Corporation ("Omnipoint"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby petitions the Commission for reconsideration of the Fourth Report and Order¹ ("Fourth R&O") in the above-captioned proceeding. The decisions made in the Fourth R&O are inconsistent with other policies and orders established in the Entrepreneur's Band proceedings and significantly undermine Omnipoint's ability to participate in the Block C re-auction and its business of providing innovative, competitive wireless telecommunications in markets throughout the United States.

Introduction and Summary

Omnipoint participated as a small business in the Block C auction and as a very small business in the Block F auction, receiving a 25% bid credit in each auction.² As the Commission

¹ *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Fourth Report and Order, WT Dkt. No. 97-82, 63 Fed. Reg. 50791 (Sept. 23, 1998).*

² Omnipoint, through its subsidiaries, holds four Block C licenses, and 117 Block D, E and F licenses, of which 50 are Block F entrepreneurial licenses.

is well aware, virtually all successful entrepreneurs in those auctions qualified for the maximum bid credit, which put all serious bidders *on a par with one another* in the entrepreneurs' auctions.

The Fourth R&O decision to measure eligibility for "small business" or "very small business" bid credits at the time of re-auction short-form filing³ unfairly and irrationally discriminates against operational Block C licensees like Omnipoint by forcing such licensees to pay as much as a 33% premium over all other bidders in the re-auction.⁴ It serves no legitimate purpose to penalize operating entrepreneurs for no other reason than the fact they that grew their businesses. Unlike some other bidders in the Block C auction, Omnipoint has moved forward with significant and costly deployment of broadband PCS networks in many markets (including New York, Philadelphia, Boston, and Miami), and that has brought Omnipoint significant debt and ongoing demands on its capital resources. This same service deployment -- encouraged and applauded by the Commission -- should not count against an operational licensee's ability to participate in the re-auction in parity with other entrepreneurs.

Moreover, the Commission had resolved in the Second Report and Order, and reaffirmed in the Fourth R&O, that all bidders in the initial C Block auction would have a full opportunity to participate in the C Block re-auction.⁵ The Fourth R&O decision to deny bid credits to those

³ Id. at ¶ 47.

⁴ A 33% premium is derived from the fact that some bidders will obtain a 25% bid credit while operational licensees with average gross revenues of \$40 million or more will obtain no bid credit. Thus, the premium is 33% $(=1/(1-.75)) - 1$.

⁵ *In the Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second*

(footnote continued to next page)

bidders that simply grew their PCS businesses, and thereby deny them the same relative position as they were in at the time of the initial auction, contradicts the Commission's C Block restructuring and re-auction decisions. While the Commission had expressly sought an equitable restructuring, this aspect of the order is wholly inequitable.

Finally, the Commission's only rationale (at ¶ 47 of the Fourth R&O) for such a decision, i.e., that other bidders would be harmed, is not accurate. Other competing small businesses are not harmed if operational licensees can also participate in the auction with the same bid credits. Operational licensees will not be able to dominate the auctions by virtue of bid credits that merely put them on a par with other bidders. Other bidders do not have the huge debt loads that are borne by operational licensees. Moreover, as the Commission well knows, the parties that have dominated past auctions amassed enormous funds for auctions while qualifying for the Commission's "small business" or "very small business" status.⁶ Nothing prevents a repeat of the past, when huge international companies put \$500 million in cash into a shell bidding entity that claims "very small business" status because the bidder has no revenues.

It is speculative, at best, to reason that operational licensees – with massive existing and ongoing costs and debts – will somehow be more apt to capture access to capital for the Block C

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Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 16436, 16438 (1997) ("Second R&O").

⁶ See, e.g., WTB Public Notice – Broadband PCS: C Block Auction, *found at*, www.fcc.gov/wtb/auctions/blk_c/cblk1fact.html (Of the 255 applicants for the Block C auction, 253 qualified as "small businesses;" all 89 of the Block C auction winners qualified as "small businesses").

re-auction in a manner that is any more effective than any other “very small business” re-auction applicant.

Omnipoint urges the Commission to reverse its decision in the Fourth R&O, and to evaluate bid credit eligibility on the basis of an applicant’s gross revenues at the time of the initial C Block auction. In addition, the Commission should permit all Entrepreneurs that participated in the initial Block C auction to participate fully in future Block C re-auctions, without a time limitation for similar reasons.

Discussion

I. The Commission Should Support, and Not Penalize, Entrepreneurs Who Were Able to Commence Operations

In the Fourth R&O, the Commission contradicted its earlier policy decision and held that eligibility for bid credits in the C Block *re-auction* would be determined at the deadline for filing short-form applications for the re-auction rather than the *initial* Block C auction. The Commission concluded that it was “not in the best interests of the public and, in particular, of competing small business bidders and licensees to provide a discount to applicants that no longer meet the small business size standards.”⁷ However, this decision penalizes those existing entrepreneur licensees that have generated revenues in the time since the initial C Block auction as a result of operating competitive PCS networks.

The decision to penalize operational entrepreneur licensees contravenes the Commission’s entrepreneur band policies. The Fifth MO&O established that licensees would

⁷ Fourth R&O at ¶ 47.

retain entrepreneur status and eligibility even as they grow beyond the pre-existing asset and revenue caps.⁸ This policy furthers the Commission’s statutory mandate for auctions “promoting economic opportunity . . . by disseminating licenses among a wide variety of applicants, including small businesses . . .,” and the Commission’s obligation to “ensure that small businesses . . . are given the opportunity to participate in spectrum based services.” 47 U.S.C. § 309(j)(3)(B) & (4)(D). In broadband PCS, this policy allows Block C and F licensees to grow without concern for license eligibility⁹ or unjust enrichment,¹⁰ and to acquire other Block C and F licenses through the assignment and transfer process.¹¹ The Commission has also carried forward these policies first adopted for the PCS auctions into other licensed services where the

⁸ *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Fifth Memorandum Opinion and Order*, 10 FCC Rcd. 403, 468 (1994) (“Fifth MO&O”) (“ . . . we will allow licensees to retain their eligibility . . . even if the company has grown beyond our size limitations for the entrepreneurs’ block and for small business eligibility”). The Commission correctly established this policy to allow designated entities to grow and not be penalized for their success.

⁹ 47 C.F.R. § 24.709(a)(3) (increased gross revenues from business development and operations are not considered when determining an existing licensee’s eligibility).

¹⁰ Id. at § 1.2111(b)(2) (no unjust enrichment penalty is due if the transferee is an eligible designated entity).

¹¹ Id. at § 24.839(d)(2) (Block C or F licensees that met the eligibility standards at the time they obtained Block C or F licenses may be the transferee or assignee of additional Block C or F licenses).

Commission also encourages business growth and development by small business entrepreneurs.¹²

The Fourth R&O undercuts this long-standing precedent. By requiring current Block C licensees to re-establish their small business eligibility for the Block C re-auction, the Commission penalizes those existing providers who took seriously their obligation to provide competitive services to U.S. consumers and meet federally mandated buildout schedules. While the Commission has previously laid out a policy that auction and service regulations should encourage small business growth, the Fourth R&O is at odds with those policy decisions.

The Commission seems to assume -- inappropriately -- that operational Block C licensees will be able to compete effectively in the re-auction without bid credits, and overcome the 33% bid premium not paid by other auction participants. However, operational licensees that played by the rules will face significant hurdles in raising capital vis-à-vis those who otherwise failed to commence service to the public. Forcing operational licensees to accept a 33% bid premium for participation in the re-auction makes that capital fundraising nearly impossible. Moreover, non-operational auction participants have demonstrated in prior auctions an uncanny ability to raise

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In the IVDS context, the Commission emphasized its “strong interest in seeing small businesses grow and succeed in the wireless marketplace and stated that growth of the licensee’s gross revenues and assets . . . generally would not jeopardize continued eligibility for designated entity preferences.” *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Tenth Report and Order*, PP Dkt. No. 93-253, 11 FCC Rcd. 19974, 19983 (1996) (citing Fifth MO&O, 10 FCC Rcd. at 420). See also *In the Matter of Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Second Report and Order*, 12 FCC Rcd. 19079, 19173 (1997) (noting that normal projected growth of gross revenues and assets will not generally jeopardize small business eligibility).

capital for auctions; but, because these parties would have generated no “gross revenues” through actual service to the public, the Fourth R&O provides them with the fullest bid credit. Operational licensees, on the other hand, are denied those same credits even though such licensees bring service to the public, employ many workers, and pay the federal government for license obligations even through the current market “downturn.” The Commission’s assumptions concerning an operational licensee’s ability to raise capital (especially in the current market) relative to other auction participants are simply erroneous.

II. Since the Block C Restructuring Significantly Re-Wrote The Initial Auction Results, All Initial Block C Applicants Should Be Entitled To Participate As They Did In the Initial Block C Auction.

The Commission’s intervention in the Block C auction significantly changed the results of the initial auction and the ordinary process for license reallocation. Out of the 493 C Block licenses originally auctioned, 263 of those were returned to the Commission through the Election process. In addition, the two largest bidders in the initial Block C auction, NextWave and GWI, sought bankruptcy protection concurrent with and, it could be argued, as a result of the Commission’s restructuring decisions. The re-auction(s) will now produce a significant re-allocation of C Block spectrum beginning with a single re-auction event in the first quarter of 1999. It is also significant to note that, absent the Commission’s extended stay of payment obligations and debt relief under restructuring, many licensees would have quickly defaulted and such licenses would have been available for re-auction well before this time. Thus, absent the unprecedented Commission interventions, Omnipoint and other operational licensees would have otherwise had an opportunity to obtain reallocated licenses much sooner than under the restructuring plan and *at a time when they would have qualified as a “very small business.”*

In full knowledge of these unusual consequences stemming from its restructuring/payment stay decisions, the Commission correctly provided all auction participants with a right to participate in the upcoming re-auctions in order that no party would be unjustly treated in the restructuring process.¹³ The Commission also recognized that the restructuring decisions have the potential to be especially harmful to operational Block C licensees.¹⁴ Unlike non-operational licensees that can abandon one corporate applicant for another to prepare for the re-auction, operational licensees cannot abandon continuing services offered to the public, significant debt and vendor financing, and employee obligations. For these reasons, the Commission was especially sensitive to avoiding a restructuring process that devastated operational licensees.¹⁵

However, the Fourth R&O abandons this approach. It forces operational licensees to accept a 33% bid premium, and only *after* such licensees have made their June, 1998 election decisions on the basis of the Commission's promise for meaningful opportunity to participate in the re-auction. While the order provides operational licensees with only a nominal right to

¹³ Second R&O, at ¶ 7 (“... a re-auction of the C block spectrum ... will be open to ... all applicants to the original C block auction ...”), id. at ¶22 (“We also will allow all entities that were eligible for and participated in the original C block auction to bid in the reaction.”).

¹⁴ Id. at ¶ 44 (additional flexibility under restructuring for C block operators who have built-out markets promotes the Commission's goals of being “fair and equitable to all interested parties”); id. at ¶ 57 (additional restructuring flexibility for built-out Block C operators “facilitates the achievement of the statutory goal set forth in Section 309(j) that we encourage the rapid provision of service to the public, and responds to the needs of licensees that have already commenced operations or have otherwise invested significantly in certain of their C block licenses. The Commission has an interest in minimizing the competitive impact of the changes it makes to the auction rules, consistent with its broader policy objection.”).

participation, the 33% bid premium denies such licensees of any meaningful auction participation. Incredibly, the Commission is implying that only the entrepreneurs that grew their PCS businesses will be penalized even when re-bidding on the very spectrum they held but refunded for re-auction under the Commission's amnesty option. It is incumbent on the Commission to treat all participants in the initial Block C auction, and especially operational licensees, in an equitable manner with respect to the bid credits. It is not appropriate for the Commission, at the very end of the difficult restructuring process, to simply apply a formulaic rule of bid credit eligibility "at the time of short-form filing." Rather, the Commission needs to ensure that bid credits are provided for equitably, so that operational licensees can participate meaningfully in the last stages of the Commission's Block C restructuring plan.¹⁶

III. Other Auction Participants Will Not Be Harmed By Allowing Operational Licensees to Participate On A Par With Other Bidders.

At ¶ 47 of the Fourth R&O, the Commission's only reason for declining to extend bidding credits to initial Block C applicants that were entitled to such credits is that "it is not in the best interests of the public and, in particular, of competing small business bidders and licensees" Omnipoint disagrees. Other auction participants are not significantly harmed if an operational licensee is entitled to the same bid credit as they enjoy. Moreover, the Commission's "gross revenue" test has never shielded entrepreneurs in the auction from the

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Second R&O at ¶ 57.

capital resources of their fellow entrepreneur auction participants, and so depriving operational licensees from bid credits will not protect other entrepreneurs from bidders that are better capitalized.

While the Commission's intent for bidding credits was to provide truly small businesses with a rough "counterbalance" against those other non-small business entrepreneurs in the same auction,¹⁷ the reality of the bid credit scheme over the past several entrepreneurs' auctions has been very different. In fact, almost every bidder in the initial Block C auction qualified as a "small business" for a 25% bid credit; the same was true for the Block F bidders in the Block D,E, and F auction. Even though the Commission, or Congress, may not have envisioned small businesses with ready access to capital from foreign and large corporate backers and did not expect bids in the entrepreneur's auctions that reached over 10 billion dollars, it is far too late in the auction process to deny that such vast capital resources are obtained by some "small business" participants.

Given the significant monetary advantages at stake, the same situation could easily play out in the re-auction, with "new entrants" forming for the express purpose of qualifying as a "very small business" and obtaining the maximum bid credit. New bidders with low or no gross revenues will be deemed eligible to receive up to a 25% bid credit and will be free to amass

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¹⁶ As an alternative, the Commission could establish parity among Block C bidders by eliminating all bid credits in the C-Block re-auctions.

¹⁷ *In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd. 5532, 5537 (1994).

hundreds of millions of dollars in “debt” financing and other off-balance sheet funding while still maintaining eligibility.

The only parties that cannot engage in such gamesmanship, of course, are operational licensees such as Omnipoint. Operational licensees cannot simply dissolve one corporate form and spawn another which is more suitable to meet the Commission’s changing bid credit standards.¹⁸ Such licensees cannot abandon service to the public, financial commitments, as well as obligations to employees and shareholders. By operation of the affiliation rules, such licensees also cannot create a wholly new “very small business” subsidiary with a completely “clean slate.”¹⁹ The responsibilities of an operational licensee do not, however, confer on such companies the ability to obtain additional capital. Omnipoint does not have any greater access to financing than its other entrepreneurial competitors. In fact, because of massive obligations of building and operating systems that other bidders do not have, the financial constraints which led to the creation of bid credits and installment financing are just as real for Omnipoint as for any other “very small business” auction participant.

¹⁸ The Commission’s standards for small business bid credit eligibility have changed at least three times. In the initial auction, Block C applicants with \$40 million or less average gross revenues (“AGR”) were “small businesses” entitled to a 25% bid credit off of the nominal winning bid price. 47 C.F.R. § 24.712(a) (1997) In the *Block C Re-Auction Further Notice*, the Commission proposed a “small business” category of \$40 million or less AGR for a 25% bid credit, and a category of “very small business” of \$15 million or less AGR for a 35% bid credit. Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 16,436, ¶ 100 (1997). In the Fourth R&O (at ¶ 46), however, the Commission now offers a “small business” category of \$40 million or less AGR for a 15% bid credit, and a category of “very small business” of \$15 million or less AGR for a 25% bid credit.

¹⁹ 47 C.F.R. § 24.720(l).

Therefore, in the context of the Block C re-auctions, it makes no sense to deny benefits to operational Block C licensees on the conclusion that such companies have a relatively greater access to capital. The Commission's prior auctions demonstrate that actual access to capital and the "very small business" requirements have no strong correlation. Further, it is unfair to restrain operational licensees out of concern for other figurative auction participants that may, in fact, have much greater access to capital because they are not similarly constrained by operational obligations.

IV. The Commission Should Permit All Qualified Entrepreneurs That Participated In the Original C Block Auction to Participate In All Subsequent Reactions of C Block Licenses Regardless of Their Growth.

Under the Fourth R&O, the Commission will require every future applicant for Block C licenses to verify its eligibility as of the short-form application filing date of any subsequent C Block reactions.²⁰ For the reasons discussed above, the Commission should allow all originally-qualified C Block licensees to participate in any subsequent C Block auctions under the same terms and conditions in which they participated in the original C Block auction to assure a level playing field among entrepreneurs.

With the number of C Block licenses currently tied up in bankruptcy and not slated for the upcoming C Block reaction, entrepreneurs will again see a shift in the market result of all prior C Block auctions during all upcoming reactions. Under the same notions of fairness and auction integrity, the Commission should allow all original C Block applicants to compete in any subsequent reaction of C Block licenses without time limitations.

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Fourth R&O at ¶ 15.

Conclusion

The Commission went forward with a restructuring plan that it found to be "fair and equitable," even while it significantly impacted the valuations of Omnipoint's licenses. The Commission must now allow operational licensees like Omnipoint to participate in C Block re-auctions on a par with all other auction participants. The Commission should reverse its decision to penalize operating entrepreneurs by denying them bid credits and limiting the time in which they may participate in future Block C re-auctions. Any other result would be contrary to the public interest and would unfairly penalize legitimate participants in the C Block re-auctions.

Respectfully submitted,

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