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

In the Matter of)
)
Amendment of the Commission's Rules Regarding)
Installment Payment Financing for Personal)
Communications Services (PCS) Licensees)
)
Request For Rule Waiver To Qualify)
As A "Very Small Business" For)
FCC Auction #22)

WT Docket No. 97-82

To: Wireless Telecommunications Bureau

REQUEST FOR RULE WAIVER

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TABLE OF CONTENTS

	<u>PAGE</u>
Introduction and Summary	3
Discussion	6
I. The Rule, As Applied To Omnipoint, Would Not Serve The Underlying Purpose of Protecting Other Bidders in the Upcoming Re-Auction	6
II. Special Circumstances Surrounding the Block C Re-Auction Necessitate A Waiver for Omnipoint to Participate On A Par With Other Bidders	11
Conclusion	15

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REQUEST FOR RULE WAIVER

Omnipoint Corporation ("Omnipoint"), by its attorneys and pursuant to Section 24.819 of the Commission's rules, hereby requests a waiver of 47 C.F.R. § 24.712, adopted in the Fourth Report and Order¹ ("Fourth R&O") in the above-captioned proceeding.² Omnipoint's ability to hold its current Block C licenses, and associated bid discounts, is unaffected by the growth in

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 has also sought reconsideration of the Fourth R&O on two issues: (1) permitting initial "small business" Block C licensees to participate in Block C re-auctions using their qualifications at the time of the initial Block C auction; and (2) permitting all qualified Entrepreneurs that participated in the initial Block C auction to participate in all subsequent Block C re-auctions, regardless of whether such Block C licensees have grown. Omnipoint Corporation, "Petition For Reconsideration," WT Dkt. No. 97-82 (filed Oct. 23, 1998). This waiver request should not be construed in any way as a relinquishment of Omnipoint's positions in its reconsideration petition, as Omnipoint continues to support fully the issues it raised on reconsideration.

Omnipoint's revenues as it successfully grows its PCS business.³ Consistent with this Commission policy, Omnipoint believes that it should be allowed to participate in the upcoming Block C re-auction using this same criteria, i.e., to use the same gross revenues as it had for the initial Block C auction.⁴ Omnipoint's business growth as an entrepreneur occurring after the initial Block C auction should not disqualify Omnipoint for the 25% bid discounts necessary to compete in the upcoming Block C re-auction and fill in holes in its footprint – some of which are licenses Omnipoint held but returned to the Commission under its amnesty plan. Only the delays in reaucting the spectrum, due to the Commission's payment stay and restructuring processes, could prevent Omnipoint from participating fully in the Block C re-auction with a 25% bid discount; it is simply inequitable to now effectively single out Omnipoint for such an arbitrary penalty.

³ 47 C.F.R. § 24.839(d)(2) (Block C or F licensee that qualified at the time of the initial Block C or F auction may hold additional Block C or F licenses); *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) (where assignee of a Block C or F licensee “holds other entrepreneurs’ block licenses (and thus at the time of the [initial Block C or F] auction satisfied the entrepreneurs’ block criteria)” then no unjust enrichment penalties apply). See also 47 C.F.R. § 24.709(a)(3) (increased gross revenues due to “revenue from operations or other investments, business development or expanded service shall not be considered” in evaluating whether a licensee maintains eligibility to hold Block C or F licenses).

⁴ Therefore, Omnipoint requests that it be treated as a “very small business” for purposes of the Block C re-auction. Very small business status will also permit Omnipoint to participate in a “small business” consortium without harming other members of the consortium.

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.⁵ As the Commission 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 Fourth R&O, the Commission decided to generally measure eligibility for “small business” or “very small business” bid credits for future Block C re-auctions as of the due date for short form applications for the re-auction.⁶ As applied to Omnipoint’s participation in the upcoming March, 1999 Block C, D, E and F re-auction, this general decision would unfairly and irrationally discriminate against Omnipoint solely because Omnipoint is an operational entrepreneur that has grown its business. The harm is significant. Without the 25% bid discount, Omnipoint would be forced to pay a premium over all other bidders in the re-auction.⁷ The harm would also be meaningless. No legitimate purpose is served by penalizing Omnipoint in the upcoming March re-auction because it grew its “small business” since the time of the

⁵ 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. For the last three years for which Omnipoint has audited statements, the average gross revenues are \$17.5 million.

⁶ Id. at ¶ 47.

⁷ A 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. If the short-form filing deadline remains as February 12, 1999, however, Omnipoint anticipates that it will qualify under the current rule as a “small business” and the resulting premium cost will be 17.6% above the bid prices paid by “very small business” participants. But, if the auction is delayed for any reason, then the premium could be 33% $(=1/(1-.75)) - 1$.

initial Block C auction. 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 Philadelphia (the only top 25 city with a Block C operator), and Miami (where Omnipoint holds a Block F license)), and that has required Omnipoint to undertake significant debt and ongoing demands on its capital resources. This same service deployment -- encouraged and applauded by the Commission -- should not count against Omnipoint's ability to participate in the re-auction in parity with other entrepreneurs.

Omnipoint submits that the requested waiver could not possibly threaten the Commission's rationale (at ¶ 47 of the Fourth R&O) for the rule. Other competing small businesses will not be harmed if Omnipoint can also participate in the auction with the same bid credits. In adopting the rule, the Commission's concern was over auction participation by large bidders with massive capital resources. Omnipoint could not so dominate the re-auction by virtue of bid credits that merely establish an equal position with other bidders. While other bidders may not have Omnipoint's operational revenues, neither do those bidders have the huge debt load that Omnipoint carries. Bidders do not bid with revenues. As the Commission well knows, the parties that dominated past auctions amassed enormous bidding funds while qualifying for the Commission's "small business" or "very small business" status.⁸ Nothing prevents a repeat of the past, when huge companies put \$500 million in cash into a shell bidding entity that claims "very small business" status because the bidder has no revenues. Therefore, as

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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

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applied to Omnipoint, it is speculative to believe that Omnipoint – with massive existing and ongoing costs and debts – will somehow be more apt to capture access to capital for the Block C re-auction in a manner that is any more effective than any other “very small business” re-auction applicant.

Moreover, the application of the rule to Omnipoint in the upcoming auction would significantly undermine the Commission’s commitment to fairness and equity in the Block C restructuring process. The Commission had resolved in the Second R&O, and reaffirmed in the Fourth R&O, that all bidders in the initial C Block auction would have an opportunity to participate in the C Block re-auction.⁹ However, denying bid credits to Omnipoint simply because it grew its PCS businesses would deny it the same relative position as it was in at the time of the initial auction, which contradicts the Commission’s C Block restructuring and re-auction decisions. While the Commission had expressly sought an equitable restructuring, this application of the Fourth R&O would be wholly inequitable.

It is especially inequitable to apply the rule to Omnipoint *because it was the Commission’s own intervention*, through its stay of Block C payments and Block C restructuring orders, which caused the significant delay in the ordinary process of license reallocation by auction. Without this delay, the re-auction of the initial Block C licenses would likely have

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C auction, 253 qualified as “small businesses;” all 89 of the Block C auction winners qualified as “small businesses”).

⁹

In the Matter of Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd. 16436, 16438 (1997) (“Second R&O”).

occurred much earlier and Omnipoint would have qualified for bid credits on a par with other bidders without waivers or reconsideration. Omnipoint never asked for Commission intervention or restructuring, and the Commission cannot now ignore the inequitable result that the Commission's actions have had on Omnipoint.

Discussion

Section 24.819(a)(1)(i)-(ii) of the Commission's rules states that waivers of the Commission's Part 24 rules may be granted upon an affirmative showing:

(i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or

(ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

47 C.F.R. § 24.819(a)(1)(i)-(ii). As demonstrated below, Omnipoint's request meets *both* prongs of the rule waiver standard.

I. The Rule, As Applied To Omnipoint, Would Not Serve The Underlying Purpose of Protecting Other Bidders In the Upcoming Re-Auction

In the Fourth R&O, the Commission held that eligibility for bid credits in the Block C *re-auction* would be determined at the deadline for filing short-form applications for the re-auction, rather than from the *initial* Block C auction, because it is "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.”¹⁰

Omnipoint respectfully submits that other auction participants would not be in any way harmed if Omnipoint were provided with the same “very small business” bid credit as those prospective auction participants will enjoy. The responsibilities of Omnipoint as an operational licensee do not confer on it the ability to obtain additional capital. Unlike some non-operational licensees, Omnipoint has significant difficulty raising capital and faces enormous competing demands for its capital, such as: maintaining and expanding its competitive service to the public; employing thousands of U.S. workers; and paying the federal government for license obligations. It simply cannot afford to overcome a bid premium not paid by other auction participants.

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,¹¹ 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;¹² the same was true for the Block F bidders in the Block D,E, and F auction. Moreover, the Commission’s “gross revenue” test has never shielded entrepreneurs in the auction from the capital resources of their fellow “very small business” auction participants, and so depriving Omnipoint of bid credits will not protect other

¹⁰ Fourth R&O at ¶ 47.

¹¹ *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).

¹² See, n. 6, above.

entrepreneurs from bidders that are better capitalized. Auction participants have demonstrated in prior auctions an uncanny ability to raise capital for auctions even as they qualify for “very small business” status. There is evidence that parties with enormous financing are, once again, preparing to qualify as “very small” in the upcoming auction.¹³ While such parties with enormous capital already amassed are apparently free to obtain the highest bid credit, it is plainly contrary to the underlying purpose of the rule to single out Omnipoint for diminished bid credits.¹⁴

Omnipoint, however, stands as one of the few Block C participants that cannot engage in such gamesmanship because it, as an operational licensee, simply cannot dissolve one corporate form and spawn another to meet the Commission’s changing bid credit standards.¹⁵ Omnipoint cannot abandon service to the public, financial commitments, as well as obligations to creditors,

¹³ See, e.g., Application of Airgate Wireless, FCC File No. 0000002035, DA 98-2319, FCC Form 603, Exh. I, at 8 (filed Oct. 13, 1998), *petitions to deny pending* (Leap Wireless intends to use a \$229.8 Million credit facility from QUALCOMM to “in order to acquire licenses and assets”).

¹⁴ WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“salutary presumptions [in favor of general rules] do not obviate the need for serious consideration of meritorious applications for waiver, and a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties.”).

¹⁵ The Commission’s proposals 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

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employees and shareholders for the sake of qualifying for the re-auction. By operation of the affiliation rules, licensees such as Omnipoint also cannot create a wholly new “very small business” subsidiary with a completely “clean slate.”¹⁶

Moreover, broader entrepreneur policies are also undone unless a waiver is granted in this case. The Fifth MO&O established that licensees would retain entrepreneur status and eligibility *even as they grow beyond the pre-existing asset and revenue caps.*¹⁷ 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). The Commission has also carried forward these policies first adopted for the PCS auctions into other licensed services where the Commission also encourages business growth and development by small business entrepreneurs.¹⁸ In broadband PCS, this policy allows Block C and F licensees to grow

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\$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.

16

47 C.F.R. § 24.720(l).

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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.

18

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

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without concern for license eligibility¹⁹ or unjust enrichment,²⁰ and to acquire other Block C and F licenses through the assignment and transfer process.²¹ Fifth MO&O, 10 FCC Rcd. at 468 (where assignee of a Block C or F licensee “holds other entrepreneurs’ block licenses (and *thus at the time of the [initial Block C or F] auction* satisfied the entrepreneurs’ block criteria)” then no unjust enrichment penalties apply). Application of the decision in the Fourth R&O to Omnipoint would undercut this long-standing precedent, and so a waiver in this case would better serve the Commission’s overriding policy goals of the entrepreneur’s band..

Finally, a waiver in this case would serve the public interest by avoiding cumbersome post-auction transactions and allowing the public to benefit directly from healthy competitive bidding in the auction process itself. A strict application of the rule would deter Omnipoint from

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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).

¹⁹ 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).

²⁰ *See also Ex Parte* Letter of Mark J. Tauber and Mark J. O’Connor, Counsel for Omnipoint Corporation, to Ari Fitzgerald, Esq., FCC, dated January 25, 1999 (filed in WT Dkt. No. 97-82).

²¹ 47 C.F.R. § 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).

rigorous bidding in the auction event,²² and would encourage it to acquire Block C licenses through post-re-auction, private transactions.²³ It makes little sense to force Omnipoint to obtain the benefit of the "very small business" credit through private and more cumbersome post-auction transactions. Clearly, the public interest, and the public fisc, is better served through Omnipoint's participation in the direct and competitive bidding process of the re-auction on a par with other bidding applicants.

II. Special Circumstances Surrounding the Block C Re-Auction Necessitate A Waiver For Omnipoint To Participate On A Par With Other Bidders

Omnipoint respectfully submits that special circumstances surrounding the upcoming Block C re-auction, and the application of the Fourth R&O decision to Omnipoint's case, fully justify the requested waiver.

First, Omnipoint believes it is unfair to apply the Fourth R&O decision when Omnipoint is the only party that stands to be adversely affected by it. To Omnipoint's knowledge, it is the only Block C licensee that has managed to generate sufficient revenues in the time since the initial C Block auction as a result of operating competitive PCS networks to be impacted by the Fourth R&O decision.²⁴ Omnipoint certainly does not believe that the Commission intended to single it out, as compared to all the other powerful bidders and Block C licensees, for this harsh

²² See *Wireless Co., L.P.*, Order, 10 FCC Rcd. 11111, 11113 (¶ 16) (1995) (rule waiver appropriate where a "strict application" of the rule would not serve the public interest).

²³ Clearly, no unjust enrichment penalty would apply to the private, post-reaction transactions. See, n. 18, above.

²⁴ No other initial Block C licensee has, to Omnipoint's knowledge, engaged in as aggressive a build-out and deployment strategy as Omnipoint in the past few years, and

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denial of bid credits. However, absent a waiver, Omnipoint will be uniquely disadvantaged while, as described above, it is highly likely that other bidders will be at least as well capitalized for the auction as Omnipoint.

In addition, Omnipoint respectfully submits that the peculiar application of the "gross revenues" test in the upcoming re-auction is largely a result of the Commission's extraordinary intervention into the Block C restructuring process. FCC precedent recognizes that governmental action can itself be the cause of "special circumstances" justifying a rule waiver.²⁵ In this case, the Commission's intervention in the Block C auction has significantly changed the results of the initial auction and added years onto the ordinary process for license reallocation. Out of the 493 Block C licenses originally auctioned, 263 of those were returned to the Commission through the recent election process.²⁶ The re-auction 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 noteworthy that, absent the Commission's extended stay of payment obligations and debt relief under restructuring,²⁷ many licensees would have quickly defaulted and such licenses would have been available for re-auction well before this time. Thus, absent this

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so Omnipoint stands to be the only initial Block C licensee that would be harmed by the Fourth R&O decision.

²⁵ *Pacific Telesis, Order*, 12 FCC Rcd. 15134, 15139 (¶ 9, 10) (CCB 1998) (adoption of Section 222 of the Communications Act, and pending FCC rulemaking proceeding create special circumstances for waiver of Computer III CPNI rules).

²⁶ Public Notice, DA 98-1340 (rel. July 2, 1998).

²⁷ Installment Payments for PCS Licenses, Order, DA 97-649 (rel. March 31, 1997); Second R&O.

unprecedented Commission intervention, Omnipoint would have otherwise had an opportunity to obtain reallocated licenses much sooner than under the restructuring plan and *at a time when it would have qualified as a “very small business.”*

In full knowledge of these unusual consequences stemming from its restructuring and 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.²⁸ The Commission also recognized that the restructuring decisions have the potential to be especially harmful to operational Block C licensees.²⁹ 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 particularly sensitive to avoiding a restructuring process that devastated operational licensees.³⁰

²⁸ Second R&O, at ¶ 7 (“... a re-auction of the C block spectrum ... will be open to ... all applicants to the original C block action ...”), 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.”).

²⁹ 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.”).

³⁰ Second R&O at ¶ 57.

Consistent with these sensible policies, a waiver in this case would avoid the consequence of isolating Omnipoint to accept a bid premium, and only *after* Omnipoint made its June, 1998 election decisions on the basis of the Commission's promise for meaningful opportunity to participate in the re-auction. In fact, unless equity is provided under these circumstances, the Commission would send a horrible signal to all entrepreneurs -- only the entrepreneurs like Omnipoint that grew their PCS businesses will be penalized even when re-bidding on the very spectrum they held but returned for re-auction under the Commission's amnesty option.

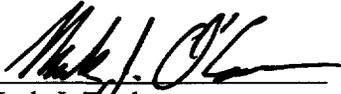
Omnipoint respectfully submits that this result is grossly inequitable and contrary to the Commission's otherwise well thought out public interest standards enunciated in the Block C restructuring orders. Omnipoint, like other participants in the initial Block C auction, should be treated in an equitable 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 Omnipoint, even as it took on the responsibilities of an operational licensee, can participate meaningfully in the last stages of the Commission's Block C restructuring plan.

Conclusion

Omnipoint requests that the Commission grant the requested waiver so that Omnipoint is not left at a significant disadvantage vis-à-vis other bidders in the Block C re-auction.

Respectfully submitted,

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