

FCC MAIL SECTION

Federal Communications Commission

FCC 00-54

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Before the
Federal Communications Commission
Washington, D.C. 20554

DISTRICT OF COLUMBIA

In the Matter of

Amendment of the Commission's Rules
Regarding Installment Payment Financing
for Personal Communications Services (PCS)
Licenses

WT Docket No. 97-82

**ORDER ON RECONSIDERATION
OF THE FOURTH REPORT AND ORDER**

Adopted: February 15, 2000

Released: February 29, 2000

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Order on Reconsideration, we address petitions for reconsideration of our Fourth Report and Order, released August 19, 1998, ("*C Block Fourth Report and Order*") in which we modified the rules governing auctions of C block broadband Personal Communications Services ("PCS") spectrum.¹ To date, there have been three auctions of licenses for C block spectrum. Auctions No. 5 and 10, which ended on May 6, 1996, and July 16, 1996, respectively, preceded the *C Block Fourth Report and Order*.

¹ See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15,743 (1998) ("*C Block Fourth Report and Order*"); see also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd 6571 (1999) ("*Second C Block Reconsideration Order*"), *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Reconsideration Order*"), *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997) ("*C Block Second Report and Order*" and "*C Block Further Notice*"). We refer collectively herein to petitions for reconsideration, comments on or oppositions to petitions for reconsideration, notices of *ex parte* meetings, and other filings referenced in Appendix A as "petitions," and to the filers of those documents as "petitioners," unless specific reference is made otherwise.

Auction No. 22, which followed the *C Block Fourth Report and Order*, concluded on April 15, 1999, and also included licenses for E and F block spectrum.² An earlier auction of licenses for D, E, and F block spectrum, Auction No. 11, concluded on January 14, 1997. One or more additional auctions of C and F block spectrum are expected.³

2. In response to the *C Block Fourth Report and Order*, we received five petitions for reconsideration, one opposition, and one set of comments.⁴ Within the time frame for filing oppositions, we also received related correspondence.⁵ Some of the issues raised by petitioners are specific to Auction No. 22 and have been rendered moot by the occurrence of that auction.⁶ Other issues will be decided in separate proceedings. The remaining issues concern entrepreneur and bidding credit eligibility. In this order, we decline to extend the two year "grandfather" exception to the entrepreneur eligibility requirement for C block auctions and also decline to "grandfather" in future C and F block auctions the bidding credit eligibility of participants in earlier C block auctions.

II. AUCTION INVENTORY

3. **Background.** In the *C Block Fourth Report and Order*, we decided not to delay the next C block auction pending resolution of bankruptcy proceedings affecting the availability for auction of certain C block spectrum.⁷

4. **Discussion.** Both Conestoga and DiGiPH ask that we reconsider this decision.⁸ Because Auction No. 22 has already been held, these requests have become moot. As we stated in the *C Block Fourth Report and Order*, spectrum made available for licensing as a result of any bankruptcy proceeding

² Auction No. 22 was originally announced as an auction of licenses for C, D, E, and F block spectrum; however, no D block spectrum remained in the license inventory by the start of the auction.

³ See, e.g., "Auction of C and F Block Broadband PCS Licenses: Notice of Auction Scheduled for July 26, 2000," *Public Notice*, DA 00-49 (released January 12, 2000). We also expect that the resolution of various pending bankruptcy proceedings will make available still additional C and F block spectrum that will be licensed through other future auctions. See *C Block Fourth Report and Order*, 13 FCC Rcd at 15,747-48, 15,752, paras. 8, 15.

⁴ See App. A.

⁵ See *id.*

⁶ We note that, except for Mountain Solutions, none of the petitioners whose issues have become moot sought a stay of Auction No. 22. Mountain Solutions sought such a stay and was unsuccessful. *Mountain Solutions, Ltd., Inc. v. FCC*, Nos. 98-1503 and 99-1107, 1999 WL 229027 (D.C. Cir. March 22, 1999) (order denying Mountain Solutions' emergency motion for a stay); see *Mountain Solutions Ltd., Inc., Petition for Stay* (filed March 3, 1999) (rendered moot by the appellate court decision).

⁷ *C Block Fourth Report and Order*, 13 FCC Rcd at 15,747-48, para. 8.

⁸ Conestoga Petition; DiGiPH Petition.

will be included in the next appropriate auction of C block spectrum.⁹

III. ENTREPRENEUR ELIGIBILITY

5. **Background.** Consistent with Congress' mandate to promote the participation of small businesses and other "designated entities"¹⁰ in the provision of spectrum-based services,¹¹ the Commission limited eligibility for C and F block broadband PCS licenses in Auctions No. 5, 10, and 11 to "entrepreneurs." The Commission considers entrepreneurs, with regard to the C and F blocks, to be those entities that can meet the auction and licensing eligibility requirements of Section 24.709 of the Commission's rules.¹² The principal requirement is as follows:

No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million at the time the applicant's short-form application (Form 175) is filed.¹³

6. In the *C Block Fourth Report and Order*, we decided that entities that had been eligible for and had participated in Auction No. 5 or 10 would also be eligible to bid on C block spectrum in Auction No. 22 and in any C block auction beginning within two years of the start date of Auction No. 22, even if such entities had become too large to qualify as entrepreneurs.¹⁴

7. **Discussion.** In its petition, Omnipoint argues that, because a "number of C [b]lock licenses [are] currently tied up in bankruptcy and not slated for the upcoming C [b]lock reauction [Auction No. 22], entrepreneurs will again see a shift in the market result of all prior C block auctions during all

⁹ *C Block Fourth Report and Order*, 13 FCC Rcd at 15,747-48, para. 8.

¹⁰ See 47 C.F.R. § 1.2110.

¹¹ See Communications Act of 1934, as amended ("Communications Act"), § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

¹² See 47 C.F.R. § 24.709.

¹³ *Id.* § 24.709(a)(1); see *id.* § 24.720; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) ("*Competitive Bidding Fifth Report and Order*"), *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994), *Sixth Report and Order*, 11 FCC Rcd 136 (1995), *aff'd sub nom.*, *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996).

¹⁴ *C Block Fourth Report and Order*, 13 FCC Rcd at 15,751-52, paras. 13, 15; see 47 C.F.R. § 24.709(b)(9)(i). A licensee (along with qualifying members of the licensee's control group, and their affiliates) is ineligible for a period of two years from the March 23, 1999 start date of Auction No. 22 to reacquire licenses for spectrum it returned to the Commission pursuant to the disaggregation, prepayment, and/or amnesty/prepayment options. *C Block Fourth Report and Order*, 13 FCC Rcd at 15,750-51, paras. 12-14; see 47 C.F.R. § 24.709(b)(9)(ii); see *infra* note 17.

upcoming reauctions."¹⁵ Omnipoint maintains that, pursuant to "notions of fairness and auction integrity," the Commission should allow all "original C block applicants" to compete in any subsequent auction of C block licenses, regardless of when such auction occurs.¹⁶

8. We disagree. The two-year "grandfather" exception to the entrepreneur eligibility requirement was part of a package of financial restructuring options offered by the Commission to C block licensees experiencing financial difficulties in the wake of the first two C block auctions.¹⁷ When making these options available, the Commission explained that they were intended to provide "limited relief,"¹⁸ limited in both scope and time. We recognized that not all licenses involved in bankruptcy proceedings would likely be available for inclusion in the Auction No. 22 license inventory; nevertheless, we decided to permit the grandfather exception for only two years.¹⁹ We believe, as we explained in the *C Block Fourth Report and Order*, that fairness to other future bidders prevents our providing the eligibility exception indefinitely.²⁰ Therefore, as to the issue of entrepreneur eligibility, we will deny Omnipoint's petition.

IV. BIDDING CREDIT ELIGIBILITY

9. **Background.** Bidding credits are available to C block auction winners that qualify as small or very small businesses, or consortia thereof.²¹ Under current C (and F) block rules, which were in effect for Auction No. 22, small businesses and small business consortia receive a 15 percent bidding credit and very small businesses and very small business consortia receive a 25 percent bidding credit.²² In the *C Block Fourth Report and Order*, we expressly declined to "grandfather" eligibility for bidding credits, deciding that bidding credit eligibility in upcoming C block auctions would be determined according to an applicant's size at the deadline for filing short-form applications and not the applicant's size when it applied to participate in Auction No. 5 or 10.²³ We concluded that it would not be in the best interests of the public and, in particular, of competing small business bidders and licensees to provide a discount

¹⁵ Omnipoint Petition at 12.

¹⁶ *Id.*

¹⁷ For background on the financial restructuring options, see *C Block Reconsideration Order*, 13 FCC Rcd 8345 (1998), and *C Block Second Report and Order*, 12 FCC Rcd 16,436 (1997) (collectively, "Restructuring Orders"). See also *Second C Block Reconsideration Order*.

¹⁸ See *C Block Reconsideration Order*, 13 FCC Rcd at 8346, paras. 1, 5; see also *C Block Fourth Report and Order*, 13 FCC Rcd at 15,752, para. 15.

¹⁹ *C Block Fourth Report and Order*, 13 FCC Rcd at 15,752, para. 15.

²⁰ See *id.*

²¹ 47 C.F.R. § 24.712.

²² *C Block Fourth Report and Order*, 13 FCC Rcd at 15,768, para. 46; 47 C.F.R. §§ 1.2110(e), 24.712, 24.717.

²³ *C Block Fourth Report and Order*, 13 FCC Rcd at 15,768, para. 47.

to applicants that no longer meet the small business size standards.²⁴

10. **Discussion.** Omnipoint urges us to reconsider this decision, contending that our refusal to "grandfather" bidding credit eligibility is unfair to those existing entrepreneur licensees that have generated PCS revenues since the initial C block auction.²⁵ We disagree. Bidding credits function as a discount on a winning bidder's high bid, thereby substantially reducing the licensee's payment obligation to the Federal government.²⁶ The purpose of such credits is to allow small entities with limited access to capital to compete effectively against larger businesses in auctions.²⁷ Were we to allow large businesses to qualify for bidding credits, by virtue of their past participation as small businesses in earlier C block auctions, we would undermine the effectiveness of such credits in aiding entities that currently qualify as small businesses. We cannot justify such a result, nor can we envision a convincing public policy rationale for providing larger businesses with a 15 or 25 percent discount off their Federal obligation. Accordingly, we deny Omnipoint's petition as to the issue of bidding credits.²⁸

V. CONTROLLING INTEREST RULE

11. **Background.** In the *C Block Reconsideration Order*, we deferred to other phases of WT Docket No. 97-82, the decision whether to use a "controlling interest" approach to determine financial attribution for future C block auctions rather than to continue using "control group" structures.²⁹

12. **Discussion.** In its petition, Leap asks that we apply the controlling interest concept to the C and F blocks.³⁰ Cook opposes this request.³¹ Leap's petition and Cook's opposition are moot insofar as

²⁴ *Id.*

²⁵ Omnipoint Petition at 1-13.

²⁶ *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5590, para. 132.

²⁷ *See id.* at 5539, 5589-91, paras. 15, 130-133 (Bidding credits are intended to help small businesses within the entrepreneurs' blocks by encouraging large companies to invest in them and by assisting small businesses without large investors to overcome the additional hurdle presented by auctions.).

²⁸ We rejected Omnipoint's request for waiver of the Commission's small business size standards for purposes of Omnipoint's eligibility for very small business bidding credits in Auction No. 22. Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Memorandum Opinion and Order*, FCC 99-335 (released November 8, 1999), *aff'g* Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Mark J. Tauber, Counsel for Omnipoint Corporation, DA 99-332 (February 12, 1999).

²⁹ *C Block Reconsideration Order*, 13 FCC Rcd at 8374-75, para. 69.

³⁰ Leap Petition.

³¹ Cook Opposition.

they concern Auction No. 22, for which control group structures applied.³²

VI. MINIMUM OPENING BIDS

13. **Background.** In the *C Block Fourth Report and Order*, we established that the minimum opening bid for each market in Auction No. 22 would be ten percent of the corresponding net high bid for the market in the first C block auction; however, we stated that the Wireless Telecommunications Bureau ("Bureau") could exercise its discretion to set smaller minimum opening bids if the Bureau believed they were warranted.³³

14. **Discussion.** While disagreeing on specifics, Conestoga and Omnipoint both suggest that we reduce the minimum opening bids.³⁴ Because Auction No. 22, has already taken place, these requests are moot. We note that the Bureau, after considering comments, including one filed by Omnipoint, reduced the Auction No. 22 minimum opening bids for C block licenses to five percent (for 30 MHz C block licenses) and 2.5 percent (for 15 MHz C block licenses) of the most recent net high bid for C block licenses in the same market.³⁵ For each future C block auction, the Bureau will continue its current practice under the Balanced Budget Act of 1997 to establish minimum opening bids and/or reserve prices after notice and comment.³⁶

³² See "Auction of C, D, E, and F Block Broadband PCS Licenses; Notice and Filing Requirements for Auction of C, D, E, and F Block Broadband PCS Licenses Scheduled for March 23, 1999; Minimum Opening Bids and Other Procedural Issues," *Public Notice*, 13 FCC Rcd 24,540, 24,551 (1998) ("*Announcement Public Notice*"). We note that, despite the application of control group structures to Auction No. 22, Leap participated (on a conditional basis) in Auction No. 22, was the high bidder for 36 C block licenses, and has been conditionally granted those licenses. See "Wireless Telecommunications Bureau Announces It Conditionally Grants Leap Wireless International 36 C Block Broadband PCS Licenses," *Public Notice*, DA 99-1450 (released July 23, 1999); Applications of Airgate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, for Consent to Assign Broadband PCS F Block Licenses KNL882, KNLG279, KNLG280 and KNLG281, FCC File No. 000002035, Application of Leap Wireless International, Inc. for Authorization to Construct and Operate 36 Broadband PCS C Block licenses, FCC File No. 0000012974, *Memorandum Opinion and Order*, 14 FCC Rcd 11,827 (1999), *petition for reconsideration or clarification granted in part and denied in part*, Application of Leap Wireless International, Inc. for Authorization to Construct and Operate Broadband PCS C Block Licenses (Markets B140, B153 and B257), FCC File No. 0000012974, DA 99-990, DA 99-2401 (released November 2, 1999), *app. for review pending*; "Auction of 356 Broadband PCS Licenses, 66 Qualified Bidders," *Public Notice*, 14 FCC Rcd 3855 n.2 (1999); "Auction of C, D, E, and F Block Broadband PCS Licenses, Status of Applications to Participate in the Auction, Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings," *Public Notice*, 14 FCC Rcd 5467, 5468 n.2 (1999).

³³ *C Block Fourth Report and Order*, 13 FCC Rcd at 15,759, para. 29.

³⁴ Conestoga Petition; Omnipoint Comment; Omnipoint Notice.

³⁵ *Announcement Public Notice*, 13 FCC Rcd at 24,568-72.

³⁶ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 454, para. 139 (1998) ("*Part 1 Third Report and Order*").

VII. BID INCREMENT METHODOLOGY

15. In a December 10, 1998 meeting with Bureau and Division staff, Omnipoint outlined a proposal for a bid increment methodology to be employed in Auction No. 22.³⁷ The fact that Auction No. 22 has already occurred renders Omnipoint's suggestion moot; however, we note that, in advance of Auction No. 22, the Bureau considered and rejected essentially the same proposal by Omnipoint.³⁸ For each future C block auction, the Bureau will, after notice and comment, establish an appropriate bid increment methodology.³⁹

VIII. DEFAULT PAYMENT RULES

16. Mountain Solutions argues that our decision to eliminate installment payment financing in Auction No. 22 and to exclude from the auction spectrum involved in bankruptcy proceedings, along with other factors, will decrease auction prices and thereby increase the payment owed by Mountain Solutions for defaults on second down payments for C block licenses Mountain Solutions had previously won.⁴⁰ Mountain Solutions argues further that it would be inequitable for the Commission strictly to apply its default payment rule against Mountain Solutions.⁴¹ Because Auction No. 22 has already occurred, Mountain Solutions' petition, insofar as it seeks modification of our rules for that auction, is moot. The remaining issue -- the extent to which Mountain Solutions will be held liable for its default payment obligations -- is before us in a separate proceeding and will be considered there.⁴²

IX. OTHER FILING

17. In a letter related to this proceeding, McBride asks that we assist Representative W. J. "Billy" Tauzin, Chairman of the U.S. House of Representatives Subcommittee on Telecommunications, Trade, and Consumer Protection, in Chairman Tauzin's efforts with regard to the C block auction. Specifically, McBride requests that we help promote competition and encourage the participation of designated entities in the wireless telecommunications industry and that we make sure that all C block licensees are treated in a fair and equitable manner. We believe that, with the *C Block Fourth Report and Order* and Auction No. 22, we have furthered the goals articulated in McBride's letter; however, because the letter does not request specific reconsideration of the *C Block Fourth Report and Order*, we neither grant nor deny it.

³⁷ Omnipoint Notice.

³⁸ See *Announcement Public Notice*, 13 FCC Rcd at 24,572-74.

³⁹ See *Part 1 Third Report and Order*, 13 FCC Rcd at 450-52, 456-57, paras. 128-134, 143-144.

⁴⁰ Mountain Solutions Petition at 3-5.

⁴¹ *Id.* at 5-7.

⁴² See *Mountain Solutions Ltd., Inc., Application for Review* (filed January 22, 1999), filed in response to the *Announcement Public Notice*. The United States Court of Appeals for the D.C. Circuit recently denied in part and dismissed in part Mountain Solutions' appeal of our October 1, 1998 denial of its emergency petition for waiver of the Commission's down payment deadline rule. *Mountain Solutions Ltd., Inc., v. FCC*, 197 F. 3d 512 (1999).

X. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the petition for reconsideration filed in response to the *C Block Fourth Report and Order* by Omnipoint Corporation IS DENIED.

19. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the petition for reconsideration filed in response to the *C Block Fourth Report and Order* by Mountain Solutions, Ltd., Inc., IS DISMISSED in part as MOOT and DENIED in all other respects.

20. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the remaining petitions for reconsideration filed in response to the *C Block Fourth Report and Order* ARE DISMISSED as MOOT.

21. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), this *Order on Reconsideration* IS HEREBY ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Appendix A**LIST OF FILERS****Petitions for Reconsideration**

1. Conestoga Wireless Company ("Conestoga")
2. DiGiPH PCS, Inc. ("DiGiPH") (two filings)
3. Leap Wireless International, Inc. ("Leap") (Petition for Reconsideration or Clarification)
4. Mountain Solutions, Ltd., Inc. ("Mountain Solutions")
5. Omnipoint Corporation ("Omnipoint")

Comments re / Opposition to Petitions for Reconsideration

1. Omnipoint Corporation ("Omnipoint") (Comments)
2. Cook Inlet Region, Inc. ("Cook") (Opposition)

Notice of Ex Parte Meeting

1. Omnipoint Corporation ("Omnipoint")

Related Correspondence

1. Vincent D. McBride ("McBride")