

February 12, 1999

DA 99-332

Mark J. Tauber, Esq.
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Dear Mr. Tauber:

This letter is in response to a request filed on behalf of Omnipoint Corporation ("Omnipoint")¹ for a waiver of Section 24.712 of the Commission's rules.² Omnipoint asks that its eligibility for size-based bidding credits in the upcoming broadband PCS auction (Auction No. 22) be based upon its average gross revenues for the three years preceding its application for the initial C block PCS auction. In effect, Omnipoint asks that its business size at the time of a prior C block auction be "grandfathered" for purposes of bidding credits. Omnipoint indicates that grant of a waiver would enable it to qualify as a very small business under the Commission's rules. For the reasons discussed below, we deny Omnipoint's waiver request.

In the *C Block Fourth Report and Order*, the Commission decided that all entities that had been eligible for and had participated in either of the prior C block auctions would be eligible to participate in C block auctions that begin within two years of the start date of the next C block auction (Auction No. 22), without regard to the current size of such entities.³ The Commission, however, expressly declined to "grandfather" eligibility for bidding credits, deciding that bidding credit eligibility in upcoming C block auctions would be determined at the deadline for filing short-form applications.⁴ The Commission 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 to applicants that no longer meet the small business size standards.⁵

In order to obtain a waiver of the Commission's size eligibility standard, Omnipoint must show either

¹ Omnipoint Corporation, *Request for Rule Waiver* (filed January 29, 1999) ("*Waiver Request*").

² Section 24.712 states that a winning C block bidder that is a "small business" may use a bidding credit of 15 percent to lower the cost of its bid and that a winning C block bidder that is a "very small business" may use a bidding credit of 25 percent to lower the cost of its bid. 47 C.F.R. § 24.712. Under Section 24.720(b) of the Commission's rules, a small business has average annual gross revenues not exceeding \$40 million for the preceding three years; whereas, a very small business has average annual gross revenues not exceeding \$15 million for the preceding three years. 47 C.F.R. § 24.720(b); see 47 C.F.R. § 1.2110(e)(2)(ii), (iii).

³ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, *Fourth Report and Order*, FCC 98-176, 13 FCC Rcd. 15,743, 15,751-52, paras. 13, 15 (1998) ("*C Block Fourth Report and Order*"); see 47 C.F.R. § 24.709(b)(9)(i).

⁴ *C Block Fourth Report and Order* 13 FCC Rcd at 15,768, para. 47.

⁵ *Id.*

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"(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."⁶ We find that Omnipoint fails to satisfy either aspect of this requirement.

Omnipoint argues first that the underlying purpose of the rule would not be served by its application in this case because the gross revenues standard for eligibility as a small or very small business does not effectively shield competing bidders from competitors with access to large amounts of capital.⁷

We disagree. The Commission has said that "average gross revenues provide an accurate, equitable, and easily ascertainable measure of business size."⁸ Moreover, in determining eligibility for size-based provisions, Commission rules require aggregation of the gross revenues of the applicant, its affiliates, those with attributable interests in the applicant, and their affiliates.⁹ In establishing this eligibility standard, the Commission has endeavored to define legitimate small businesses, while at the same time enabling them to raise sufficient capital to compete at auction and in the provision of telecommunications services to the public.¹⁰ Omnipoint's argument that other bidders will not be harmed by grant of its waiver request is merely an untested assertion and does not show that application of the rule in this case will undercut the rule's purpose.

Omnipoint next suggests that application of the rule here would not serve its underlying purpose because Omnipoint could obtain the benefit of a very small business bidding credit in a secondary market transaction, even if it would not be able to obtain the benefit directly at Auction No. 22.¹¹ Omnipoint claims that in the *Fifth Memorandum Opinion and Order*,¹² the Commission established an exception to the Commission's bidding credit unjust enrichment rules for transfers to entities that hold other entrepreneurs' block licenses and thus, at the time of the initial C or F block auction, satisfied the entrepreneurs' block

⁶ 47 C.F.R. § 24.819. As of February 12, 1999, Section 24.819 is superseded by Section 1.925, which contains essentially the same standard for granting a waiver. 63 FR 68,904 (December 14, 1998).

⁷ *Waiver Request* at 6-9.

⁸ 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, at 388-89, para. 19 ("*Part 1 Third Report and Order*").

⁹ 47 C.F.R. § 24.720(b).

¹⁰ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, FCC 94-61, 9 FCC Rcd 2348, 2395-96, paras. 266-73 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, FCC 94-178, 9 FCC Rcd 5532, 5601-02, para. 159 (1994) ("*Fifth Report and Order*"); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, FCC 94-285, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 438-39, 441, paras. 62, 66-77 (1994) ("*Fifth Memorandum Opinion and Order*").

¹¹ *Waiver Request* at 9-11.

¹² *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 468, para. 126.

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criteria. Thus, Omnipoint asserts it could obtain the benefit of a transferor's bidding credit in the form of a reduced transfer price.

Omnipoint's belief in the existence of such an exception is misguided. The applicable rules do not provide for such an exception. In the *Part 1 Third Report and Order*, the Commission established that both future and existing licensees are to be governed by new Part 1 unjust enrichment rules, including bidding credit unjust enrichment provisions.¹³ While the Commission conformed the new Part 1 rules to previously existing broadband PCS unjust enrichment rules,¹⁴ it made clear that the Part 1 rules would supplant existing service-specific unjust enrichment rules, including those for broadband PCS.¹⁵ There is no mention in the *Part 1 Third Report and Order* or the Part 1 rules of a grandfathering exception to the bidding credit unjust enrichment provisions.

Further, in the *C Block Fourth Report and Order*, the Commission reminded applicants that unjust enrichment provisions would continue to apply to C block licensees that utilize a bidding credit and, during their initial license term, seek to make a change in the ownership or control of a license that would result in the license's being owned or controlled by an entity that does not meet the same eligibility criteria for a bidding credit.¹⁶ The *C Block Fourth Report and Order*, which so thoroughly discusses the grandfathering exception to the entrepreneurs' block eligibility requirement, makes no reference to a grandfathering exception to bidding credit unjust enrichment obligations.

Omnipoint's argument is based entirely on its interpretation of one sentence in the *Fifth Memorandum Opinion and Order* discussing the application of unjust enrichment rules in the event a licensee transfers entrepreneurs' block licenses.¹⁷ However, this interpretation is contrary to the Commission's intent and, indeed, is contradicted in the next paragraph of the same order.¹⁸

¹³ *Part 1 Third Report and Order*, 13 FCC Rcd at 407, para. 53.

¹⁴ *Id.* at 406, para. 52.

¹⁵ *Id.* at 407, para. 53.

¹⁶ *C Block Fourth Report and Order* 13 FCC Rcd at 15,769, para. 48.

¹⁷ "[W]e clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. **Unjust enrichment penalties (as described above) apply if these requirements are not met,** or if they qualified for different provisions at the time of licensing." [emphasis added]

Fifth Memorandum Opinion and Order, 10 FCC Rcd at 468-69, para. 126. Omnipoint relies on the bolded language while ignoring the remainder of the sentence. See *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 Docket No. 97-82).

¹⁸ See *Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 469, para. 127:

[W]e reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the

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Omnipoint finally attempts to demonstrate that special circumstances necessitate that we grant its waiver request.¹⁹ It states that it is the only C block licensee that has outgrown its prior bidding credit eligibility. It argues that the Commission is responsible for the delays in auctioning available C block spectrum, absent which Omnipoint would still qualify as a very small business. Finally, Omnipoint protests that it made its June 1998 election decisions based on the Commission's promise of a meaningful opportunity to participate in the next C block auction.

We find these arguments unpersuasive. It is impossible to test at this time, Omnipoint's assertion that it is the only C block licensee affected by the eligibility rule at issue, which is neutral on its face. While the Commission attempted in its restructuring orders to address the many concerns of participants in the prior two C block auctions, it did not attempt to place -- and indicated that it would not place -- prior participants in the same position they would have occupied had the initial C block auctions not occurred.²⁰ Omnipoint had no reasonable basis on which to expect that it would automatically qualify in upcoming C block auctions for the same level of bidding credits for which it previously had been eligible.

For these reasons, we must adhere to the Commission's decision not to "grandfather" bidding credit status from prior C block auctions in Auction No. 22. We deny Omnipoint's request for a waiver of Section 24.712. We will evaluate Omnipoint's eligibility for bidding credits according to its qualifications at the deadline for short form filing.

Sincerely,

Amy J. Zoslov
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller and bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC.

See also id. at 466, para. 119; *Fifth Report and Order*, 9 FCC Rcd at 5591, para. 134 (The Commission adopts the bidding credit unjust enrichment rule with no mention of grandfathering a licensee's eligibility for bidding credits.).

¹⁹ *Waiver Request* at 11-14.

²⁰ *See, e.g.*, Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8359, para. 36 (1988) ("If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the reauction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.").