

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

In the Matter of
Requests for Waiver of
Section 24.711(b)(3) of the
Commission's Rules Establishing the
Interest Rate on Installment Payments for
C Block PCS Licensees
Petitions for Reconsideration of Note and
Security Agreement for C Block PCS Licensees

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1999

Released: June 2, 1999

By the Commission:

1. The Commission has before it an Application for Review filed by Omnipoint Corporation ("Omnipoint"), a broadband Personal Communications Services ("PCS") C block licensee. Omnipoint challenges the Wireless Telecommunications Bureau's ("Bureau") 1998 Order, which denied its request for waiver of the Commission's rule imposing a 7 percent interest rate on installment payment plans for broadband PCS C block licenses that were conditionally granted on September 17, 1996. Also before the Commission are Applications for Review filed by Savannah Independent PCS Corporation ("Savannah") and the Joint C-Block Applicants ("Joint Applicants") contesting the Bureau's 1997 Order, which dismissed Savannah's petition for reconsideration challenging the 7 percent interest rate imposed on

1 Omnipoint, Requests for Waiver of Section 24.711(b)(3) of the Commission's Rules Establishing the Interest Rate on Installment Payments for C Block PCS Licenses, Application for Review (filed June 17, 1998).

2 Requests for Waiver of Section 24.711(b)(3) of the Commission's rules Establishing the Interest Rate on Installment Payments for C Block PCS Licenses, Order, 13 FCC Rcd 10,230 (1998) ("1998 Order").

3 Savannah, Petitions for Reconsideration of Note and Security Agreement for C Block PCS Licensees, Application for Review (filed July 2, 1997); Joint Applicants, Petitions for Reconsideration of Note and Security Agreement for C Block PCS Licensees, Application for Review (filed July 2, 1997).

licenses conditionally granted on September 17, 1996.<sup>4</sup> Because these Applications for Review address the same issues, we have opted to resolve these matters together.<sup>5</sup> For the reasons discussed below, we dismiss the Application for Review of the Joint Applicants and deny Omnipoint's and Savannah's Applications for Review.

2. **Background.** On May 6, 1996, the Commission concluded the first auction of broadband PCS C block licenses (Auction No. 5). Pursuant to the Commission's rules, winning bidders were permitted to pay for their licenses in installment payments over their license term.<sup>6</sup> The Bureau released a public notice announcing the award of several broadband PCS C block licenses on September 17, 1996.<sup>7</sup> Under Section 24.711(b)(3) of the Commission's rules, interest on installment payments "shall be imposed based on the rate for ten-year U.S. Treasury ["Treasury"] obligations applicable on the date the license is granted."<sup>8</sup> As a result, for C block licenses conditionally granted on September 17, 1996, the applicable interest rate is 7 percent, based on the Treasury's August 1996 auction.

3. On December 16, 1996, Omnipoint filed a Request for Rule Waiver of the 7 percent interest rate imposed pursuant to Section 24.711 on installment payment plans for licenses conditionally granted on September 17, 1996.<sup>9</sup> Omnipoint argued that there were unique circumstances surrounding the August 1996 Treasury auction and that application of the 7 percent interest rate is inequitable, arbitrary, and burdensome, as well as contrary to Commission policy of setting interest rates at no more than the government's cost of money.<sup>10</sup> Omnipoint requested that the Commission apply an interest rate of 6.5 percent to all licenses conditionally granted on September 17, 1996, and sought refund of any interest paid in excess of that rate.<sup>11</sup> A number of other parties filed informal requests for waiver of the 7 percent

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<sup>4</sup> Petitions for Reconsideration of Note and Security Agreement for C Block PCS Licensees, *Order*, 12 FCC Rcd 7624 (1997) ("1997 Order").

<sup>5</sup> In addressing these waiver requests in a single order, however, we are mindful of our duty to decide each request on the individual facts presented by each petitioner. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("[A]llegations . . . stated with clarity and accompanied by supporting data are not subject to perfunctory treatment, but must be given a 'hard look.'").

<sup>6</sup> 47 C.F.R. § 24.711(b).

<sup>7</sup> FCC Announces Grant of Broadband Personal Communications Services Entrepreneurs' Block BTA Licenses, *Public Notice*, 11 FCC Rcd 11,316 (1996) ("September 17th Public Notice").

<sup>8</sup> 47 C.F.R. § 24.711(b)(3).

<sup>9</sup> Omnipoint, Broadband PCS Block C Installment Plan Interest Rate for Small Business Licensees, Request for Rule Waiver (filed December 16, 1996), at 7-16 ("Waiver Request").

<sup>10</sup> *Id.*

<sup>11</sup> Omnipoint claims that an interest rate of 6.5 percent is appropriate based on the yield for the August 1996 Treasury auction of 6.535 percent. Waiver Request at 14-16. See 47 C.F.R. § 24.711; 31 C.F.R. § 356.20(b).

interest rate.<sup>12</sup> On June 2, 1997, the Bureau released a public notice seeking comment on all aspects of these waiver requests.<sup>13</sup> In response, Savannah, together with the parties comprising the Joint Applicants, filed joint reply comments.<sup>14</sup> On May 18, 1998, the Bureau released the *1998 Order* denying Omnipoint's Waiver Request, as well as the informal requests for waiver.<sup>15</sup> On June 17, 1998, Omnipoint filed its Application for Review of the Bureau's *1998 Order*.<sup>16</sup>

4. Also on December 16, 1996, several PCS C block licensees filed petitions for reconsideration challenging various aspects of the Bureau's "Installment Payment Plan Note and Security Agreement."<sup>17</sup> The Bureau addressed these petitions in the *1997 Order*,<sup>18</sup> concluding that because the *September 17th Public Notice* constituted proper notice to petitioners under Section 1.4(b) of the Commission's rules,<sup>19</sup> these petitions for reconsideration should be dismissed as untimely filed.<sup>20</sup> On July 2, 1997, Savannah and the Joint Applicants filed their Applications for Review of the *1997 Order*.<sup>21</sup>

5. Discussion. First, we note that Joint Applicants did not participate in the prior

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<sup>12</sup> See also informal requests for waiver of Section 24.711(b)(3) filed by the following parties: Alpine PCS, Communications Venture PCS Limited Partnership, Comscape Telecommunications of Charleston License, Inc., DiGiPH PCS, Inc., Eldorado Communications, L.L.C., Horizon Infotech, Inc., KMTel, L.L.C., Mercury PCS, L.L.C., Miccom Associates, Northern Michigan PCS Consortium, L.L.C., PCSouth, Inc., Quantum Communications Group, Inc., Savannah Independent PCS Corp., SouthEast Telephone, Ltd., Southern Wireless, L.P., and Wireless 2000, Inc.

<sup>13</sup> See "Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes," *Public Notice*, 12 FCC Rcd 7637 (rel. June 2, 1997).

<sup>14</sup> *Id.* at Appendix.

<sup>15</sup> *1998 Order*, 13 FCC Rcd 10,230.

<sup>16</sup> See *supra* note 1.

<sup>17</sup> Alpine PCS, Eldorado Communications, L.L.C., KMTel, L.L.C., Mercury PCS, L.L.C., Miccom Associates, and PCSouth, Inc., Petition for Reconsideration (December 16, 1996) (collectively challenged the Bureau's authority to execute the Note and Security Agreement as a condition to the grant of their licenses); Devon Mobile Communications, L.P. and R & S PCS, Inc., Chase Telecommunications, Inc., MCG PCS, Inc., Comscape Holding, Inc., Central Alabama Partnership L.P. 132, Integrated Communications Group Corporation, Mobile Tristates L.P., Quantum Communications Group, Inc., Alpine PCS, Eldorado Communications L.L.C., Miccom Associates, and PCSouth, Inc., Petition for Reconsideration (December 16, 1996) (collectively challenging various terms in the *Note and Security Agreement*); Savannah Independent PCS Corp., Petition for Reconsideration (January 16, 1997) (challenging the interest rate applicable under the *Note and Security Agreement* for broadband PCS licenses conditionally granted on September 17, 1996).

<sup>18</sup> *1997 Order*, 12 FCC Rcd 7624.

<sup>19</sup> 47 C.F.R. § 1.4(b).

<sup>20</sup> 47 U.S.C. § 405(a) ("[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report or action complained of").

<sup>21</sup> See *supra* note 3.

proceeding that resulted in the *1997 Order*, and provided no explanation for their lack of participation. Accordingly, we dismiss Joint Applicants' Application for Review pursuant to Section 1.115(a) of the Commission's rules.<sup>22</sup> Notwithstanding our dismissal, the substantive issues raised by the Joint Applicants mirror those raised by Omnipoint and Savannah, and will be addressed below.

6. Although their Applications for Review have come before the Commission by different paths, both Omnipoint and Savannah raise the same issues in seeking an interest rate of 6.5 percent, rather than the 7 percent interest rate applied by the Bureau under the Commission's rules. Omnipoint contends that the circumstances surrounding the August 1996 Treasury auction were unusual in that the Treasury set a coupon rate of 7 percent, despite an auction yield of 6.535 percent.<sup>23</sup> Under these circumstances, Omnipoint argues that waiver of the 7 percent rate is warranted. In addition, Omnipoint argues that waiver is appropriate because application of the 7 percent rate is contrary to the Commission's policy of offering financing to small businesses at a rate not exceeding the government's cost of money.<sup>24</sup> Similarly, Savannah challenges the 7 percent rate on the grounds that, with respect to the August 1996 auction, the yield rather than the coupon rate reflects the government's cost of money and is the appropriate rate under Commission policy.<sup>25</sup> We agree with the Bureau that Omnipoint fails to make either of the showings necessary for grant of a waiver.<sup>26</sup> Accordingly, we also find that Savannah's arguments do not convince us to apply a rate other than the 7 percent interest rate applicable under the rules to installment payment plans for licenses conditionally granted on September 17, 1996.

7. First, contrary to Omnipoint's contention,<sup>27</sup> we find that the Bureau properly afforded Omnipoint's Waiver Request a "hard look" as required by *WAIT Radio*.<sup>28</sup> The Bureau considered all the

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<sup>22</sup> A party seeking an application for review when it did not participate in the prior proceeding must "show a good reason why it was not possible for him to participate in the earlier stages of the proceeding." Applications for review that fail to make an adequate showing in this respect results will be dismissed. 47 C.F.R. § 1.115(a). See Application of Family Stations, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 11779, 11780-81 ¶¶ 6-7 (1997) (dismissing application for review for failure to participate in the prior proceeding).

<sup>23</sup> Omnipoint's Application for Review at 6-8.

<sup>24</sup> Omnipoint's Application for Review at 9-12.

<sup>25</sup> Savannah's Application for Review at 7-10.

<sup>26</sup> A waiver is granted only upon a showing that either "(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant particular case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." 47 C.F.R. § 1.925(b)(3).

<sup>27</sup> Omnipoint's Application for Review at 4-5.

<sup>28</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("*WAIT Radio*") (holding that presumptions of regularity apply with special vigor when a Commission acts in reliance on an established and tested agency rule). See Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, *Memorandum Opinion and Order*, FCC 99-62 (rel. April 2, 1999) (denying petitions for reconsideration of an order denying requests for waiver); *BellSouth Corporation and BellSouth Wireless, Inc. v. FCC*, 162 F.3d 1215 (D.C. Cir.

facts presented by Omnipoint and properly concluded that application of the rule does not impose undue burdens, thwart the underlying purpose of the rule, or contravene the public interest.<sup>29</sup> "[A] strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases."<sup>30</sup> Although the August 1996 Treasury auction may have been unusual, a uniform application of our rules and procedures outweighs any hardship Omnipoint claims.<sup>31</sup> We agree with the Bureau that although application of the rule results in licensees paying varying interest rates, this variation is clearly contemplated by the rule, and is one of the risks that licensees assumed in return for favorable 10-year financing terms.<sup>32</sup>

8. In addition, we disagree with the contentions of Omnipoint and Savannah that the 7 percent interest rate is inconsistent with the Commission's policy of setting interest rates at no more than the government's cost of money.<sup>33</sup> The Commission has recognized that Treasury auctions provide an identifiable benchmark on which to base interest rates for installment payments, but may not always reflect the government's cost of money.<sup>34</sup> The policy behind our installment payment plan was to facilitate small business participation in our auction process by, among other things, application of the low interest rates used in the Treasury auctions.<sup>35</sup> Finally, with respect to the contention that the yield, not the coupon rate, should be used,<sup>36</sup> our rule states ". . . interest shall be imposed based on the rate for ten-year U.S. Treasury obligations. . ." <sup>37</sup> It is our intention to mirror the Treasury's interest rate and not the yield, for its 10-year

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1999) ("*BellSouth*") (upholding Commission denial of a waiver request).

<sup>29</sup> See 47 C.F.R. § 1.925. See also *supra* note 13.

<sup>30</sup> *BellSouth* at 1225 (quoting, *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988)); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601 n.44 (1981).

<sup>31</sup> "Rigid and consistent adherence to a policy will be upheld if it is valid." *BellSouth* at 1225 (quoting, *ICBC Corp. v. FCC* 716 F.2d 926, 929 (D.C. Cir. 1983)). See also *Basic Media, Ltd. v. FCC*, 559 F.2d 830, 832 (D.C. Cir. 1977) ("[p]reserving the integrity of a general rule[ ] takes on increased importance . . ." when an agency has not previously deviated from that rule.)

<sup>32</sup> *1998 Order*, 12 FCC Rcd at 10,234 ¶ 10.

<sup>33</sup> *Omnipoint's Application for Review* at 9-12; *Savannah's Application for Review* at 7-10.

<sup>34</sup> Amendment of Part 1 of the Commission's rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5709 ¶ 37 (1997).

<sup>35</sup> See 47 U.S.C. § 309(j)(3)(B). The Commission decided to use the Treasury rate after notice and comment. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2390-91, ¶ 239 (1994) ("*Competitive Bidding Second Report and Order*"), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994). See also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (adopting auction rules and procedures for PCS auctions).

<sup>36</sup> *Omnipoint Application for Review* at 9-12; *Savannah Application for Review* at 7-10.

<sup>37</sup> 47 C.F.R. 24.711(b)(3).

notes. The Treasury clearly delineates between its "interest rate" (coupon rate) and "yield."<sup>38</sup> We find the Bureau's application of the 7 percent interest rate to be consistent with our policy to provide small businesses with below market financing rates.<sup>39</sup>

#### ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that for the reasons set forth above, the July 2, 1997 Application for Review filed by the Joint C-Block Applicants is DISMISSED pursuant to 47 C.F.R. § 1.115 of the Commission's rules.

10. IT IS FURTHER ORDERED that for the reasons set forth above, the June 17, 1997 Application for Review filed by Omnipoint Corporation and the July 2, 1997 Application for Review filed by Savannah Independent PCS Corporation ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>38</sup> See the Treasury's website at <http://www.publicdebt.treas.gov/of/ofntebnd.htm>

<sup>39</sup> Omnipoint paid an interest rate of 11.625% on privately secured notes during the same time in question, August 1996. Broadband PCS C and F Block Installment Payment Restructuring, *Comments of Nextwave Telecom, Inc.*, WT Docket No. 97-82 (filed June 23, 1997), at Appendix A, Section II (citing case studies provided by BT Wolfensohn). See *Competitive Bidding Second Report and Order* at 2390-91 ¶ 239.