

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

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In the Matter of)
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D&E Communications, Inc.)
)
Request for Waiver of Sections 24.712,)
24.720(b)(1), 1.2111(d), and 24.839(a) of the)
Commission's Rules Regarding Eligibility to)
Acquire License as a Small Business)
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)

ORDER

Adopted: December 28, 1999

Released: December 29, 1999

By the Chief, Auctions and Industry Analysis Division:

1. We have before us a request by D&E Communications, Inc. ("D&E") for waiver of Sections 24.712, 24.720(b)(1), 1.2111(d), and 24.839(a) of the Commission's rules.¹ Specifically, D&E asks that the Commission treat it as a small business, so that a joint venture formed by subsidiaries of D&E and Omnipoint Corporation ("Omnipoint") can acquire C block broadband Personal Communications Services ("PCS") licenses from Omnipoint without triggering the unjust enrichment payment obligations of the Commission's rules. For the reasons discussed below, we deny D&E's request.

2. **Background.** In Auction No. 5, D&E's predecessor, PCS One, Inc. ("PCS One"), a "small business" under Commission rules, won the C block license for the Lancaster, Pennsylvania, Basic Trading Area ("BTA").² At the time, D&E indirectly owned 9.17 percent of PCS One. In March 1997, after merging with PCS One, D&E became the C block licensee for the Lancaster BTA.⁴ At that point, D&E, itself, qualified as a small business.⁵ Also in March 1997, D&E completed a pro forma assignment of the

¹ D&E Communications, Inc., Request for Rule Waiver (filed May 20, 1999) ("Waiver Request"); see 47 C.F.R. §§ 24.712, 24.720(b)(1), 1.2111(d), and 24.839(a).

² Waiver Request at 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Lancaster license to its wholly owned subsidiary, D&E Investments, Inc.⁶ In April 1997, another D&E subsidiary was granted the D block broadband PCS license for the Harrisburg, Pennsylvania, BTA and the E block broadband PCS license for the York-Hanover, Pennsylvania, BTA after having been the high bidder in Auction No. 11.⁷ On June 8, 1998, D&E elected the pure amnesty option for its Lancaster C block license.⁸

3. In Auction No. 5, Omnipoint was the high bidder for the Reading, Pennsylvania, BTA C block license; and in Auction No. 11, it was the high bidder for the Lancaster, Pennsylvania, BTA E block license. On November 10, 1997, Omnipoint applied for pro forma assignments of both the Reading C block license⁹ and the Lancaster E block license.¹⁰ On December 17, 1997, Omnipoint applied for pro forma transfers of control of subsidiaries holding the Reading C block license¹¹ and the Lancaster E block license.¹² All of these applications were granted on December 29, 1997.¹³ On June 8, 1998, Omnipoint elected to disaggregate 15 MHz of its Reading C block license and to retain and resume payments on the remaining 15 MHz.¹⁴

4. On November 14, 1997, D&E's wholly owned subsidiary, D&E Wireless, Inc. (hereinafter also "D&E") entered into an agreement with wholly owned subsidiaries of Omnipoint to form a new 50-50 limited partnership, D&E/Omnipoint Wireless Joint Venture ("Joint Venture").¹⁵ On July 29, 1998, D&E filed an application with the Commission to assign the Harrisburg D block license and the York-Hanover E block

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 5; "Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections," *Public Notice*, DA 98-1168, at App. A, p. 2 (released June 16, 1998), *erratum* (released June 18, 1998). For background on the 1998 election of alternative payment options by C block licensees, see 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 Second Report and Order*, 13 FCC Rcd 8345 (1998), and *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

⁹ Omnipoint Reading License, Inc., FCC Form 603, File No. 50165CWAL98 (filed November 10, 1997).

¹⁰ Omnipoint Philadelphia-E. Lancaster E License, Inc., FCC Form 603, File No. 50147CWAL98 (filed November 10, 1997).

¹¹ Omnipoint Reading License, Inc., FCC Form 603, File No. 50178CWTC98 (filed December 17, 1997).

¹² Omnipoint Philadelphia-E. Lancaster E License, Inc., FCC Form 603, File No. 50227CWTC98 (filed December 17, 1997); Omnipoint Philadelphia-E. Lancaster E License, Inc., FCC Form 603, File No. 50282CWTC98 (filed December 17, 1997).

¹³ "Wireless Telecommunications Bureau Commercial Wireless Service Information," *Public Notice*, at 1, 2, 6, 12, and 13 (released December 29, 1997).

¹⁴ "Wireless Telecommunications Bureau Announces Broadband Personal Communications Services (PCS) C Block Unconditional Elections," *Public Notice*, DA 98-1340, at App. A, p. 2 (released July 2, 1998); "Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections," *Public Notice*, DA 98-1168, at App. C, p. 2 (released June 16, 1998), *erratum* (released June 18, 1998).

¹⁵ Waiver Request at 3.

license to the Joint Venture.¹⁶ The next day, Omnipoint filed applications to transfer control to the Joint Venture of the wholly-owned Omnipoint subsidiaries holding the Lancaster E block license and the disaggregated Reading C block license.¹⁷ The Wireless Telecommunications Bureau (the "Bureau") granted these assignment and transfer applications on December 30, 1998;¹⁸ and D&E assigned its licenses to the Joint Venture the next day.¹⁹ The Bureau conditioned grant of Omnipoint's Reading C block transfer application on completion of the transfer within 60 days;²⁰ however, Omnipoint has not completed the transfer.²¹ According to D&E, Omnipoint has delayed transferring the Reading C block license out of concern "that such a transfer would trigger the unjust enrichment provisions of Section 1.2111 of the Commission's rules."²² On June 2, 1999, Omnipoint completed the transfer to the Joint Venture of its subsidiary holding the Lancaster E block license.²³

5. On July 15, 1999, Omnipoint filed an application to transfer control of its subsidiary holding the Lancaster E block license to VoiceStream Wireless Holding Corporation, which would be a transfer of Omnipoint's negative control of the Joint Venture.²⁴ On July 16, 1999, Omnipoint filed an application to assign its Reading C block license to Cook Inlet/VS GSM II PCS, LLC.²⁵ D&E and Omnipoint have indicated that, despite Omnipoint's July 1999 applications and provided the Waiver Request is granted, Omnipoint still intends to contribute the Reading C block license and the Lancaster E block license to the

¹⁶ *Id.* at 5; PCS Licenses, Inc., FCC Form 490, File No. 50532CWAL98 (filed July 19, 1998).

¹⁷ Omnipoint PCS Entrepreneurs Two, LLC, FCC Form 490, File No. 50530CWTC98 (filed July 30, 1998) (Lancaster E block license); Omnipoint Reading License, LLC, FCC Form 604, File No. 50531CWTC98 (filed July 30, 1998) (Reading C block license). The Waiver Request incorrectly indicates that Omnipoint filed its two transfer applications as a single application. *See* Waiver Request at 5.

¹⁸ Report Number: 122, *Public Notice*, 1999 WL 3413 (January 6, 1999) (Omnipoint's Lancaster E block license and D&E's Harrisburg D block and York-Hanover E block licenses); "Wireless Telecommunications Bureau Grants Consent to Assign or Transfer C and F Block Broadband PCS Licenses and 900 MHz SMR Licenses," *Public Notice*, DA 98-2652 (released December 30, 1998) (Omnipoint's Reading 15 MHz C block license).

¹⁹ Waiver Request at 5-6.

²⁰ "Wireless Telecommunications Bureau Grants Consent to Assign or Transfer C and F Block Broadband PCS Licenses and 900 MHz SMR Licenses," *Public Notice*, DA 98-2652, at 2 (released December 30, 1998) (Reading, Pennsylvania, 15 MHz C block license).

²¹ As discussed below, Omnipoint has since applied to assign its Reading C block license to Cook Inlet/VS GSM II PCS, LLC; nevertheless, Omnipoint has indicated that, should D&E's waiver request be granted, Omnipoint still intends to contribute the Reading C block license to the Joint Venture. *Infra* notes 25 and 26 and accompanying text.

²² Waiver Request at 7-8.

²³ Omnipoint Philadelphia-E. Lancaster E License LLC, FCC Form 603, File No. 0000015053, at 4 (filed June 7, 1999); letter from Stephen E. Holsten, Counsel to D&E Communications, Inc., to Audrey A. Bashkin, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (August 5, 1999) ("August 5 letter").

²⁴ Omnipoint Philadelphia-E. Lancaster E License, LLC, FCC Form 603, File No. 0000016681, Att. 1 (filed July 15, 1999), incorporating by reference Omnipoint Albany-Schenectady-Glens Falls E License, LLC, FCC Form 603, File No. 0000016501, Att. 3 at 17, n.7 (filed July 15, 1999) ("Application [for transfer of control of the Lancaster E block license] is for transfer of Omnipoint's negative control of D&E Omnipoint Wireless Joint Venture, L.P., the parent of the licensee."); August 5 letter.

²⁵ Omnipoint Reading License, LLC, FCC Form 603, File No. 0000016605 (filed July 16, 1999).

Joint Venture.²⁶

6. **Discussion.** D&E states that in July 1998, when Omnipoint filed applications to transfer control to the Joint Venture of subsidiaries holding the Lancaster E block and Reading C block licenses, D&E had already exceeded the Commission's size limitation for small business status.²⁷ Thus, D&E seeks a waiver that would allow it to participate as a small business in the Joint Venture so that Omnipoint can transfer to the Joint Venture "certain C block licenses" it obtained using small business bidding credits without making an unjust enrichment payment.²⁸ Section 24.712 of the Commission's rules allows C block broadband PCS auction winners that are small businesses and very small businesses to use, respectively, bidding credits of 15 percent and 25 percent to reduce the cost of their winning bids.²⁹ Section 24.720(b) defines a small business in the C and F blocks as an entity that, together with its affiliates, has had average annual revenues not exceeding \$40 million for the preceding three years, and defines a very small business as one that, together with its affiliates, has had average annual gross revenues not exceeding \$15 million for the preceding three years.³⁰ Under Section 1.2111(d), a licensee that used a bidding credit during an auction and, during the first five years of the initial license term, seeks to assign or transfer control of its license to an entity that does not meet the eligibility criteria for the same bidding credit, will be required to reimburse the Government a sum of money that, depending upon the size of the transferee and the time of the transfer, could equal as much as the full amount of the bidding credit plus interest.³¹

7. In order to obtain the requested waiver, D&E must show that either "(i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n 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."³² D&E offers some rather unpersuasive arguments related to both prongs of this requirement.

8. To satisfy the first prong of the waiver standard, D&E asserts that applying the rules at issue in

²⁶ Letter from Richard Rubin and Stephen E. Holsten, Counsel to D&E, and Mark J. Tauber and E. Ashton Johnston, Counsel to Omnipoint, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (August 6, 1999) ("August 6 letter"). The Lancaster E block license has already been transferred to the Joint Venture. See note 23, *supra*, and accompanying text. Omnipoint and D&E also indicate that, should the Waiver Request be granted, Omnipoint will also assign to the Joint Venture its C block licenses for Harrisburg, Lancaster, and York-Hanover, Pennsylvania, won in Auction No. 22. August 6 letter; see Waiver Request at 8, 10, and 11.

²⁷ Waiver Request at 7.

²⁸ *Id.* at 1.

²⁹ 47 C.F.R. § 24.712.

³⁰ *Id.* § 24.720(b).

³¹ *Id.* § 1.2111(d); see *id.* § 24.712(c); see also 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, 406-07, paras. 52-53 (1998).

³² 47 C.F.R. § 1.925. D&E relies on Section 24.819 of the Rules, see Waiver Request at 2 and n.5, which was superseded by Section 1.925 on February 12, 1999. 63 Fed. Reg. 68,904 (December 14, 1998).

this case would not serve their underlying purpose. The Commission's entrepreneurs' block bidding credit rules are intended "to encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions."³³ The purpose of the entrepreneurs' block unjust enrichment bidding credit rules is "[t]o ensure that bidding credits benefit the parties to whom they are directed" and "to help promote the long-term holding of licenses by those parties receiving bidding credits."³⁴ D&E argues, however, that "the Commission recognized that there might be circumstances which would justify a waiver of its unjust enrichment rules and, in fact, stated that licensees may request waivers of its unjust enrichment rules."³⁵ In support, D&E quotes from the Commission's *Part 1 Order*:

While certain FCC rules contain restrictions on the transfer of licenses acquired through the use of designated entity provisions for the statutory purpose of assuring license dissemination among a wide variety of applicants including designated entities, licensees may request a waiver of such rules.³⁶

9. As a threshold matter, we note that D&E lacks standing to request a waiver of the unjust enrichment bidding credit rules. Only Omnipoint, the sole party transferring an entrepreneurs' block license to the Joint Venture, would incur liability for an unjust enrichment payment and have standing to request a waiver of Section 1.2111(d). In addition, D&E has misinterpreted the Commission's *Part 1 Order*. The rest of the quoted paragraph reveals that the Commission was speaking not of waiving unjust enrichment obligations but rather of waiving the restrictions on license transfers to non-designated entities. Moreover, the Commission made clear that, if such license transfer waivers are granted, licensees will be expected to make the unjust enrichment payments required by the rules:

For example, upon a showing supported by an affidavit, that the licensee is in financial distress, the Commission will consider granting a waiver of the transfer restrictions provided that such transaction is otherwise in the public interest. *Under these circumstances, if a license is transferred to an entity that would not qualify for designated entity provisions, or that would qualify for less favorable designated entity provisions, the unjust enrichment provisions set forth in Section 1.2111 of the Commission's rules or service-specific rules would apply.* In summary, commercial lenders and equipment vendors have adequate assurances from the Commission that in most situations of financial distress, licenses can be transferred as a "going concern," *subject, of course, to the rights of the Commission to the payments of obligations created under the Commission's rules (including unjust enrichment payments), the license conditions, the promissory note, and the security*

³³ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, FCC 94-178, 9 FCC Rcd 5532, 5539, para. 15 (1994) ("*Fifth Report and Order*").

³⁴ *Id.* at 5591, para. 134.

³⁵ Waiver Request at 9.

³⁶ *Id.* at n.26, quoting Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5695-96, para. 13 (1997) ("*Part 1 Order*") (footnote omitted).

agreement.³⁷

10. D&E additionally points out that its size exceeds the \$40 million limit for small businesses only slightly and only because it grew "in the normal course of business."³⁸ Accordingly, D&E contends that allowing the transfer of C block licenses to the Joint Venture without the imposition of unjust enrichment obligations would facilitate "not a sale to a large company, but rather a competitive collaboration between two small companies."³⁹

11. D&E has not outlined a situation where adherence to the Commission's small business size and bidding credit eligibility rules would undermine their underlying purpose or where deviating from the rules would be in the public interest. Our denial of the waiver request would not prohibit the transfer of licenses to the Joint Venture. Rather, it would ensure that bidding credits are used only by entities eligible for them. Application of the rules in this case would achieve the precise goal envisioned by the Commission, and would serve the public interest.⁴⁰ Accordingly, we decline to waive, under the first prong of the waiver standard, our small business size, bidding credit eligibility, and unjust enrichment rules.⁴¹

12. D&E also argues, under the second prong of the waiver standard, that its waiver request should be granted based on unique factual circumstances. D&E claims that, at the time it transferred its licenses to the Joint Venture, it "was a small business by virtue of having retained such status as a result of having participated in the original C [b]lock auction as PCS One and having selected full amnesty for its C [b]lock Lancaster, PA BTA PCS license which it had held as a small business."⁴² This claim is incorrect. The Commission evaluates an entity's status as a small business at the time the relevant application is filed; the election made by a C block licensee makes no difference as to its status as a small business.⁴³ In this case, D&E's status as a small business must be evaluated as of July 1998 when Omnipoint filed its application to transfer control of its Reading C block license to the Joint Venture. In its Waiver Request, D&E admits that for the applicable years 1995-1997, D&E's average annual gross revenues, along with those of its affiliates,

³⁷ *Part 1 Order*, 12 FCC Rcd at 5695-96, para. 13 (1997) (footnotes omitted, emphasis added).

³⁸ Waiver Request at 10.

³⁹ *Id.*

⁴⁰ We note that the Commission adopted its unjust enrichment rules at the direction of Congress, *see* 47 U.S.C. § 309(j)(3)(C),(4)(E), denominating them "strict repayment penalties." *Fifth Report and Order*, 9 FCC Rcd at 5591, para. 134.

⁴¹ The Commission recently 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).

⁴² Waiver Request at 5 (footnote omitted).

⁴³ 47 C.F.R. § 24.839(a)(2); *see id.* §§ 1.2110(m), 1.2111(d), and 24.720(b) and (f); *see also* 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, 15,768, para. 47 (1998) ("*C Block Fourth Report and Order*").

were \$44.6 million,⁴⁴ or \$4.6 million beyond the limit to qualify as a small business with regard to C and F block PCS licenses. Accordingly, at the time Omnipoint filed its application for transfer of control, D&E did not qualify as a small business.⁴⁵

13. D&E also contends that it "lost its status as a small business" because of Commission delays.⁴⁶ D&E argues that it and Omnipoint could not "realistically" apply to transfer control of their licenses to the Joint Venture without first making their C block elections and that, while waiting for the twice postponed election date, D&E grew too large to qualify as a small business.⁴⁷ Yet D&E concedes that for 1994-1996, the years applicable to the original January 15, 1998 election date, its average annual gross revenues, along with those of its affiliates, were \$40.7 million,⁴⁸ or \$700,000 in excess of the small business ceiling. Thus, while we are not persuaded that postponement of the C block election date would constitute a sufficient basis for waiving the small business size standard in any case, the issue in this case is moot.

14. D&E further maintains that, because it returned its only C block license to the Commission pursuant to the pure amnesty option, it lost its eligibility under Section 24.839(a) of the Commission's rules to obtain another C block license as a small business entrepreneur.⁴⁹ D&E apparently misunderstands this rule. Section 24.839(a) generally restricts transfers of a C or F block license during the first five years of the initial license term to an entity that qualifies as an entrepreneur⁵⁰ or that holds other C or F block licenses that it acquired while qualifying as an entrepreneur.⁵¹ An entity's eligibility as an entrepreneur to acquire a C block license under Section 24.839(a) is not affected by its failure to qualify as a small business. D&E is similarly misguided in its belief that its election of the pure amnesty option affected its C block small business status. In finalizing the rules for Auction No. 22, the Commission emphasized that eligibility for small business status would be determined solely according to an applicant's financial qualifications as of the Auction No. 22 short-form application deadline.⁵²

15. D&E also maintains that operating as the Joint Venture is essential for it and Omnipoint to

⁴⁴ Waiver Request at 7.

⁴⁵ As D&E acknowledges, Omnipoint, in its application to transfer control to the Joint Venture of the Reading C block license, inaccurately states that "all of the entities listed in this application qualify as small businesses." Omnipoint Reading License, LLC, FCC Form 604, File No. 50531CWTC98, Ex. 1 at B. (filed July 30, 1998) (Reading C block license); *see* Waiver Request at 7.

⁴⁶ Waiver Request at 6-7. This contention appears to contradict D&E's previous assertion that it qualified as a small business as of July 1998 when Omnipoint applied to transfer control to the Joint Venture of its subsidiary holding the disaggregated Reading C block license. *See id.* at 5.

⁴⁷ *Id.* at 6-7.

⁴⁸ *Id.* at 7, n.18.

⁴⁹ *Id.* at 6.

⁵⁰ *See* 47 C.F.R. § 24.709.

⁵¹ *Id.* § 24.839(a).

⁵² *See C Block Fourth Report and Order*, 13 FCC Rcd. at 15,768, para. 47.

compete successfully against cellular incumbents and to survive in the central Pennsylvania market, and D&E asserts that unjust enrichment payments would compromise the Joint Venture's viability.⁵³ This justification is insufficient for the requested waiver. As stated earlier, D&E lacks standing to request a waiver of Omnipoint's unjust enrichment payment obligation. Moreover, as the Commission indicated in the *Part 1 Order*, even when the financial distress of a licensee is so severe that the Commission chooses to allow the transfer of the licensee's entrepreneurs' block license to a non-designated entity, the Commission will require the payment of any applicable unjust enrichment obligation.⁵⁴ We therefore decline to waive, under the second prong of the waiver standard, our small business size, bidding credit eligibility, and unjust enrichment rules.

⁵³ Waiver Request at 11-12.

⁵⁴ *Part 1 Order*, 12 FCC Rcd at 5695-96, para. 13 (footnotes omitted, emphasis added).

16. **Ordering Clauses.** For the reasons set forth above, IT IS ORDERED that D&E's request for waiver of Sections 24.712, 24.720(b)(1), 1.2111(d), and 24.839(a) of the Commission's rules IS HEREBY DENIED.

17. This action is taken pursuant to delegated authority under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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