

and (3) using a slotted ALOHA protocol during the unscheduled interval to maximize throughput.³⁶

NWN can and will operate with low cost personal messaging units. Mtel, in fact, provided an exhaustive description of all components necessary to fabricate NWN user devices in its June 1, 1992 Technical Feasibility Demonstration.³⁷ MPR Teletech, an experienced radio equipment manufacturer and design consultant, utilized this information to project wholesale costs at that time for NWN modems of \$299, and wholesale costs for NWN portables of \$380.³⁸ Since that time, two other independent manufacturers have estimated that the wholesale costs for either type will be under \$300.

4. The Functionality of Mtel's NWN Service Cannot Be Replicated By Existing Services Such As RAM

In furtherance of its argument that Mtel's NWN service is not innovative, BellSouth asserts that "it is easily matched, if not surpassed, by existing mobile data services, such as RAM Mobile Data's Mobitex."³⁹ BellSouth's argument,

³⁶ Mtel Feasibility Demonstration at 13-15.

³⁷ Mtel Feasibility Demonstration, att. C.

³⁸ Id., att. C at 11.

³⁹ BellSouth at 18. RAM Mobile Data is partially owned by BellSouth.

however, fails to recognize that NWN is unlike any other data service because it is designed at the outset to offer inexpensive nationwide messaging. BellSouth disingenuously compares NWN with RAM, ignoring the fact that systems like RAM are designed as real time interactive services.

Services such as RAM establish a single transmitter to mobile link for communications.⁴⁰ The use of a single transmitter on a given channel, however, means that such a system does not have the same degree of building penetration achievable through simulcasting and, unlike simulcasting, must use multiple channels to expand service over large areas. For highly portable, relatively inexpensive terminals, the simulcast architecture of NWN provides a less expensive and more spectrally efficient means of delivering a messaging service than does the multi-channel distributed base station design of RAM Mobile Data.⁴¹ Thus, technological comparisons between NWN and systems such as RAM are inappropriate.

⁴⁰ This distinction is highly relevant, since a system such as RAM is not constrained to use the robust modulation techniques needed in simulcast, nor is the symbol rate of such a system practically limited by intersymbol interference caused by delay spread. Accordingly, such systems can achieve high data rates using faster baud rates and techniques like quadrature amplitude modulation.

⁴¹ RAM is characterized by comparatively large, more expensive mobile units with extensive power requirements and relatively higher service costs. In contrast, NWN provides an inexpensive mobile communications solution for store and forward compatible data messaging applications.

**5. Nationwide Service Areas for NWN
Are Warranted**

Both Florida Cellular and Arch also argue that grant of a nationwide pioneer's preference is unwarranted. Florida Cellular states that "[s]ince the Mtel system requires specialized hardware with timing restraints, it would naturally be a specialized application with at best only small regional acceptance."⁴² Although Mtel's system may require "specialized" hardware -- e.g., an NWN compatible modem -- as Mtel has discussed above, this "specialized" hardware will not require highly sophisticated timing devices and it will be readily available at consumer prices. Furthermore, it is unclear why the requirement of "specialized" hardware would limit the acceptance of a system to a particular region.

Arch states that its "experience has been that there are in fact a relatively small percentage of potential messaging service customers who have a bona fide need for nationwide service."⁴³ As support for its premise, Arch cites to its own comments at paragraph 19, a paragraph that does not at any point discuss -- or even mention -- the number of customers who need or want nationwide messaging services. In contrast, Mtel -- the country's pioneer in nationwide paging

⁴² Florida Cellular at 19.

⁴³ Arch Communications at 16.

services -- has submitted a number of studies documenting statistically projectable markets for nationwide NWN service. Within the initial five years, these studies indicate a market of over 1.3 million two-way NWN messaging customers, as well as 1.3 million users of NWN acknowledgement messaging, flatly contradicting Arch's subjective assessment of the messaging industry.

Arch also argues that the Commission's decision to award a nationwide pioneer's preference is "completely unsupported."⁴⁴ However, extensive record evidence exists supporting nationwide allocations -- including market studies, technical implementation discussions, and economic justifications. Furthermore, the Commission's tentative decision has been justified in that the decision explicitly states that the major concern implicated by nationwide preferences -- the potential anticompetitive effect of granting a monopoly -- does not exist "[g]iven that our alternatives include nationwide competition within this spectrum."⁴⁵

⁴⁴ Id.

⁴⁵ Tentative Decision, 7 FCC Rcd at 5736.

IV. THE COMMISSION'S PROCEDURES FOR AWARDING PIONEER'S PREFERENCES ARE CONSISTENT WITH THE COMMUNICATIONS ACT AND ADMINISTRATIVE PROCEDURES ACT

In its comments, BellSouth contends that the Commission's procedures in the 900 MHz Narrowband PCS proceeding violate the Administrative Procedure Act and the Communications Act. Specifically, BellSouth maintains that a full-blown evidentiary hearing is required prior to award of a Pioneer's Preference to Mtel. Absent such hearings, BellSouth insists that interested parties are deprived of statutorily protected procedural rights.

Neither the facts nor the law support any of BellSouth's contentions. BellSouth was an active proponent of the Commission's established procedures. Indeed, BellSouth aggressively participated in a multiplicity of proceedings with full notice and opportunity for comment. Only after its own Pioneer's Preference was tentatively denied has BellSouth uncovered its purportedly troubling legal problems with the Commission's conduct.

BellSouth now, for the first time, argues that the FCC was required, as a matter of law, to hold an evidentiary, on-the-record hearing, in accordance with the provisions of sections 554, 556, and 557 of the Administrative Procedure Act, before arriving at its tentative decision. As detailed below, BellSouth's arguments are wholly without foundation because the Communications Act does not make these APA

sections applicable to this type of FCC determination. Indeed, with the blessing of the courts, the Commission has often made decisions in a rulemaking context with important implications for licensing proceedings without following the APA procedures which govern evidentiary hearings.⁴⁶

Common sense and sound administrative practice also compel the conclusion that a grant of a pioneer's preference is not a radio licensing determination and is not subject to an on-the-record hearing requirement. Forcing the FCC in every case to hold an evidentiary hearing before awarding a pioneer's preference would defeat the purposes of the policy in several respects. First, such a requirement would substantially impede the FCC's goal of expeditiously delivering new services to the public "with the least amount of regulatory delay."⁴⁷ Second, requiring each party to undertake the cost of an evidentiary hearing at the pioneer preference stage would undercut much, if not all, of the advantage of such a preference.⁴⁸ Third, holding an

⁴⁶ The procedures that BellSouth wants the Commission to follow in this case are those which section 309 of the Communications Act requires the Commission to employ when it grants construction permits and station licenses, or when it modifies or renews such licenses. See 47 U.S.C. § 308 (1988).

⁴⁷ Tentative Decision, 7 FCC Rcd at 5678.

⁴⁸ Presumably, the rationale behind the pioneer's preference is that investors will support entities which have received a pioneer preference through the actual licensing
(continued...)

adjudicative hearing at the pioneer's preference stage would be costly and inefficient to the agency and the administrative process. The whole point of the pioneer's preference is to enable the FCC to select a new type of service which it considers sufficiently innovative to warrant special treatment in a later licensing determination which fully complies with the requirements of section 309. Thus, BellSouth's attack is based on a misperception of the nature of the FCC's pioneer preference award.

In any event, as demonstrated in Section IV.C below, BellSouth has failed to adduce any substantial or material facts which might give rise to an evidentiary hearing (even if section 309 of the Communications Act governed this proceeding). There is no real factual dispute that Mtel's proposed service can and will achieve its stated performance characteristics and capabilities. Instead, BellSouth quarrels with the conclusions drawn from those facts of record. However, this is not sufficient to necessitate an

⁴⁸(...continued)
determination because of the innovating entity's substantial advantage going into that process. Establishment of Procedures to Provide to Applicants Proposing an Allocation for New Services, 5 FCC Rcd. 2766, 2767 (1990) ("Pioneer Preference Notice"). Compelling such entities to first go through the costly process of securing a pioneer's preference via an on-the-record hearing, however, and then requiring them to bear the expenses of translating those preferences into an actual license in (potentially) another on-the-record hearing would harm, rather than benefit, innovating companies and their investors.

evidentiary hearing. Accordingly, BellSouth's arguments are without merit.

A. The Commission Has Employed Procedures Ensuring Full Notice And Opportunity To Comment For All Interested Parties

The Commission gave extremely careful consideration to its decision to award Mtel a tentative pioneer's preference for NWN. On April 30, 1992, the Commission accepted for comment six requests for a pioneer's preference to provide narrowband data or paging services at frequencies in the 900 MHz range.⁴⁹ Mtel's petition for rulemaking, which had initially been filed on November 12, 1991, was one of those accepted and released for public comment.⁵⁰ At the same time, the Chief Engineer of OET announced that June 1, 1992 would be the final day for filing any additional pioneer's preference requests with regard to proposals that the FCC authorize narrowband data or paging services in the 900 MHz range. That same order made plain that a tentative preference would not be awarded without a demonstration of technical feasibility or preliminary experimental results.

BellSouth did not initially object to Mtel's request for a pioneer's preference; on the contrary, BellSouth (through a

⁴⁹ Public Notice, Mimeo No. 22915 (Apr. 30, 1992).

⁵⁰ The Commission sought comment on these requests by June 1, 1992, with reply comments due fifteen days later. Public Notice, Mimeo No. 22914 (Apr. 30, 1992).

subsidiary) asked for a preference itself on June 1, 1992 -- filing a submission that was essentially a restatement of Mtel's NWN proposal, with some minor variations.⁵¹ On that same date, Mtel submitted a wealth of data to the Commission demonstrating the technical feasibility of NWN. Four days later, the agency again sought comment on the new and the supplemented requests for pioneer's preferences (including the technical feasibility demonstrations).⁵² Again, extensive comments and reply comments were presented to the Commission.⁵³ In none of these pleadings did BellSouth demand that the Commission conduct an on-the-record hearing before making a determination with respect to its own request for a pioneer's preference.

On July 16, 1992, the Commission adopted the Notice of Proposed Rulemaking and Tentative Decision which is the subject of this submission. As described above, in that decision the FCC tentatively concluded that Mtel

⁵¹ Mtel demonstrated at length that "the similarities between [BellSouth's proposed service] and NWN [were] so extensive as to preclude any claim of innovation on [BellSouth's] part" and that BellSouth's proposed system "extend[ed] well beyond appropriation" to be "almost a clone of NWN, both technically and linguistically." Opposition of Mtel at 6, ET Docket 92-100, PP-82 (June 19, 1992).

⁵² Mobile Communications Corp. of America Consolidated Reply to Oppositions to Request for Pioneer's Preference, ET Docket No. 92-100, PP-82 (filed June 29, 1992).

⁵³ See, e.g., Pioneer's Preference Requests Accepted in ET Docket No. 92-100, FCC Public Notice (released June 4, 1992).

merits a preference for its having developed and demonstrated significantly improved bit transmission rates, submitted an innovative proposal based upon these improved rates that will result in new service functionalities being available to consumers, and developed the technology necessary to implement its proposal.⁵⁴

The FCC also rejected BellSouth's application on the grounds that it proposed "to offer a variety of services that are indistinguishable from those proposed by other requesters"; did "not demonstrate that [BellSouth] has developed the capabilities or possibilities of a specific identifiable PCS technology or service"; and, had "yet to demonstrate [the] feasibility through an experiment [of 'a multi-phase modulation technique to increase spectrum efficiency']".⁵⁵

Now, finding itself dissatisfied with the agency's tentative decision granting a pioneer's preference to Mtel, BellSouth has decided that the Commission did not follow the proper procedures in making its decision. BellSouth is here contending that the agency's careful and extensive process by which the Commission awarded Mtel a tentative pioneer's preference for NWN was insufficient.

⁵⁴ Tentative Decision, 7 FCC Rcd at 5735.

⁵⁵ Id. at 5738.

B. The Award Of A Pioneer's Preference Is Not A Radio License Determination Subject To The Formal Hearing Requirements Of Section 309 Of The Communications Act And The APA

BellSouth's attack on the manner in which the Commission awarded a pioneer's preference to Mtel mischaracterizes the nature of the Commission's proceeding. BellSouth views the FCC's "system for awarding pioneers' preferences, as implemented in this proceeding" as a "licensing determination []." ⁵⁶ More particularly, BellSouth asserts that such a determination is subject to the requirements of a formal adjudicative hearing on the record. But the Commission's action here, like all of its pioneer preference decisions, is not an adjudication governed by sections 554, 556, and 557 of the Administrative Procedure Act or by section 309 of the Communications Act. Rather, it is a rulemaking procedure, and has always been conceived of as such. ⁵⁷ The Federal Communications Commission has great discretion in choosing to address an issue by rulemaking as opposed to adjudication. ⁵⁸

⁵⁶ See, e.g., BellSouth at 2.

⁵⁷ See Pioneer Preference Order, 6 FCC Rcd at 3488; Pioneer Preference Reconsideration, 7 FCC Rcd at 1808.

⁵⁸ See, e.g., FCC V. National Citizens Committee for Broadcasting, 436 U.S. 775, 808 n.29 (1978); Southern Bell Tel. & Tel. Co. v. FCC, 781 F.2d 209, 216 n.8 (D.C. Cir. 1986); AT&T Communications v. MCI, 7 FCC Rcd 807, 809 (1992) (citing SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1977)). See also Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkeil, Administrative Law and Process 281-285 (1985).

The Communications Act does not compel the Commission to hold a judicial-type of hearing before awarding a pioneer's preference.

1. **Neither Section 309 nor the APA Require the Commission to Hold an On-the-Record Hearing Before it Awards A Pioneer's Preference**

BellSouth's objection to the procedures the Commission employed here ignores the express limitation in the language of section 554 stating that it, along with sections 556 and 557, applies only to formal agency adjudications required by the agency's enabling statute to be conducted "on the record."⁵⁹ "[S]tatutorily required procedures can be determined only by reading the relevant provisions" of the APA together with "the organic act that authorizes the agency to take the action" -- here, the Communications Act -- and then "analyzing the interrelationship between the two."⁶⁰

⁵⁹ 5 U.S.C. § 554(a) (1988) ("This section applies . . . in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing") (emphasis added).

⁶⁰ Administrative Law and Process, supra, at 277. Thus, the APA

does not direct any agency to use a particular procedure. Instead, it refers to provisions of agency organic acts as the basis for determining which of the . . . procedures described in APA, if any, an agency is required to use in taking particular types of actions. For instance, an agency is required to use formal adjudication only in case of "adjudication required by statute to be
(continued...)

As the Commission and the courts have found time and again, no part of the Communications Act requires the FCC to follow formal adjudicatory procedural processes in dealing with all issues before it, even when licensing decisions are implicated.⁶¹ The Supreme Court long ago recognized that section 309 of the Communications Act does not create an absolute right to a trial-like adjudication in all cases:

⁶⁰(...continued)
determined on the record after opportunity for an agency hearing."

Id. at 279 (citations omitted). See International Record Carriers' Communications, 61 F.C.C.2d 183, 184 (1976) ("Section 553 requires trial-type proceedings only where the operative statute requires rule to be made 'on the record after opportunity for an agency hearing.'" (quoting 5 U.S.C. §553(c)), vacated on other grounds, 559 F.2d 881 (1977).

⁶¹ In fact, as the D.C. Circuit has explained, the Commission is not obligated to provide "the full panoply of trial-like hearing requirements embodied in § 554 of APA" even in actual comparative license hearings (which this is not). It said:

Nothing in § 409 of the Communications Act of 1934, which deals with FCC hearings in general, . . . nor § 309, which deals specifically with licensing proceedings, . . . uses the "on the record" language necessary to trigger the full panoply of trial-like hearing requirements embodied in § 554 of the APA. . . . In addition, § 556(d) of the APA contains an express exemption which provides that, in processing applications for initial licenses, "an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."

Gencom Inc. v. FCC, 832 F.2d 171, 174 n.2 (D.C. Cir. 1987) (citing Cellular Mobile Systems v. FCC, 782 F.2d 182, 197-98 (D.C. Cir. 1985); statutory citations omitted).

We do not read the hearing requirement, . . . as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business. . . .

We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing.⁶²

Storer "confirmed the Commission's ability to withdraw issues from the Section 309 licensing decision via a rulemaking proceeding."⁶³ Here, the Commission has exercised this unquestioned power to set certain threshold eligibility requirements for license applicants.⁶⁴

The purpose of the pioneer's preference is not to make a full range of determinations that would be necessary to the award of a radio license. Rather, it focuses on one specific aspect of the proposals of prospective applicants. In reaching a pioneer's preference determination, the FCC "looks for technical innovation when deciding pioneer's preference

⁶² United States v. Storer Broadcasting Co., 351 U.S. 192, 202, 205 (1956); see, e.g., Aeronautical Radio, Inc. v. FCC, 928 F.2d 429, 439 (D.C. Cir. 1991) (citing cases).

⁶³ Domestic Satellite Earth Stations, 81 F.C.C.2d 304, 315 (1980) (Notice of Proposed Rulemaking).

⁶⁴ See, e.g., Cellular Communications Systems, 86 F.C.C. 2d 469 (1981), modified, 89 F.C.C. 2d 58, further modified, 90 F.C.C. 2d 571 (1982), Hispanic Information & Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (Section 309 "does not preclude the FCC from establishing threshold standards to identify qualified applicants and excluding the applicants who plainly fail to meet the standards"); Aeronautical Radio, 928 F.2d at 438-39.

grants and does not make licensing or diversity of services a criteria for this decision."⁶⁵

BellSouth's lengthy demonstration that the FCC did not adhere to the strictures of section 557 in issuing its Tentative Decision is therefore irrelevant. The Commission never pretended to follow those procedures, because it was not required to do so.⁶⁶ The FCC here simply chose to perform its rulemaking in two steps, so that its judgment might be better considered. The agency's choice to adopt rules in a careful and deliberative fashion should not expose it to additional procedural burdens or attacks.

⁶⁵ Telocator Bulletin, Aug. 21, 1992, at 6 (quoting David Siddall, Chief, Allocation Branch of the FCC's Office of Engineering and Technology). That there may be some factual questions present does not invalidate the FCC's choice to proceed by rulemaking. "Rulemaking is hardly limited . . . to that certainly rare and probably entirely hypothetical situation in which the facts relevant to determination of a question of general policy are beyond dispute." Washington Util. & Transportation Comm. v. FCC, 513 F.2d 1142, 1165, cert. denied, 423 U.S. 836 (1975).

⁶⁶ The fact that the agency used the label "tentative decision" to describe its actions does not change the character of this determination. BellSouth has failed to establish that the FCC was required to adhere to the procedures set forth in section 557 regarding tentative decisions, because it has not shown that the agency's pioneer preference proceeding was a case wherein "a hearing is required to be conducted in accordance with section 556" and section 553 of the APA. 5 U.S.C. § 557(a) (1988).

2. **The Commission's Decision to Award Mtel a Pioneer's Preference Without Holding a Formal, Adjudicative-Type of Hearing Is Consistent with Its Prior Determinations**

The FCC's decision to give Mtel a preference which will ultimately effect its determination as to which parties are most deserving of licenses is by no means unprecedented. Almost any rule establishing threshold criteria for a license operates as a "dispositive preference" which excludes some potential applicants and favors others. To illustrate, the rule in Storer had the effect of disqualifying from eligibility for a license any entity which already owned an attributable interest in more than a certain number of broadcast stations. No hearing was required before the agency determined that the public interest would not be served by giving Storer an additional license.⁶⁷

In addition, in the years following Storer, the Commission has, with judicial approval, often limited the eligibility of particular applicants -- and enhanced the eligibility of others -- when it believed that those limits were necessary to serve the public interest. Thus, for example, the Commission restricted initial eligibility for

⁶⁷ In describing its own actions here, the Commission noted that "when adequately supported by the record in a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy before they are entitled to be eligible for comparative considerations." Pioneer Preference Order, 6 FCC Rcd at 3492.

one of the two cellular licenses in each market to a wireline carrier. The FCC concluded that such an allocation would most effectively utilize wireline carriers' technical expertise and prompt settlements, thus speeding the service to the public.⁶⁸ It therefore permissibly excluded certain applicants and gave a preference -- which was, in some cases, dispositive -- to others without a hearing.

Similarly, the Commission preferred "local" applicants over "nonlocal" applicants for Instructional Television Fixed Service licenses at a time when the Commission feared that rising commercial demand for channels would squeeze out traditional ITFS providers such as schools and hospitals.⁶⁹ Also, the D.C. Circuit approved of the Commission's decision to exclude from an interim radio station licensing proceeding any applicant for the regular license, given the agency's concern for maintaining the station's unique Spanish-language service and the disqualification of the existing licensee.⁷⁰

⁶⁸ See Cellular Communications Systems, 86 F.C.C. 2d at 488-91; see also James F. Rill, 60 Rad. Reg.2d (P&F) 583, 591-92 (1986).

⁶⁹ Hispanic Information & Telecommunications Network, 865 F.2d at 1291-92.

⁷⁰ Newark Radio Broadcasting Ass'n v. FCC, 763 F.2d 450, 452, 454 (D.C. Cir. 1985). Noting that "[t]his novel requirement" was based on the Commission's past experience in similar situations, id. at 452, the D.C. Circuit "cannot say that the Commission's decision to adopt abbreviated procedures is unreasonable or unlawful. This is particularly true where the procedures -- whatever their drawbacks -- did
(continued...)

The Commission's pioneer preference decision here is much like these special licensing situations. As the developer of an innovative, efficient approach to the use of the spectrum, Mtel has been granted an initial licensing benefit. This advantage is consistent with the Commission's desire to provide innovators with an incentive to risk their resources on speculative research and development. This initial benefit, while obviously considerable, does not itself constitute the award of a radio license. As noted, Mtel will receive the full benefit of its pioneer preference award only after interested parties have had two opportunities to review its proposal and challenge it as unworthy of the Commission's grant.

Consequently, the proceeding in which Mtel was awarded this preference was not required to be conducted as an on-the-record adjudication.⁷¹ The decision whether to grant a

⁷⁰(...continued)
afford each applicant the opportunity to present its side and to dispute the contentions of others." Id. at 454.

⁷¹ It bears noting that the agency fully complied with the requirements for an informal rulemaking under sections 553 of the APA and 303(r) of the Communications Act. The Commission published a "general notice of proposed rule making" in the Federal Register, which included a statement of the time, place, and nature of the rulemaking, reference to the legal authority under which the Commission proposed the rule, and a "description of the subjects and issues involved." 5 U.S.C. §553(b)(3) (1988). The FCC gave "interested persons an opportunity to participate in the rule making through submission of written data, views or arguments," section 553(c) and issued a "tentative pioneer's
(continued...)

new service a pioneer's preference is fundamentally a policy choice, especially suitable to rulemaking. As the Ninth Circuit has said:

[R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and . . . such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.⁷²

The designation of a service for a pioneer preference unquestionably concerns "the future development" of an industry "subject to intensive administrative regulation in the public interest." As such, the FCC should reject BellSouth's attempt to hold it to "formalities developed for the adjudicatory process and unsuited for policy rulemaking."⁷³

⁷¹(...continued)
preference . . . to allow the other companies to file comments to convince the [C]ommission that the winner was unworthy of the award." Telocator Bulletin, Aug. 21, 1992, at 6 (quoting David Siddall, Chief, Allocation Branch of the FCC's Office of Engineering and Technology. Unlike certain other pioneer preference applicants, BellSouth chose to forego its first opportunity to persuade the Commission not to award Mtel a pioneer preference.

⁷² Washington Utilities & Transportation Commission, 513 F.2d at 1163.

⁷³ Id.

C. In Any Event, BellSouth's Pleading Raises No Substantial And Material Question Of Fact Necessitating A Hearing Under Section 309

Even if the award of a pioneer's preference were subject to the hearing requirements of section 309 of the Communications Act (which it is not), BellSouth's pleading fails to meet the well-recognized criteria for establishing the need for a hearing. BellSouth has not demonstrated, "on the basis of the application, the pleadings filed, or other matters which it may officially notice", that there are "substantial and material question[s] of fact" presented.⁷⁴ BellSouth simply does not show that the assertions in its petition raise questions of fact which are sufficiently substantial and material that the Commission's decision to proceed without an evidentiary hearing was "so irrational as to be arbitrary and capricious."⁷⁵

It is well settled that, to trigger the hearing requirements under section 309, a "dispute must be a factual one, rather than a disagreement over the proper interpretation to be given to agreed-upon facts."⁷⁶ The Commission may deny an evidentiary hearing where claims turn

⁷⁴ 47 U.S.C. § 309(d)(2) (1988).

⁷⁵ Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 394 (D.C. Cir. 1985).

⁷⁶ Beaumont Branch of the NAACP v. FCC, 854 F.2d 501, 507 (D.C. Cir. 1988) (emphasis in original); Stone v. FCC, 466 F.2d 316, 323 (D.C. Cir. 1972).

not on a determination of the authenticity or accuracy of the facts, but on inferences to be drawn from facts already known and the conclusions to be drawn from those facts.⁷⁷

Moreover, to meet the substantiality requirement, BellSouth must adduce "substantial and specific allegations of fact which, if true, would indicate that a grant of the application would be prima facie inconsistent with the public interest."⁷⁸

The Commission retains broad discretion to decide whether the issue warrants a hearing or whether the matter may be decided on an analysis of the evidence already before it.⁷⁹ Indeed, "the Commission's discretion and expertise are

⁷⁷ See, e.g., Gencom Inc., 832 F.2d at 181; California Public Broadcasting Forum v. FCC, 752 F.2d 670, 674 (D.C. Cir. 1985); Washington Ass'n for Television Children v. FCC, 665 F.2d 1264, 1270 (D.C. Cir. 1981); National Ass'n for Better Broadcasting v. FCC, 591 F.2d 812, 815 (D.C. Cir. 1978); National Organization for Women v. FCC, 555 F.2d 1002, 1018 (D.C. Cir. 1977); Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 (D.C. Cir. 1976); Columbus Broadcasting Coalition v. FCC, 505 F.2d 320, 324 (D.C. Cir. 1974); Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919, 924 (D.C. Cir. 1973); Stone v. FCC, 466 F.2d at 323; Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 171 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969).

⁷⁸ Alianza Federal de Mercedes v. FCC, 539 F.2d at 736 (quoting Stone v. FCC, 466 F.2d 316, 322 (1972)).

⁷⁹ See Astroline Communications Co. L.P. v. FCC, 857 F.2d 1556, 1561 (D.C. Cir. 1988); Citizens for Jazz, 775 F.2d at 395-96.

paramount" in this area.⁸⁰ The Commission's discretionary power includes the authority to "determine how much weight to accord disputed facts based on the record [already] before it" and "whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for."⁸¹

BellSouth's generalized allegations that Mtel is not qualified to hold a pioneer preference fall short of fulfilling the showing required under section 309(d). The "evidence" offered by BellSouth in support of its claim is devoid of facts that might contradict those already before the Commission. Rather, BellSouth merely takes issue with the Commission's ultimate judgment supporting Mtel's pioneer preference. Therefore, even if section 309 applied to this proceeding, the Commission would not need to undertake further inquiry through a hearing; there is ample evidence on the record to justify dismissal of BellSouth's claim.

Simply put, BellSouth fails to provide the evidence required in section 309 proceedings to show that the

⁸⁰ David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1257 (D.C. Cir. 1991) (quoting Gencom Inc. v. FCC, 832 F.2d 171, 181 (D.C. Cir. 1987)). See also United States v. FCC, 652 F.2d 72, 90 n.87 (D.C. Cir. 1980) ("The substantiality or materiality of purported issues of fact, and the need for further information, are issues to be evaluated in the first instance by the Commission in light of its public interest responsibility.").

⁸¹ Astroline, 857 F.2d at 1561-62 (quoting Gencom Inc. v. FCC, 832 F.2d 171, 181 (D.C. Cir. 1987)).

pioneer's preference award to Mtel would be contrary to the public interest, convenience, or necessity.⁸² BellSouth's various substantive objections to Mtel's selection essentially boil down to two broad claims under the Commission's pioneer preference standards. First, as discussed above in Section III.C supra, BellSouth alleges that Mtel's proposal "does not constitute a significant innovation" and, concomitantly, that it is not "particularly spectrally efficient."⁸³ Second, BellSouth makes an unsubstantiated argument that Mtel is not responsible for "develop[ing]" its proposal.⁸⁴ Both arguments are meritless -- and in the context of this docket, repetitive, because the Commission has considered and rejected these arguments

⁸² As the statutory language clearly provides, to successfully request a hearing the petitioner must supply specific allegations of fact "supported by affidavit of a person or persons with personal knowledge thereof." 47 U.S.C. § 309(d)(1) (1988). See Stone, 466 F.2d at 322. Considering that BellSouth's comments contain no new facts at all, it is unsurprising that it also failed to meet this procedural burden.

⁸³ BellSouth at 17.

⁸⁴ Id.

previously.⁸⁵ Neither meet the requisite level of specificity which might warrant an evidentiary hearing.⁸⁶

⁸⁵ See Comments of PageMart, Inc., ET Docket No. 92-100 (filed June 1, 1992) ("PageMart"); Comments of Paging Network, Inc., ET Docket No. 92-100, PP-35 (filed June 1, 1992) ("PageNet"). As the Commission found, "Mtel has developed and preliminarily demonstrated" that its proposal

is capable of transmitting 24 kilobits per second simulcast in a single 50 kHz channel. This development represents a bit rate that is ten times that of existing state-of-the-art simulcast paging systems using an equivalent bandwidth and facilitates providing a new type of service to the public. This improved bit rate capacity provides the foundation for Mtel's proposal to provide a wireless network offering a broad range of two-way data communications services, acknowledgement paging, encryption, error correction, and general determination of subscriber location.

Tentative Decision, 7 FCC Rcd at 5735. In so finding, the Commission rejected the more detailed arguments of PageNet and PageMart that Mtel's proposal was neither innovative nor spectrally efficient. Instead, the agency found Mtel's argument to the contrary "persuasive" with respect to this "ultimate question of fact." Id. at 5735-36. Similarly, the Commission may dismiss BellSouth's bizarre and unsupported contention that Mtel is not the party responsible for the innovation. See, e.g., Sections III.C.1 and III.C.2, supra.

⁸⁶ BellSouth also complains that the Commission's factual determinations and conclusions on the various pioneer preference requests are not as voluminous as BellSouth thinks fit. BellSouth at 12. The courts have recognized, however, that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations. In such cases, complete factual support for the Commission's conclusions is not required because "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." FCC v. WNCN Listeners Guild, 450 U.S. 582, 595 (1980) (quoting FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 814 (1978)); see also Telecommunications Research & Action Center v. FCC, 800 F.2d 1181, 1185 (D.C. Cir. 1986). Given that the pioneer

(continued...)

More fundamentally, BellSouth's attack on the Commission's determination of innovativeness is not sufficient to trigger a section 309 hearing requirement because it constitutes a disagreement about inferences to be drawn from agreed-upon facts. BellSouth's claims turn upon the proper interpretation of certain facts, not the facts themselves. As such, the agency properly awarded Mtel a pioneer's preference without an on-the-record hearing.⁸⁷

⁸⁶(...continued)

preference rules are specifically designed to bring technical innovations to the marketplace as quickly as possible, such deference to the Commission's expertise is particularly appropriate here. Even if that were not the case, however, no rule of law requires the Commission to explicitly state that Mtel's proposal is "technically feasible" and the Commission's proposed rules for NWN are a "reasonable outgrowth" of Mtel's proposal when both statements are patently obvious from the context.

⁸⁷ See, e.g., Beaumont, 854 F.2d at 507.