

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

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OCT 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Amendment of the Commission's)
Rules to Establish New Narrowband)
Personal Communications Services)

GEN Docket No. 90-314
ET Docket No. 92-100

**OPPOSITION OF MOBILE TELECOMMUNICATION TECHNOLOGIES
CORPORATION TO PETITIONS FOR RECONSIDERATION OF
PAGING NETWORK, INC. AND PACIFIC BELL**

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SUMMARY

The petitions for reconsideration of Pacific Bell (PacBell) and Paging Network (PageNet) requesting the FCC to require Mtel to pay competitive bidding fees for a licensee awarded pursuant to the pioneer's preference policies should be rejected. As the Commission recognized just last week, fundamental changes to the FCC's pioneer preference rules, such as those sought by PageNet and PacBell, should not be applied retroactively. Indeed, acknowledging the enormous resources Mtel has invested in developing its Nationwide Wireless Network, the FCC expressly said that "as a matter of equity," Mtel's pioneer preference should remain undisturbed.

The petitions for reconsideration of PageNet and PacBell in no way justify any of their proposed rule changes. The contention that Mtel should be required to pay an auction-level fee should be rejected because:

- * Congress has specifically provided that license fees may not exceed the cost of regulation.
- * In authorizing a competitive bidding process, Congress did not alter the fee requirements for licenses awarded to pioneer preference holders and others outside the competitive bidding context.
- * Retroactively charging pioneer preference winners for spectrum would be inconsistent with the policies under which pioneer's preference requests were invited, prepared, significant resources expended, and awarded.

PageNet's other demands should be denied as well.

Delaying the grant of Mtel's license until potential competitors have obtained their own licenses would disserve the public interest. The goal of the pioneer's preference

policy is to encourage the development of technical innovations to the end of promoting new consumer services. Delaying the licensing of a system that is ready for deployment is inconsistent with that objective. Finally, because Mtel will shortly be submitting a formal license application based on its NWN proposal, PageNet's concern that Mtel might not pursue its innovations in the spectrum awarded is without foundation.

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OPPOSITION OF MOBILE TELECOMMUNICATION TECHNOLOGIES CORPORATION TO PETITIONS FOR RECONSIDERATION OF PAGING NETWORK, INC. AND PACIFIC BELL

Mobile Telecommunication Technologies, Inc. ("Mtel"), by its attorneys, hereby submits its opposition to the petition for reconsideration and clarification of Paging Network ("PageNet") and the petition for clarification of Pacific Bell ("PacBell") of the Commission's July 23, 1993 First Report and Order ("Order") in the above-captioned proceeding.¹ Both PageNet and PacBell contend that Mtel should be required to pay for the frequency awarded and licensed to it pursuant to its pioneer's preference. PageNet also contends that the award of Mtel's license should be delayed until any potential competitors are ready to apply for, and have been granted, licenses; and that Mtel should be required to construct and operate the precise system described in its pioneer preference proposal.

As demonstrated below, there is no legal or policy basis for the relief sought by petitioners. Moreover, their concerns that

¹ Amendment of the Commission's Rules To Establish New Narrowband Personal Communications Services, First Report and Order, 8 FCC Rcd 7162 (1993) ("Order").

Mtel might not pursue its innovations in the spectrum awarded are without any foundation. Mtel will shortly be submitting a formal license application based on its Nationwide Wireless Network proposal. Accordingly, their petitions should be summarily denied.

INTRODUCTION

The Petitioners seek fundamental changes in the Commission's Pioneer's Preference rules. However, as the Commission recognized in its Notice of Proposed Rulemaking issued last week, future changes in the rules should not be applied retroactively. Indeed, in initiating a re-evaluation of the pioneer's preference rules, the Commission expressly held that "as a matter of equity," Mtel's pioneer preference should remain undisturbed.²

The Commission's approach recognizes that Mtel has invested enormous resources in developing its innovative Nationwide Wireless Network ("NWN") pursuant to the existing pioneer's preference rules. As the Commission noted, in order to provide the advanced level of functionality represented by NWN to the public, "Mtel improved[,] by a factor of ten[,] bit transmission rates for simulcast paging, developed the necessary technology, and designed an innovative proposal based upon these improved rates and technology."³ Mtel also developed and refined for NWN

² Review of the Pioneer's Preference Rules at ¶18, ET Docket No. 93-266, FCC 93-477 (rel. Oct. 21, 1993) ("NPRM").

³ Order at ¶57.

a number of highly efficient techniques for maximizing use of the spectrum that will allow NWN to utilize a nationwide and zonal format for forward channel frequency re-use, employ base receivers on an individual but coordinated basis to permit reverse channel frequency re-use, dynamically control access to system resources, minimize inefficiencies caused by contention inherent in portable generated requests to transmit, and tailor portable unit location and tracking schemes for optimal use of resources. As the FCC noted, these innovations "result in more efficient delivery of current paging services and permit the provision of new messaging and related services."⁴

Developing and proving out the innovative technology to realize Mtel's NWN system has been a monumental task. Mtel began its efforts by using advanced computer modeling techniques, and creating new techniques, to develop the theoretical basis for NWN. Mtel's research then progressed to over-the-air testing and research into the characteristics of multicarrier modulation simulcast signals in Oxford, Mississippi, with the Center for Telecommunications Research. Mtel's testing most recently culminated in a closed loop test of an operational developmental NWN system in Dallas, Texas.

To date, these efforts represent an investment and commitment of approximately \$50 million in NWN development and related research. Mtel's efforts have now progressed to the

⁴ Id. at ¶57.

stage where it has entered into definitive contracts with other telecommunication firms, including Motorola, Glenayre, and Wireless Access Group, for construction of NWN base transmitters and mobile devices.

The FCC's pioneer preference policy has also been crucial in enabling Mtel to obtain the funding for its NWN system. Without its pioneer preference, Mtel might not have been able to raise capital at the crucial early stages of NWN development. The grant of the preference enabled Mtel to attract \$6 million this year for use in deploying NWN through an investment by Kleiner, Perkins, Caulfield & Byers. More recently, Mtel's award of a final preference made it possible for Mtel to raise funding for NWN of \$187 million in a recently concluded private offering. These funds are targeted to construct and operate Mtel's Nationwide Wireless Network.

Taken as a whole, Mtel's wide-ranging activities to implement its Nationwide Wireless Network are compelling evidence of Mtel's substantial reliance on its pioneer preference award. Thus, just as "it would be inequitable to apply any change" in the Commission's rules as a result of the new NPRM to this pioneer preference proceeding,⁵ it would be similarly unfair for

⁵ NPRM at n.19.

the FCC to modify the grant of Mtel's pioneer preference at this point.⁶

ARGUMENT

I. PAGENET AND PACBELL'S DEMAND THAT THE COMMISSION REQUIRE PIONEER PREFERENCE HOLDERS TO PAY FOR THE SPECTRUM AWARDED THEM SHOULD BE REJECTED.

PageNet and PacBell contend that, in light of Congress's recent adoption of auctions as a possible means of licensing spectrum, winners of pioneer preference awards should be required to pay for the use of the spectrum granted to them. More specifically, PacBell urges that pioneer preference licensees "be required to pay a fee equal to the lowest winning bid for the appropriate licensing area."⁷ These arguments ignore the fact that:

- * Congress has specifically provided that license fees may not exceed the costs of regulation.
- * In authorizing a competitive bidding process, Congress did not alter the fee requirements for licenses awarded to pioneer preference holders and others outside the competitive bidding context.
- * Retroactively charging pioneer preference winners for spectrum would be inconsistent with the policies under which pioneer's preference requests were invited, prepared, significant resources expended, and awarded.

⁶ See also *id.* at ¶18 ("Disposition of pioneer's preference requests were made before Congressional enactment of competitive bidding authority, and as a matter of equity, nothing in this review will affect these proceedings.").

⁷ Petition for Clarification of Pacific Bell, GEN Docket No. 90-314, ET Docket No. 92-100, at 2 (filed September 10, 1993) ("PacBell Petition").

Thus, PacBell and PageNet's efforts to deny Mtel the fruits of its hard-won grant of a pioneer preference should be rejected for reasons of both law and policy.

A. Congress Has Specifically Provided that License Fees May Not Exceed The FCC's Cost of Regulation.

"Congress has directly spoken to the precise question at issue" with respect to how much the Commission may charge for licensing fees.⁸ In so doing, Congress has clearly indicated that any license fee "charges" must approximate the cost of regulation. As such, in order to "give effect to the unambiguously expressed intent of Congress,"⁹ the FCC should reject PacBell's demand that Mtel pay auction-level fees.¹⁰

As the Commission itself has stated, 47 U.S.C. § 158 mandates that fees charged for FCC licenses reflect the cost of regulation. The agency has "noted that the charges [under 47 U.S.C. § 158] represent a rough approximation of the Commission's actual cost of providing the regulatory actions listed in new section 8(a) of the Communications Act."¹¹ The Commission has

⁸ Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842 (1984).

⁹ Id. at 843.

¹⁰ For reasons discussed below, the grant to the Commission of the authority to conduct competitive bidding for certain licenses does not include the power to auction off spectrum awarded to pioneer preference holders. See infra text accompanying notes 15-23.

¹¹ Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, Report and Order, 2 FCC Rcd 947, 948 (1987).

further explained that the fee schedule "could only be changed in accordance with the statute [to take inflation into account] or through the passage of new legislation."¹²

The wording and structure of 47 U.S.C. § 158 make clear that the FCC has correctly interpreted the will of Congress. The language of Section 158(g) is mandatory: "Until modified pursuant to subsection (b) of this section, the Schedule of Charges which the Federal Communications Commission shall prescribe pursuant to subsection (a) of this section shall be as follows."¹³ The structure of the statute, which includes a defined "Schedule of Charges," is comprehensive, and does not recognize any other basis for computing license fees.¹⁴

¹² Id. (emphasis added).

¹³ 47 U.S.C. § 158(g) (1991) (emphasis added). The method for modifying fee amounts is explained in subsection (b)(1), which indexes fees to the Consumer Price Index.

¹⁴ Fee amounts are expressly set out in subsection (g), "Schedule of Charges." Moreover, section 158(e), which explains the purpose of any fees the Commission may charge, states that "[m]onies received from charges . . . shall be deposited in the general fund of the Treasury to reimburse the United States for amounts appropriated for use by the Commission in carrying out its function under this Act." That this language limits the purpose for which the FCC may charge fees is illustrated by the House Budget Committee's explanation of the basis used for calculating fees: "These [licensing] fees have been recommended by the FCC and are based on the Commission's estimates of the cost of providing such services." House Comm. on the Budget, Comprehensive Omnibus Budget Reconciliation Act of 1986, H.R. Doc. 300, 99th Cong., 2d Sess. 506 (1986). The Committee added in that report that "fees based on cost of regulation principles are an appropriate mechanism by which a portion of the FCC's regulatory expenses may be recaptured." Id.

Thus, because Congress has limited license fees to those that reflect the cost of regulation, all suggestions that Mtel should be required to pay a license fee in excess of that amount should be rejected.

B. In Enacting the Omnibus Budget Reconciliation Act of 1993, Congress Did Not Alter the Fee Requirements for Licenses Awarded to Pioneer Preference Holders and Not Subject to Competitive Bidding.

Congress's recent grant of authority to the FCC to use a competitive bidding process in awarding certain parts of the spectrum does not change the basis for computing other fees for licenses awarded in other contexts.¹⁵ The terms of the grant are quite limited; competitive bidding can only apply when "mutually exclusive applications are accepted for filing."¹⁶ Because pioneer preference holders do not submit mutually exclusive applications,¹⁷ such applicants are not subject to competitive bidding -- or to fees based on competitive bidding.

The Commission recognized that pioneer preference holders such as Mtel may not be charged for licenses just this past week, when it said:

Congress authorized use of competitive bidding methods only when multiple applications are filed that are mutually exclusive. Inasmuch as we have determined

¹⁵ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 309(j)(1), 107 Stat. 388 (1993).

¹⁶ Id. (emphasis added).

¹⁷ 47 C.F.R. § 1.402(d) (1992).

that a pioneer's preference application will be the sole application acceptable for filing for the specific license at issue, we believe that the statutory scheme, combined with our pioneer's preference as it currently exists, exempts pioneer's preference licensees from payment for a license so issued.¹⁸

This determination is entirely correct. As PageNet concedes, Mtel is not competing for spectrum.¹⁹ The FCC's rule regarding pioneer preferences expressly states that "[i]f awarded, the pioneer's preference will provide that the preference application for a construction permit or license will not be subject to mutually exclusive applications."²⁰ Because such applications are not filed by holders of pioneer preferences, authorization to conduct competitive bidding does not apply in this context.

The limited nature of Congress's action is clear enough; in an excess of caution, however, Congress explicitly excluded the award of licenses to pioneer preference holders from the competitive bidding process. Section 309(j)(6)(G) states that "[n]othing in this subsection, or in the use of competitive bidding shall . . . be construed to prevent the Commission from awarding licenses to those persons who make significant

¹⁸ NPRM at ¶ 10.

¹⁹ Petition for Reconsideration and Clarification, GEN Docket No. 90-314, ET Docket No. 92-100, at 20 (filed September 10, 1993) ("PageNet Petition"). ("[T]he Commission has apparently concluded that Mtel will not be subject to competing applications.")

²⁰ 47 CFR § 1.402(d).

contributions to the development of a new telecommunications service or technology."²¹

The legislative history of this section further confirms that pioneer preference holders may not be forced to bid for spectrum or be charged auction-level fees. In adopting the predecessor of 309(j), the House Budget Committee stated its intention that "the Commission is free to continue to implement such [a Pioneer Preference] policy."²² The Conference Report reiterates that determination.²³ Thus, in the absence of any provision subjecting pioneer preference holders to the competitive bidding process, 47 U.S.C. § 158 establishes the appropriate level of application fees. And, as noted above, Section 158 directs that licensees may not be charged fees that exceed the Commission's costs of regulation.

C. Retroactively Charging Mtel for Spectrum Would Be Inconsistent with the Rules Under Which Its Preference Was Requested, Invited, Prepared, and Awarded by the Commission.

Even if the Commission had the authority as a matter of law to charge Mtel auction-level fees, retroactively requiring Mtel

²¹ 47 U.S.C. § 309(j)(6)(G), 107 Stat. 389-90.

²² House Comm. on the Budget, Omnibus Budget Reconciliation Act of 1993, H.R. Doc. No. 111, 103d Cong., 1st Sess. 257 (1993).

²³ See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 485 (1993) ("The Conference Agreement adopts the House provisions with an amendment. The amendment includes three provisions from the Senate Amendment, including the provision of Section 309(j)(5)(E), concerning the so-called "Pioneer's Preference.").

to pay for its license would be inequitable and improper. In good faith reliance upon the Commission's existing rules and policies, Mtel pursued a pioneer's preference at enormous expense and risk. Since the award of the preference, Mtel has raised \$187 million to fund the NWN system -- funds raised in reliance upon the Commission's established rules and policies.

The petitioners' proposal to retroactively alter the pioneer's preference rules and policies would clearly be inequitable and inappropriate. In pursuing NWN, Mtel has relied on the Commission's representations regarding its pioneer preference policy. Capital that might have been set aside for use in a spectrum auction (or to pay auction-level fees) was instead invested, as the FCC desired, in research and development in order to create the technically innovative Nationwide Wireless Network. For the agency at this point to change its policy and require Mtel to pay an auction-level fee would undercut Mtel's reasonable reliance and could substantially harm its ability to provide the public with an innovative service.²⁴

The FCC itself has reached the conclusion that changes to the pioneer's preference rules should not be retroactively applied. In the recent Notice of Proposed Rulemaking to initiate a re-examination of the pioneer's preference rules, the Commission stated "[d]isposition of the [Mtel] pioneer's

²⁴ In any event, the Commission may not adopt a rule that pioneer preference holders must pay auction-level fees in this rulemaking because it has never provided notice and comment with respect to such a proposal. 5 U.S.C. § 553 (1988).

preference . . . already w[as] made before Congressional enactment of competitive bidding authority, and as a matter of equity, nothing in this review will affect [that] proceeding."²⁵ The FCC also noted that it has "proposed that mutually exclusive applications in the 900 MHz narrowband PCS service be assigned using the competitive bidding process," but again affirmed that "it would be inequitable to apply any change in our rules in that pioneer's preference proceeding."²⁶ Consistent with these statements and the FCC's past practice of not implementing policies on a retroactive basis,²⁷ the FCC should avoid inequitable results in the present case and dismiss petitioners' claims that Mtel should be required to pay.

II. MTEL'S LICENSE APPLICATION SHOULD BE PROCESSED EXPEDITIOUSLY WITHOUT ANY ARTIFICIAL DELAYS

PageNet's demand that Mtel's license be held up until any potential competitors have obtained their own licenses would

²⁵ NPRM at ¶18.

²⁶ Id. at n.19.

²⁷ See, e.g., Redevelopment of Spectrum To Encourage Innovation in the Use of New Telecommunications Technologies, 8 FCC Rcd 6495 (1993) (providing grandfathering rights and transition procedures for microwave users in the Emerging Technologies band); Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, GN Docket No. 93-252, FCC 93-454 (rel. Oct. 8, 1993) (proposing provisions to grandfather foreign ownership interests in commercial mobile service providers); "Channel Exclusivity to be Provided to Qualified Private Paging Systems at 929-930 MHz," FCC News Release (rel. Oct. 21, 1993) (adopting exclusivity rules that provide grandfathered status to pre-October 14 applications by existing systems).

disserve the public interest by denying consumers access to an innovative service as soon as it is ready for deployment. As noted, the overriding purpose of the FCC's pioneer preference policy is to encourage the development of technical innovations in the telecommunications industry to the end of promoting new consumer services. Delaying the licensing of Mtel's Nationwide Wireless Network is inconsistent with this goal of encouraging the rapid introduction and use of such new technologies.

Moreover, the Commission has already rejected the contention, revived here by PageNet, that pioneer preference holders should be put on the same licensing track as any potential competitors. In adopting its policy, the FCC understood that winners of pioneer preferences would receive a "de facto headstart" -- "that is the headstart that may occur due to the time it may take other entities to apply for and receive a license."²⁸ But instead of delaying the licensing of the innovative new service, to the detriment of the public, the agency committed itself to "act[] expeditiously on these other applications" of those who had failed to receive a preference. The Omnibus Budget Reconciliation Act of 1993, in fact, requires the FCC to begin issuing PCS licenses by May 13, 1994, and the

²⁸ Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order, 6 FCC Rcd 3488, 3942 (1991) (emphasis added).

Commission is moving aggressively to ensure that it fulfills that commitment.²⁹

Refusing to delay Mtel's license and acting quickly with respect to any potential competitors' applications is consistent with the Commission's goal of ensuring a rapid "speed of deployment" for new telecommunications services.³⁰ And giving Mtel a license for its Nationwide Wireless Network as soon as it has satisfied all relevant requirements would not significantly disadvantage Mtel's potential competitors. As noted, other competitors must soon follow. There is, accordingly, no basis for PageNet's concern that consumers will choose Mtel's service merely "because there are no alternatives."³¹ The Commission should grant Mtel's license as soon as it has satisfied all of the relevant requirements.

III. PAGENET'S DEMAND THAT MTEL'S LICENSE BE CONDITIONAL IS UNNECESSARY, AS MTEL WILL SHORTLY BE FILING A LICENSE APPLICATION TO IMPLEMENT ITS NWN PROPOSAL

PageNet's concern that Mtel might not pursue its innovations in the spectrum awarded is without any foundation. Mtel will shortly be submitting a formal license application based on its NWN proposal. As such, the Commission should reject PageNet's

²⁹ Sec. 6002(c)(2)(B), 107 Stat. 396.

³⁰ Order at ¶3.

³¹ PageNet Petition at 21.

demand that Mtel's license be conditioned upon its building the precise system for which Mtel was granted a preference.

Mtel intends to deploy a Nationwide Wireless messaging system "offering consumers a broad range of two-way services in a single 50 kHz channel."³² Mtel's Nationwide Network will also take advantage of "Multi-Carrier Modulation (MCM) technology capable of transmitting a 24 kilobits per second (Kbps) simulcast signal."³³ Additionally, Mtel will "deploy a base receiver network that efficiently accommodates a large number of users while permitting mobile units to transmit using low power."³⁴ Mtel's license application will ensure that consumers will "benefit from application of [Mtel's] innovation."³⁵

³² Order at ¶59.

³³ Id. at ¶58.

³⁴ Id. at ¶59.

³⁵ PageNet Petition at 19.

CONCLUSION

For the reasons stated herein, the petition for reconsideration and clarification of Paging Network and petition for clarification of Pacific Bell of the Order should be denied to the extent that they demand that Mtel pay for the spectrum it has been awarded, or that Mtel's license be delayed or conditioned in any way.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 1993, I caused copies of the foregoing "Opposition of Mobile Telecommunication Technologies, Inc. to Petitions for Reconsideration of Paging Network, Inc. and Pacific Bell" to be mailed via first-class postage prepaid mail to the following:

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