

NOV - 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of:)	GEN Docket No. 90-314
)	ET Docket No. 92-100
Amendment to the Commission's)	RM-7617, RM-7760, RM-7782
Rules to Establish New)	RM-7860, RM-7977, RM-7978
Narrowband Personal)	RM-7979, RM-790, PP-4,
Communications Services)	PP-5, PP-11, PP-14, PP-35
		through PP-40, PP-53,
		PP-69, PP-79 through
		PP-85

To the Commission:

REPLY TO OPPOSITION OF
MOBILE TELECOMMUNICATION TECHNOLOGIES CORPORATION TO
PETITIONS FOR RECONSIDERATION

PageMart, Inc. ("PageMart"), by its attorneys, hereby submits its reply to the opposition of the Mobile Telecommunications Technologies Corporation ("Mtel") to the petitions for reconsideration filed in the above captioned proceeding by PageMart and others.

- I. MTEL SHOULD BE REQUIRED TO PAY FOR THE LICENSE FOR WHICH IT HAS BEEN GRANTED A PREFERENCE.

As the Commission notes in its recent Notice of Public Rulemaking regarding the future of the pioneer's preference system, that scheme was established as a result

No. of Copies rec'd
List ABCDE

044

of concerns that the Commission's procedures for selecting licensees (random selection or comparative hearings) did not sufficiently encourage or reward innovation and technological development, because innovators had no assurance that they would successfully obtain FCC licenses.^{1/} With the advent of competitive bidding^{2/}, however, innovators will have significant control over whether they obtain a desired license.^{3/} The Commission correctly concludes that the availability of competitive bidding undermines one of the principal justifications for the pioneer preference system.^{4/}

As a result, while Mtel argues that it would be unfair to require it to pay for its preference, in fact just the opposite is true. It is perfectly equitable for Mtel to

^{1/} See Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking, FCC 93-477, ET Docket No. 93-266, released October 21, 1993 ("NPRM") at ¶ 5.

^{2/} See Omnibus Budget Reconciliation Act of 1993, Pub. L. NO. 103-66, Title VI, § 6002, 107 Stat. 387 (1993) (the "Budget Act"); Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking (FCC 93-455, released October 12, 1993).

^{3/} NPRM at ¶ 7. The Commission notes that under the new licensing procedures, the value of innovation will be "measured by the ability of the innovator to raise the funds necessary to obtain the desired license(s)." Id.

^{4/} Id. As the Commission points out, it is required to "reexamine the public interest basis of rules when the basis asserted by the Commission no longer exists." Id. at note 4.

be required to pay a sum for its license that approximates its true marketplace value, just as all of its competitors will have to do.^{5/} However, as opposed to its competitors, Mtel will be assured of having the winning bid. As Mtel itself points out, it has benefitted greatly as a result its pioneer's preference grant, and has been quite successful in obtaining funding and contractual arrangements, despite the uncertainty over the applicability of the spectrum auctioning provisions to the grant.^{6/}

Mtel's argument that the Commission is somehow statutorily constrained from imposing a charge for its license grant is frivolous and flies in the face of the unambiguous legislative history to the Budget Act. The statute itself is explicitly neutral on the entire pioneer's preference procedure, and the Conference Report makes clear that the instant issue has been left for the Commission to resolve.^{7/}

^{5/} As PageMart suggested in its Opposition and Comments on Petitions for Reconsideration filed October 25, 1993, at 10, Mtel should be required to pay, at a minimum, the average of the winning bids for comparable markets, perhaps with a demographic weighting formula, or calculated on a per-"pop" basis.

^{6/} See Opposition of Mtel to Petitions for Reconsideration of Paging Network, Inc. and Pacific Bell ("Mtel Opposition") at 3-4.

^{7/} See Budget Act, § 6002(a); H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess., at 485 (1993).

Moreover, there is nothing elsewhere in the Communications Act or Commission regulations that prevents the Commission from imposing such a charge. The Commission's regulations regarding the payment of licensing fees reflect an intent to limit charges for the processing of license applications and other Commission services, and cannot rationally be interpreted as imposing any restriction on the Commission's newly obtained authority to ensure that spectrum of the sort at issue here is assigned in a manner that captures the marketplace value of that resource.^{8/}

II. MTEL SHOULD BE REQUIRED TO BUILD THE SYSTEM FOR WHICH IT HAS RECEIVED A PIONEER'S PREFERENCE.

Mtel contends that it is not necessary for the Commission to impose a condition on its license requiring that it develop the system proposed in its pioneer's preference request, because it will "shortly be submitting a formal license application based on its NWN proposal."^{9/} If Mtel is planning to file a license application that truly is based on the technology for which it received a pioneer's

^{8/} See Establishment of a Fee Collection Program to Implement the Provisions of the consolidated Omnibus Budget Reconciliation Act of 1985, 2 F.C.C. Rcd. 947, 948 (1987), noting that "the very core of this effort is to reimburse the government -- and the general public -- for the regulatory services provided to certain members of the public." (emphasis added) Id.

^{9/} Mtel Opposition at 14.

preference, then it should have no objection to the codification of such a requirement.

PageMart's point -- the logic and fairness of which are unassailable -- is that it would reduce the pioneers preference system to a sham if Mtel can win a preference based on the merits of a specific new technology and then build a system based on some other technology: e.g., one already widely available to the paging industry and/or that would not have qualified for a pioneer's preference. This threat to the Commission's process can easily be eliminated by insisting that Mtel construct the system for which it was granted a preference, or face forfeiture of its license.

III. MTEL SHOULD NOT BE PERMITTED TO RECEIVE ITS LICENSE BEFORE THOSE OF ITS COMPETITORS.

The main goal of the Commission's pioneer preference policy is to encourage the development of technological innovation. The Commission did not intend for the preference system to skew the licensing process such that it would encourage the development of monopolies.^{10/}

Mtel argues that the Commission should act quickly to approve its license, and should move to encourage

^{10/} Indeed, the Commission has specifically noted its intent not to allow the pioneer's preference process to result in monopoly providers. See Pioneer's Preference Order at 3490.

competition by approving licenses for other narrowband PCS providers on expeditious basis.^{11/} Prior to the recent enactment of the spectrum auctioning authority, the Commission might have been in a position to move quickly to approve licenses for narrowband PCS competitors. With the passage of the Budget Act, however, licensing for the PCS spectrum will be delayed until the auction system can be devised and implemented.^{12/}

The Commission has explicitly rejected the idea of creating more than a de facto headstart for pioneer's preference grantees, noting that the "key public interest benefit of a preference is the assurance to the pioneering entity that, if otherwise qualified, it will receive a license. For the Commission to go beyond this and guarantee the pioneer a temporary service monopoly would not appear to be justified at this time."^{13/} Mtel already has received a de facto headstart by virtue of the licensing certainty created by the preference grant. For both public interest and equitable reasons, PageMart urges the Commission to issue all narrowband PCS licenses simultaneously, and to

^{11/} Mtel Opposition at 13.

^{12/} The Budget Act mandates that the FCC begin issuing PCS licenses within 270 days of the date of enactment, i.e., by May 6, 1994. See § 6002(d)(2)(B).

^{13/} See Pioneer Preference Order at 3492.

thus allow the market to determine the most attractive and efficient of these services.

IV. MTEL'S PIONEER'S PREFERENCE GRANT SHOULD BE LIMITED TO THE PRINCIPAL MARKET IN WHICH IT TESTED ITS SYSTEM.

PageMart reiterates its suggestion that Mtel's license should be limited to the principal geographic area in which the pioneer's preference technology was tested. As noted above, the advent of the competitive bidding procedures undermines much of the need to provide innovators with special preferences to ensure that they recoup investments in developing new technology. A license limited to the geographic region in which Mtel conducted its testing would accomplish the aims of the preference system without providing unnecessary, anti-competitive advantages.

CONCLUSION

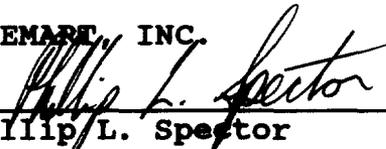
With the advent of spectrum auctioning, the most important justification for the grant of pioneer's preferences has been called into question. While the Commission will be reviewing the entire preference concept in the context of a separate proceeding, PageMart urges the Commission to consider the impact of the auctions in the instant proceeding. To allow Mtel the benefit of both the regulatory "head start" and a cost-free license goes well

beyond the intent of the preference system, and will create lasting anti-competitive results.

Respectfully submitted,

PAGEMART, INC.

By:


Phillip L. Spector

Susan E. Ryan

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1615 L Street, N.W., Suite 1300
Washington, D.C. 20036
Telephone: 223-7300
Facsimile: 223-7420

November 4, 1993

Certificate of Service

I, Ginger S. Pribble, do hereby certify that copies of the foregoing Reply to Opposition of Mobile Telecommunication Technologies Corporation to Petitions for Reconsideration of PageMart, Inc. were served via first-class, postage prepaid mail, or hand delivery, on this 4th day of November, 1993, to the parties listed below.

Chairman James H. Quello*
FCC
1919 M Street, N.W., Rm 802
Washington, D.C. 20554

Commissioner Ervin S. Duggan*
FCC
1919 M Street, N.W., Rm 832
Washington, D.C. 20554

Commissioner Andrew C. Barrett*
FCC
1919 M Street, N.W., Rm 844
Washington, D.C. 20554

Kathleen B. Levitz*
Acting Chief, Common Carrier
Bureau
1919 M Street, N.W., Rm 500
Washington, D.C. 20554

Renee Licht*
Office of General Counsel
FCC
1919 M Street, N.W., Rm 614
Washington, D.C. 20554

Judith St. Ledger-Roty, Esq.
W. Theodore Pierson, Esq.
Nancy J. Thompson, Esq.
c/o Reed Smith Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

James P. Tuthill, Esq.
Betsy Stover Granger
Pacific Bell
1450 New Montgomery Street
Room 1529
San Francisco, CA 20004

James L. Wurtz, Esq.
Pacific Bell
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dr. Thomas P. Stanley*
Chief Engineer
FCC
2025 M Street, N.W., Rm 7002
Washington, D.C. 20554

David R. Siddal*
Office of Engineering and
Technology
FCC
2025 M Street, N.W., Rm 7102-A
Washington, D.C. 20554

Rodney Small*
Office of Engineering and
Technology
FCC
2025 M Street, N.W., Rm 7332
Washington, D.C. 20554

Thomas Derenge*
Office of Engineering and
Technology
FCC
2025 M Street, N.W., Rm 7332
Washington, D.C. 20554

R. Michael Senkowski
David E. Hilliard
Eric W. DeSilva
Mobile Telecommunication
Technologies Corp.
Wiley Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

PACTEL Paging
Mark A. Stachiw
Carl W. Northrop
Bryan Cave
700 13th Street, N.W.
Suite 700
Washington, D.C. 20005


Ginger S. Pribble

* Indicates Hand Delivery