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

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| In the Matter of | ) | |
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| Review of the Pioneer's Preference Rules | ) | ET Docket 93-266 |
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**JOINT REPLY**

Advanced MobileComm Technologies, Inc. ("AMT") and Digital Spread Spectrum Technologies, Inc. ("DSST"), by their counsel and pursuant to Section 1.419 of the Commission's Rules, 47 C.F.R. §1.419, hereby submit their Joint Reply to the Comments received on November 15, 1993 on the Notice of Proposed Rule Making ("NPRM") in the above-captioned proceeding.[1] By the NPRM, the FCC has initiated a review of its pioneer's preference rules to assess the effect upon those rules of the enactment of Title VI of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") providing the Commission the authority pursuant to Section 309(j) of the Communications Act to award Title III radio licenses through the use of competitive bidding.[2]

The clear majority of the Commenters in this proceeding favor the retention by the Commission of its pioneer's preference program. A number of parties, including each party that was identified in the Commission's Tentative Decision on PCS

[1]Review of the Pioneer's Preference Rules (Notice of Proposed Rule Making), FCC 93-477 (October 21, 1993) ("NPRM").

[2]Pub. L. No. 103-66, Title VI, Section 6002(b), 107 Stat. 312, 392 (1993).

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preference requests as "innovative," have affirmed that their own experimental efforts in developing PCS services and technologies, indeed, were spurred by the pioneer's preference rules.[3] See AMT/DSST Comments at 2; Comments of American Personal Communications, Inc. ("APC Comments") at 2; Comments of Cox Enterprises, Inc. ("Cox Comments") at 1; Comments of PCN America, Inc. ("PCN America Comments") at 3-5; Comments of Omnipoint Communications, Inc. ("Omnipoint Communications") at 24. Apart even from the legal uncertainties arising from any retroactive repeal of the pioneer's preference program, simple equity dictates that the FCC proceed with its analysis of the pending broadband PCS preference requests under the standards established in Docket 90-217.[4]

Moreover, in AMT's and DSST's view, the Comments received on the NPRM confirm both the need to prospectively retain the pioneer's preference program and to implement the administrative amendments to that program proposed in the NPRM. As AMT/DSST noted in their Joint Comments, the pioneer's preference program was initiated by the Commission to promote the innovation of new services and technologies, and to facilitate

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[3]Amendment of the Commission's Rules to Establish New Personal Communications Services (Tentative Decision and Memorandum Opinion and Order), 7 FCC Rcd. 7794, (1992) ("Tentative Decision").

[4]Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd. 3488, 3489 (1991) ("Pioneer's Preference Order"), recon., 7 FCC Rcd. 1808 (1992) ("Pioneer's Preference Reconsideration Order"), further recon. denied, FCC 93-116 (1993) ("Pioneer's Preference Further Reconsideration Order").

the ability of entrepreneurs to obtain needed financing in the capital markets. AMT/DSST Joint Comments at 7-12. The incentive provided by the pioneer's preference was thus intended principally to further the ability of innovators to pursue the introduction of new, spectrally-efficient services and technologies.

> We continue to believe that a pioneer's preference has merit and could foster a host of valuable new technologies and services for the public. The present method of assigning licenses, while beneficial in many respects, appears to have dissuaded in the past at least some potential pioneers from seeking the authorization of new communications services. Of greater concern is the possibility that as future pathbreaking new telecommunications technologies and services are introduced worldwide, American consumers may not have the early benefit of these technologies and services, owing to the belief that the regulatory burden is excessive in the United States.

Pioneer's Preference Order, 69 RR 2d at 144. The Commission clarified the "regulatory burden" of which it spoke in stating that:

> In determining whether to grant the underlying allocation or rule change request, one of our most important considerations will be any possible impact on existing services and the public they serve. A new service or rule will not be granted unless we find that the overall public interest is served, and not just the special interest of an innovator or those who would be served by the innovator's proposal.

Id. at 145.

The pioneer's preference program thus was adopted to encourage "pathbreakers" to experiment and innovate new services and technologies despite the obstacles to be encountered during the regulatory process, including the anticipated opposition of

existing services and entrenched service providers with whom these new services may compete. The record in this proceeding now fully confirms that the pioneer's preference program successfully spurred much experimentation and innovation in both narrowband and broadband PCS services and technologies. Collectively, the PCS pioneer's preference applicants have advanced the state-of-the-art in wireless communications services. Those contributions, in turn, have persuaded the Commission of the need for PCS despite regulatory impedance from existing entrenched interests and potential competitors, including most particularly, the cellular industry.

In their Joint Comments (at 14), AMT and DSST supported the Commission's proposal to amend its pioneer's preference rules to eliminate the "tentative" selection of pioneers at the Notice of Proposed Rule Making stage. In this respect, AMT and DSST noted that a tentative grant may give rise to an unwarranted expectation or sense of entitlement in the pioneer applicant, and may otherwise prematurely influence the outcome of the proceeding. AMT and DSST believe that this sense of entitlement and entrenchment, perhaps justified and perhaps not, pervades the Comments of APC, Cox and Omnipoint in this proceeding and in their earlier letters to the Commission concerning the appropriate bandwidth to be assigned to pioneers.

In this respect, neither Cox, Omnipoint nor APC takes substantial cognizance that their preferences are indeed tentative or that the denials of other parties' requests are also

only tentative. Omnipoint, for example, states its concern that a failure to finalize its preference for any reason would unfairly prejudice its investors (Omnipoint Comments at 25); Cox states that failure to finalize immediately the outstanding PCS pioneer preferences would be "grossly unfair, unjust and arbitrary" (Cox Comments at 3). The Commission, nonetheless, expressly stated in the Tentative Decision (at n. 20) that its tentative grants and denials of preferences "are tentative, not final, and we will carefully review comments before reaching a final determination." In his Separate Statement to the Tentative Decision, Commissioner Barrett indicated that "[i]f this were not a tentative decision, I would not feel comfortable supporting it."[5]

In short, the finalizing of the PCS pioneer preference decisions are not pro forma actions, but instead requires essentially a de novo assessment of the contributions of each pioneer applicant against the service rules adopted in the

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[5]Separate Statement of Commissioner Andrew C. Barrett, General Docket 90-314 (October 8, 1992). Accordingly, all parties were on notice that the tentative grants and denials of PCS preferences were subject to modification by the Commission consistent with the rules adopted in the Broadband PCS Order. Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 93-451 (October 22, 1993) ("Broadband PCS Order"). Thus, no party, including investors in APC, Cox or Omnipoint existing at the time of the Tentative Decision or added thereafter can claim to be unfairly prejudiced in the event that in completing its review of the PCS preference requests, the Commission modifies or reverses any of its tentative preference grants or denials. AMT and DSST suggest in this respect that the words of noted authority Yogi Berra are particularly appropriate "It ain't over, till its over."

Broadband PCS Order.[6] The baseline established for measuring the contributions of any putative PCS pioneer by the Broadband PCS Order, indeed, differs in fundamental respects from the proposals of the PCS NPRM against which the tentative grants and denials were measured.[7]

On its final review of all pending PCS preference requests, AMT and DSST urge the Commission to grant pioneer's preferences to all innovative parties. See AMT/DSST Joint Comments on Tentative Decision, General Docket 90-314 (January 29, 1993) at 32. AMT and DSST, moreover, have indicated to the Commission that they do not take issue with any party's vision of PCS, or any party's statements to the Commission concerning the adequacy of any particular bandwidth in realizing its vision of PCS. AMT and DSST believe, however, that the suggestions by APC, Cox and Omnipoint that 10 MHz or 20 MHz PCS assignments for pioneers are "marginal," not "viable," or even "unthinkable" are simply misplaced.

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[6]As AMT and DSST established in their Joint Comments on the Tentative Decision (at 30), their cooperative program of PCS research and development, which focused upon the identification and development of advanced and specialized PCS services and technologies, is unique among the PCS preference applicants. See also AMT/DSST Joint Petition For Further Rulemaking, Gen. Docket 90-314 (August 25, 1993). The AMT and DSST program was recognized in the Tentative Decision as "innovative." The contributions of AMT and DSST were credited in the Broadband PCS Order and the need to accommodate the provision of specialized and niche PCS services formed a principal part in the FCC's decision to allocate four 10 MHz assignments in the upper PCS band. Broadband PCS Order at paras. 44, 50 and 57.

[7]Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 FCC Rcd. 5676 (1992).

Fidelity Investments ("Fidelity"), AMT's parent, and Cylink Corp. ("Cylink"), DSST's parent, have indicated to the Commission that "they do not share the views ... regarding the limitations of a 10 MHz assignment in the upper PCS band" expressed by the tentative preference selectees. See October 8, 1993 letter of Fidelity Investments and Cylink Corp., Gen. Docket 90-314, Pioneer's Preference Issues. Cylink has informed the Commission that it is pursuing plans to configure its spread spectrum "Airlink" series of radios to provide service in the upper PCS band. Cylink and Fidelity have identified a broad range of specialized PCS services that can be accommodated in that band, including, among others, emerging health care and home care, education, public and personal safety and intelligent vehicle-highway systems applications. See "An Analysis of the Need for Specialized PCS Systems" Hatfield Associates, Inc. (August 1993). Fidelity and Cylink have expressed their belief that as advanced CDMA spread spectrum systems are developed and deployed, a 10 MHz allocation in the upper band will provide a sufficient base for the provision of region-wide PCS services, albeit obviously not with the overall system capacity offered by a 20 MHz or 30 MHz assignment.

Finally, several parties seek to argue or re-argue the merits of their pioneer's preference requests. See, e.g., Comments of Nextel Communications, Inc. at 10-12; PCN America Comments, passim. AMT and DSST urge that the Commission base its rulings on specific pioneer's preference requests upon the full

record compiled in the PCS Docket. Several points in response to those arguing their specific cases, however, require clarification for the record here.

First, Omnipoint contends that it made "a specific request for a 30 MHz license at 1850 to 1990 MHz ... during the pioneer's preference application process." Omnipoint Comments at 33-34. Omnipoint made a similar claim in its September 29, 1993 letter concerning pioneer's preference issues in General Docket 90-314. In both cases, Omnipoint cited as support its June 25, 1992 Reply Comments in Gen. Docket 90-314.

As AMT and DSST noted in their January 29, 1993 Joint Comments (at 28) on the Tentative Decision, however, at no time prior to the May 4, 1992 deadline for submission of PCS pioneer's preference requests did Omnipoint state anything concerning its preferred bandwidth. See, e.g., Omnipoint Request For Pioneer's Preference at 17. After the release of the Tentative Decision and after the June 25, 1992 Reply Comments that Omnipoint cites in support, Omnipoint advocated the allocation of 40 MHz or 60 MHz licenses in General Docket 90-314:

> PCS should have at least initially only two operators per territory in order to attract the capital financing and at least 40Mhz in order to provide the capacity benefits of better trunking and to amortize across many more minutes of use per subscriber per geographic area.

Comments of Omnipoint Communications, Inc., Gen. Docket 90-314 (November 9, 1993) at 9 (emphasis supplied). Omnipoint actually opposed the allocation of 30 MHz PCS licenses:

> Unfortunately, the proposed 30 Mhz, frequency duplexed PCS allocations, present a negotiating and interference quagmire. Each of the PCS operators would have frequency boundaries that overlap halfway into multiple OFS operators' 10 Mhz channels. Every cell site using those overlapping OFS channels would require a three way negotiation.

Id. at 10. Accordingly, Omnipoint can not now be heard to claim credit for the 30 MHz allocation.

PCN America submits a list of "firsts" that it claims to have accomplished, including numerous subjective measurements, such as its claim that it first "defined PCS as it has come to be defined." Many parties, including most, if not all, of the PCS preference applicants, have contributed to the definition of PCS as a "family" of services, encompassing "big" PCS, specialized PCS and unlicensed PCS. In AMT's and DSST's view, no single party credibly can claim to be the true and sole "parent" of PCS in the United States. See PCN America Comments at 1.

For these reasons, and for those set forth in AMT's and DSST's Joint Comments in this Docket, AMT and DSST respectfully urge that the pioneer's preference rules be retained.[8]

Respectfully submitted,

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[8]Several parties have suggested that the Commission should modify its pioneer's preference program and grant bid preferences in an auction or gradations of preferences to PCS innovators based upon an assessment of their relative contributions. See Cablevision Systems Corporation Comments at 12; Ameritech Comments at 3; Comments of Personal Communications Network Services of New York at 1. AMT and DSST would not object to such modifications.

## CERTIFICATE OF SERVICE

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