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March 8, 1994

BY MESSENGER

Mr. Andrew S. Fishel, Managing Director
Federal Communications Commission
1919 M Street, N.W., Room 852
Washington, D.C. 20554

Re: Complaint of Pacific Bell
ET Docket No. 93-266, Gen. Docket 90-314

Dear Mr. Fishel:

Pacific Bell's letter of Feb. 23, 1994 against American Personal Communications ("APC")[1] requires a brief response. Contrary to Pacific Bell's assertions, any reasonable reader of our Feb. 4 reply would understand that APC has not "conceded" any rule violation. APC made no prohibited ex parte presentations concerning restricted proceedings, and Pacific Bell has produced no evidence to the contrary. In addition, the following should be noted:

1. Contrary to Pacific Bell's misrepresentation, the 1988 ex parte case it cites did not find that Wayne Schelle was "in violation" of any rule. Indeed, Mr. Schelle was exonerated by the Managing Director of the Commission in the very decision cited by Pacific Bell. That matter is, at any rate, utterly irrelevant to the claims at hand. Pacific Bell itself has been accused of ex parte violations.[2] As to

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[1] American PCS, L.P., d/b/a American Personal Communications ("APC").

[2] In one pending case, for example, a Pacific Bell policy analyst who was a member of an accounting support team is alleged to have edited a California Public Utilities Commission decision the night before it was issued; as a result, the decision was rescinded and the CPUC has reopened the matter. See Report to the Commission, A Review of Events Surrounding D.93-09-076 (Oct. 13, 1993); see also Alternative Regulatory Frameworks for Local Exchange Carriers, 1993 Cal. PUC LEXIS 791, *3-4 (Nov. 23, 1993) ("[i]f we find that policy issues, as well as implementation issues, have been improperly

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the filing of a written memorandum by one of the undersigned counsel in 1988, the Director found that counsel "did not intend to violate the Commission's ex parte rules"[3/] and no action was taken.

2. Pacific Bell takes credit for providing a "courtesy copy" of its letter to APC's attorneys when they "asked for" such a copy, even though it does not deny that it never planned to do so in the absence of such a request. The point is not when APC obtained a copy (in fact, another party provided us a copy before Pacific Bell managed to do so). The point is that Pacific Bell apparently intended to produce, and did produce, one-sided press coverage by mailing a copy of the letter to APC but faxing it immediately to the press.

3. Pacific Bell's plea that it had "instructed its employees that they were to try to avoid discussing the letter if contacted by the press" (p. 2) defies belief. The press obtained a copy of the letter by facsimile before it was served or made available to the public at the Commission. And contrary to Pacific Bell's claims, the resulting stories -- "PacTel Threatens Suit Over FCC Awards" (L.A. Times, Feb. 1, 1994), "F.C.C. 'Pioneer' Policy Under Attack" (N.Y. Times, Jan. 31, 1994) -- did deal squarely with Pacific Bell's ex parte allegations and quoted Pacific Bell's letter.

4. Pacific Bell claims not to understand how its allegations impugn the integrity of the Commission's staff. Each time Pacific Bell claims that APC improperly lobbied Commission personnel, however, it accuses those personnel of violating the FCC's Rules by discussing restricted ex parte topics and failing to report those discussions. For example, Pacific Bell contorts the language of our November 2, 1993 ex parte notice to claim that APC discussed prohibited topics with Renee Licht, then the acting General Counsel of the Commission, David H. Solomon, the Assistant General Counsel in charge of ex parte matters, and Peter A. Tenhula, the General Counsel attorney in charge of PCS. How this accusation could be anything but an indictment of the integrity of these Commission attorneys is impossible to discern.

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influenced, we will take steps to remedy the impact of such influence").

[3/] Letter from Mr. Edward J. Minkel to Russell H. Carpenter, Jr., Esq., DA 88-1673, October 17, 1988, at 1.

* * *

Pacific Bell's complaint is based on two factors: (a) APC had a substantial number of permissible and reported ex parte contacts with decision-making personnel, and (b) the Commission finalized APC's pioneer preference. But what is the basis for assuming that permissible contacts extended to prohibited topics? And since the Commission granted APC a tentative pioneer preference nearly 18 months ago and even Pacific Bell supported APC's pioneer preference, why does Pacific Bell assume that the final decision was tainted by improper contacts? Pacific Bell offers not a shred of evidence for either assumption. If reasoning as flimsy as Pacific Bell's were allowed to support claims of ex parte violations, the Commission's processes would be turned upside down for groundless reasons.

Respectfully submitted,

Jonathan D. Blake
Kurt A. Wimmer

Attorneys for American Personal Communications

cc: Gen. Docket 90-314, ET Docket 93-266
Michael K. Kellogg, Esq.
Renee Licht, Esq.
David H. Solomon, Esq.
Peter A. Tenhula, Esq.

Courtesy copies: Parties of record in Gen. Docket 90-314 and ET Docket 93-266