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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BY MESSENGER

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Opposition to Bell Atlantic Objection to Processing Broadband PCS Applications
Gen. Docket 90-314, ET Docket ~~93-266~~

Dear Mr. Caton:

American Personal Communications ("APC")[1/] opposes the request of the Bell Atlantic Companies ("Bell Atlantic") to return APC's application for an initial authorization in the personal communications service ("PCS") and its objection to the FCC's public notice inviting applications from other broadband PCS pioneers. The Commission should deny or dismiss Bell Atlantic's request and place on public notice as expeditiously as possible APC's application -- which has been pending since January 18, 1994, more than 60 days, and complies entirely with the Commission's rules. Bell Atlantic's premature and procedurally infirm objection may be resolved, if necessary, in the normal course of obtaining public comment on, and resolving properly filed objections to, APC's application after its has been placed on public notice rather than before.

I.

APC's application is acceptable for filing and should be processed in the normal course. APC's application has complied with the substantive Part 99 rules adopted by the

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1/ American PCS, L.P., d/b/a American Personal Communications ("APC"), a partnership in which APC, Inc. is the managing general partner and The Washington Post Company is an investor/limited partner.

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Commission,[2] as well as the processing rules the Commission has proposed to adopt for PCS. It has been filed on FCC Forms 401 and 155, as the Commission has directed.[3] Should the Commission alter its substantive or processing rules, or change the scope of PCS licensing areas or spectrum blocks, APC would amend its application to conform to any changes (as APC committed in its application). The fact that the ultimate authorization APC will obtain after the PCS reconsideration process has ended could, in theory, be affected by the reconsideration process provides no justification whatsoever for halting the processing of APC's application.[4]

Bell Atlantic's shadowboxing on the substance of APC's application reveals the true nature of Bell Atlantic's pleading -- as an attack on the substance of APC's preference (which is characterized as "arbitrary" by Bell Atlantic) and APC's application for an authorization based on that preference. Any arguments Bell Atlantic wishes to raise against APC's application must be raised only in a petition to deny filed after APC's application is placed on public notice,

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[2] Contrary to Bell Atlantic's formalistic argument about the "effective date" of PCS rules, there never has been a question that PCS rules would be effective before PCS authorizations would issue. It is that date, rather than the date of filing of an application, that controls.

[3] See Commission Invites Filing of Broadband Personal Communications Service Pioneer's Preference Application, Public Notice (Feb. 25, 1994).

[4] The fact that APC will expend funds in constructing its PCS system similarly provides no grounds to stop the processing of APC's application. Bell Atlantic's empty recitation of dicta to claim that the Commission and the courts would have some vague "equitable or political difficulty" in revising or reversing a pioneer preference merely because a system was constructed during the pendency of a challenge has no basis in fact or history. The adoption of Bell Atlantic's position would turn the Commission's review process on its head by requiring a de facto stay of construction to be placed on all challenged applications, regardless of how frivolous the challenge may be. It is difficult to imagine a policy that would better serve entrenched monopolists and more adversely disserve the public.

not in the guise of a pleading designed to delay or prevent its being placed on public notice.

As Bell Atlantic's pleading implicitly recognizes, the Commission's rules do not contemplate an authorized pleading to object to an application being accepted for filing. The Communications Act and the Commission's Rules wisely channel objections to applications into a 30-day period after the Commission has accepted an application. Otherwise, parties would, as a matter of course, overwhelm the Commission with premature and speculative pleadings on any applications that are filed prior to public notice dates in an attempt to prevent applications from being accepted in the first instance, and the Commission's processes would become both formless and hopelessly inefficient. If Bell Atlantic's procedural gamesmanship successfully derails or delays the acceptance of APC's application, all parties in all contested proceedings routinely will attempt to mimic this abuse of process to gain at least two bites at every apple by "objecting" to the acceptance of competitors' applications and later petitioning to deny them.[5/]

Bell Atlantic's objection thus should either be dismissed as procedurally defective or held in abeyance and treated as a petition to deny after APC's application is placed on public notice.

[5/] In this case, Bell Atlantic has had numerous opportunities to comment on APC's application in the <u>six</u> rounds of comments and replies authorized by the Commission on pioneer preference requests (in addition to a 1992 unauthorized preference pleading and the numerous shots Bell Atlantic has taken against APC in the many rounds of comments and replies in the PCS docket). Moreover, even though Bell Atlantic now has taken its objections with APC's preference to the Court of Appeals, <u>see</u> Bell Atlantic Personal Communications, Inc. v. Federal Communications Comm'n, No. 94-1157 (D.C. Cir.), it improperly continues to argue before the Commission that the grant of a preference to APC was "arbitrary" (p. 8). <u>Cf</u>. Freeman Engineering Associates, Inc. v. Federal Communications Commission, 1994 U.S. App. LEXIS 4532 (D.C. Cir. March 15, 1994) (party filing appeal but continuing to argue before the Commission that a decision should be reversed renders its appeal "incurably premature").

II.

Bell Atlantic's cellular and, eventually, wireline operations will face direct competition from APC in the Washington, D.C./Baltimore, Maryland market. It predictably asks the Commission to delay the advent of that competition and keep a highly demanded independent PCS service out of the hands of consumers by stalling the processing of a PCS application that is valid in every respect. This request, packaged in the transparent guise of preventing a "temporary service monopoly" by a PCS pioneer in a region in which Bell Atlantic today likely serves some 200,000 cellular customers and millions of wireline customers, is no more and no less than a request for the Federal government's assistance in consolidating an RBOC's market dominance.

Bell Atlantic's just-announced business plans make it quite clear why it wishes to delay the processing of APC's application and slow its emergence as a competitor:

> Bell Atlantic said it already has plans to offer PCS to consumers in Washington and other markets later this year. The company will use existing cellular networks but must upgrade them to improve how they work indoors. It plans to install about 75 small transmitter-receivers near indoor shopping malls, train stations, airports, office buildings, hotels and restaurants by the end of this year to make it easier to use the pocket phones in these places.[6/]

It is, quite clearly, Bell Atlantic that has a "headstart" in this market that it is seeking to entrench and expand by delaying APC's application.

In its preference order, the Commission determined that it would not provide an artificial headstart of a period of months or years "beyond the de facto headstart that may occur due to the time it may take other entities to apply for and receive a license." Establishment of Procedures to Provide a Preference to Applications Proposing an Allocation for New Services, Report & Order, 6 F.C.C. Rcd. 3488, 3492 (1991). Bell Atlantic now seeks to revisit this three-year-

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[6/] Sugawara, Dialing a Person, Not a Place: Phone Firms Test Service in Which Numbers Go Where the Customer Is, The Washington Post, March 29, 1994, at D1.

old decision by arguing that an artificial delay must be built into Commission processing procedures for pioneers to prevent their attaining an alleged de facto "headstart."[7] There is no basis for constructing from whole cloth unique processing

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[7] We place the term "headstart" in quotation marks here because we believe there will be no "headstart" for any PCS pioneer. Cellular carriers are implementing PCS-like portable services, as we discussed earlier, and are converting to digital transmission rapidly. ESMR services are being deployed today. The Commission has found that there is little, if any, "headstart" implicit in an opportunity to provide a new service that will compete head-to-head with existing services:

> WCA's concern that licensees in the Multichannel Multipoint Distribution Service will face undesirable competition during [the new Local Multipoint Distribution Service's] start-up period is unsupported. The existing industry has a de facto head start which moots WCA's concern. . . . MMDS wireless cable systems have had, and will continue to have, a significant opportunity to develop and refine their services and to establish market position.

Local Multipoint Distribution Service, Notice of Proposed Rulemaking, 8 F.C.C. Rcd. 557, 560 (1993).

And, at any rate, a headstart in the wireless telephony market does not convey the types of benefits implicit in a headstart in a service that begins without true competitors (such as might be the case, for example, in a new satellite radio service). Consumers will demand integrated regional and national coverage from PCS licensees from the outset. For that reason and many others, APC has been a strong advocate of speed in conducting PCS auctions. Bell Atlantic's own PCS consultant has taken a contrary view and now urges the Commission to "stop the auctions" that will license new competitors to Bell Atlantic. Washington Post, March 29, 1994, at A8 (Forbes advertisement for piece by futurist George Gilder).

delays to stall pioneers from bringing the services they pioneered to market.[8]

In fact, the Commission explicitly has rejected the precise argument made by Bell Atlantic (in an opinion that Bell Atlantic does not even cite, much less attempt to distinguish). In the context of identical arguments raised against the processing of Mtel's pioneer preference application, the Commission refused to force artificial delay on its processes:

> We disagree that Mtel is receiving more than a de facto headstart. As soon as the competitive bidding procedures are in place, we expect to begin licensing the remaining channels in this service. In the Pioneer's Preference Report and Order, we stated that pioneer's preference grantees may receive a de facto headstart because of the nature of the licensing process, but we declined to establish a defined period during which the pioneer would be guaranteed a monopoly. The parties have advanced no argument that convinces us to treat Mtel differently than other pioneer's preference awardees. Therefore, Mtel's license application will be processed without delay as soon as administratively feasible.[9]

This is precisely the approach that should be followed here.

Tellingly, when an earlier Commission policy promised to prevent Bell Atlantic and other wireline companies entitled to a set-aside of one-half the cellular licenses in the United States from gaining a headstart against their

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[8] Bell Atlantic did not argue during the 1990-1991 preference rule making against the de facto headstart that inevitably will result from a pioneer obtaining an authorization without being subject to mutually exclusive applications, perhaps because it then was a party hoping to win a preference rather than a party seeking to derail a preference.

[9] Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, Opinion and Order, 1994 FCC LEXIS 957, *43-44, 74 R.R.2d 822 (March 4, 1994).

independent competitors, Bell Atlantic was an advocate of maintaining its ability to obtain an early start:

> As now implemented, the "headstart" doctrine results in a petitioner to defer being able to obtain a four to six month delay in the introduction of cellular service in any market in which it files a petition to defer, no matter how frivolous. This delay benefits potential competitors, but harms the public, which is prevented from receiving promptly an otherwise available new communications service.

Comments of Bell Atlantic Mobile Systems, Inc. on Petition for Declaratory Ruling, p. 2 (Jan. 11, 1985).[10] Ironically, this is precisely the type of artificial delay that Bell Atlantic now seeks to impose on PCS pioneers (and which the Commission has been loathe to permit in the past).[11]

At any rate, Bell Atlantic's supposed concern about the fairness of a "headstart" has absolutely nothing to do with the relief it seeks -- the rejection of APC's application. Any "headstart" results from the date on which an authorization is granted by the Commission, not the date on which the Commission begins the routine process of placing an application on public notice and obtaining public comments on that application. If the Commission wishes to consider Bell Atlantic's tardy and misplaced rule making arguments about the efficacy of a headstart for pioneers, it may do so in the context of the normal processing of APC's application. Even

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[10] The cellular "headstart doctrine" permitted a nonwireline cellular applicant to file a petition to defer the grant of operating authority to the wireline cellular carrier in the same market. See Cellular Communications Systems, 86 F.C.C.2d 469, 491 n.57 (1981), on recon., 89 F.C.C.2d 58, 79 n.32 (1982).

[11] See, e.g., Interstate Cellular, Inc., 6 F.C.C. Rcd. 402 (1991) ("the public interest will be served by expeditious provision of cellular service to the public. The Commission does not guarantee the economic well-being of any applicant or licensee, but rather desires to further the public interest by promoting the provision of reliable, economic service as soon as possible"); Eau Claire Cellular Tel. Co., 3 F.C.C. Rcd. 3081 (1988); Illinois SMSA Limited Partnership, 3 F.C.C. Rcd. 6144 (1988).

if the Commission were to agree with Bell Atlantic (a consequence that we would find absolutely inconceivable), the relief to which Bell Atlantic would be entitled would be a delay in the date on which APC's authorization is issued or on the date upon which it could begin construction, not a delay in the date on which APC's application is accepted. Like the remainder of Bell Atlantic's arguments, this argument should be considered, if at all, in the context of public comment on the substance of APC's application.

III.

Bell Atlantic's claim that the Paperwork Reduction Act prevents the acceptance of applications from PCS pioneers demonstrates the exceptional disingenuity of Bell Atlantic's pleading.[12] The Paperwork Reduction Act (the "Act"), Pub. L. No. 96-511, 94 Stat. 2812 (1980) (codified at 44 U.S.C. §§ 3501-20), only applies to submissions that will be required of 10 or more respondents. The Commission has or will receive only three applications from broadband PCS pioneers. Under its own terms, the Act is not even applicable.

The Act limits the ability of federal agencies to collect information by requiring them to submit proposed "information collection requests" to the Office of Management and Budget ("OMB") for clearance based on certain criteria established in the Act. The statute defines the "collection of information" which an agency must not conduct without obtaining OMB review as "the obtaining or soliciting of facts . . . by an agency through the use of . . . application forms . . . or other similar methods calling for . . . answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons."[13] 44 U.S.C. § 3502(4)(A) (emphasis added); see

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[12] Equally disingenuous is Bell Atlantic's claim that the Commission's action in processing pioneer preference applications somehow offends some "competitive parity" principle established by Congress in the Omnibus Budget Reconciliation Act of 1993 (p. 7, n.10). This claim is absurd. The Act, of course, concerned regulatory parity between competing FCC-licensed services.

[13] "Ten or more persons" refers "to the persons to whom a collection of information is addressed by the agency within any 12-month period. . . ." 5 C.F.R. § 1320.7(s).

also 5 C.F.R. § 1320.7(c) (implementing statute). Here the FCC has conducted no "collection of information" as the statute defines it, because the FCC has invited only three pioneers to apply for broadband PCS authorizations. See, e.g., Policies and Rules Concerning Operator Service Providers, 7 F.C.C. Rcd. 4014, 4015 (1992) (finding Act not applicable to reporting requirement imposed by order on nine named parties); Regulatory Policies and Int'l Telecommunications, 4 F.C.C. Rcd. 323 (1988); Applications of United States Satellite Broadcasting Co. and Dominion Video Satellite, Inc., 3 F.C.C. Rcd. 6856 (1988) (finding direct broadcast satellite reporting requirement exempt from OMB review because the Commission estimated it would affect nine or fewer persons annually). A more baseless objection would be difficult to craft.

IV.

Conspicuously absent from Bell Atlantic's request that the advent of PCS be delayed is any attempt to justify its stalling tactics on the basis of the public interest. It is in this respect that the Bell Atlantic request is most deficient. Will the public be better served by the imposition of a period of additional delay and further entrenchment by existing cellular providers seeking to gain a headstart on PCS, or by the introduction of spirited, independent competition? The answer is self-evident. The only interest Bell Atlantic's delay tactic serves is its own, distinctly private interest.

In particular, Bell Atlantic's bare (and irrelevant) claim that there is a "pervasive industry feeling that the pioneer's preferences for broadband PCS have been bestowed upon parties arbitrarily" is quite telling. Contrary to Bell Atlantic's unsuccessful attempt to create a self-fulfilling prophecy, this "feeling" exists only in the press releases of certain entrenched competitors that have attempted to argue cases in the media that they have lost at the Commission.

We believe that quite a different industry "feeling" has developed since the Commission honored its commitment to reward innovation by awarding broadband PCS pioneer preferences. It is the excitement and intensity of a new industry emerging, with employees being hired and put to work, commercial agreements being negotiated and signed, and American manufacturers preparing to launch a grand new market in PCS equipment. It is the anticipation of long-enduring

entrepreneurs and far-sighted investors preparing to inject a healthy dose of competition into markets that too long have been limited to two wireless providers and a wireline monopoly. It is the "feeling," in short, of the emergence of a new competitive market in a handful of regions that presages the broader transformation of the national wireless market that will attend the nationwide deployment of PCS -- which will, in turn, be informed and aided by the experience of the PCS pioneers.

We also recognize, however, a growing industry perception that the Commission's processes have been gripped in a death-hold by the efforts of entrenched competitors to petrify the development of PCS to a point where it will be a mere shadow of what it might have been. A regulatory agency that is committed to increasing consumer access to communications services, contributing to economic growth, fostering competition, and creating jobs must not be swayed to gridlock by the protestations of an entrenched monopolist. Bell Atlantic's "request," which is merely another sad chapter in this ongoing case study of how regulation can inure to the benefit of entrenched regulated entities, should be rejected.

APC's long-pending application already has suffered serious delays, and the additional delay that could be caused by Bell Atlantic's frivolous pleading has the potential to raise this delay to an intolerable level. The Commission itself has invited applications from pioneers, and it is appropriate that the Commission should follow through now to place pioneers' applications on public notice and bring whatever objections may be filed out in the open. Delaying the processing of APC's application will stall the public's opportunity to comment and ultimately delay the provision of highly demanded independent PCS services to the public. The effects of this delay can be rectified by immediately placing APC's application on public notice and expeditiously processing it.

* * *

Bell Atlantic has filed an unauthorized pleading that has no basis in the Commission's rules or policies for the sole purpose of delaying the advent of competition to its cellular and wireline services. By this pleading, Bell Atlantic has shown a complete disregard and disdain for proper Commission procedures. Its actions are the very essence of an abuse of the Commission's processes. We believe that this

abuse of process should be a potentially disqualifying factor that should be examined by the Commission in the context of determining whether the public interest would be served by granting any application for a PCS license that may be filed by Bell Atlantic.

Please direct any inquiries concerning this matter to either of the undersigned.

Very truly yours,

Jonathan D. Blake
Kurt A. Wimmer

Attorneys for American Personal Communications

cc: Gary M. Epstein, Esq.
Parties in Gen. Docket 90-314
and ET Docket 93-266