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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Communications Services	)	GEN Docket No. 90-314
	)	RM-7140, RM-7175, RM-7618
	)	
	)	

To: The Commission

ACT'S MOTION FOR ACCEPTANCE OF PETITION FOR RECONSIDERATION NOTWITHSTANDING ITS LENGTH AS FILED

1. On March 7, 1994 Advanced Cordless Technologies, Inc. (ACT) filed a petition for reconsideration which exceeded the 25-page limit in 47 C.F.R. §1.429(d) by 4 pages. That petition was filed under heavy time pressure due to the press of that and other business then being attended to by counsel for ACT, and in the process we ran over the limit without making adjustments that would have complied with the Commission's rules. We apologize for that. However, there is good cause for the Commission to accept the petition notwithstanding its length as filed.

2. 47 C.F.R. §1.49(a) provides that pleadings such as our petition may use either 12-point type or 10-point type. The petition as filed employed 12-point type. We have retyped the petition employing 10-point type. The length of the petition thus typed (in accordance with that rule) totals 22 pages, well within the 25 page limit. That retyped material, consisting of the text of the petition, the cover sheet and the table of contents, is attached. We are providing sufficient additional copies which can be associated with all copies of the petition as originally filed.

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3. This petition for reconsideration relates to a matter on which ACT or its principals have been active since 1989. At issue are contested awards of pioneer's preferences under the PCS regulatory program. The final adjudication of such matters will be made in the courts, as appeals have already been noted by upwards of a dozen parties and there are numerous pending petitions for reconsideration which, when disposed of, no doubt will result in additional appeals.

4. Under all of these circumstances, it would be unfair and contrary to both private and public interests to reject our petition on the highly technical procedural irregularity that as submitted using 12-point type it exceeded the limit by 4 pages even though as resubmitted using 10-point type it is well below the page limit, both being type sizes that are expressly permitted by the Commission's regulations.

Respectfully submitted,

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April 11, 1994

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Before The
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Rules to Establish New	)	RM-7140, RM-7175, RM-7618
Personal Communications	)	
Services	)	

To: The Commission

PETITION FOR RECONSIDERATION
BY ADVANCED CORDLESS TECHNOLOGIES, INC.

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March 7, 1994

Note: Cover, tables and text retyped using 10-point type. The original document used 12-point type. Either is permitted, 47 C.F.R. §1.49(a).

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To: The Commission

PETITION FOR RECONSIDERATION
BY ADVANCED CORDLESS TECHNOLOGIES, INC.

1. Advanced Cordless Technologies, Inc. (ACT) petitions the Commission to reconsider its Third Report and Order in the referenced proceeding, released February 3, 1994, insofar as the Commission there (a) failed to award a pioneer's preference to ACT and (b) awarded pioneer's preferences to American Personal Communications/the Washington Post (APC-Post), Cox Enterprises, Inc. (Cox) and Omnipoint Communications, Inc. (Omnipoint).

I.
Summary

2. A pioneer's preference should have been awarded to ACT. The Commission has been confused and cryptic in its treatment of the preference request of ACT, purporting to deny such a preference under the narrowband aspect of the PCS service, in which its request had never been placed, and failing to consider its request under the broadband aspect of the PCS service, in which it has been was placed. This error became clear when the Commission adopted the broadband rules in its Second Report and Order, released October 22, 1993, 8 FCC Rcd. 7700 (the Broadband Decision). ACT deserves a preference for its unique role as the petitioner and experimental license holder which the Commission has acknowledged to be the first initiator of the PCS regulatory program. In this petition, we establish that ACT qualifies for a pioneer's preference, in accordance with the Commission's preference rules, 47 C.F.R. §1.402(a), by reference to our previous filings in support of the preference which have not been addressed by the Commission in any considered way.

3. The pioneer's preference awards to APC-Post, Cox and Omnipoint should be rescinded. There is persuasive evidence that the final decision to award these preferences has been contaminated by a heavy concentration of repeated ex parte contacts at a time after the broadband rules had been adopted and when the primary interest of these parties had to have been the final award of the preferences, having values in the hundreds of millions of dollars if not billions of dollars. The PCS program is central to the information highway which is one of the most explosive technological developments in the history of our nation. The White House and in particular the Vice President have showcased the information super highway as a highlight of the current administration. The benefits of the information super highway are of enormous consequence and interest to all citizens. This agency, as the nation's "DMV" of the information super highway, must not soil this program by giving out preferred licenses to drive on that highway based upon political or other private contacts rather than considerations of merit strictly on the public record. Before the final awards to these three parties can be permitted to stand, full evidentiary hearings on the facts and circumstances of the ex parte contacts must be conducted, before a master who is independent of the agency whose top level personnel are potential witnesses and whose files contain documents relevant to the inquiry.

II.
A pioneer's preference should have been awarded to ACT

A.
Metamorphosis of FCC rule from one rewarding pioneering parties who make meaningful contributions to one favoring entrenched major companies and, indeed, agency hostility toward the pioneer's preference process itself

4. Citizens are entited to be governed by the regulations as published by federal government agencies. Otherwise, the action of those agencies is not lawful. The Federal Register Act, 44 U.S.C. §§1501 et seq; the Administrative Procedure Act, 5 U.S.C. §§551 et seq,

and the Commission's regulations, 47 C.F.R. §0.411(b)(2). The Commission's regulation concerning pioneer's preferences is written in plain English language. A preference is to be granted to a party who "...has developed an innovative proposal that leads to the establishment of a service not currently provided..." 47 C.F.R. 1.402(a). The party must demonstrate the technical feasibility of its proposal "...unless an experimental license has previously been filed for that new service or technology." Id. The rules, as ultimately adopted, are to be "...a reasonable outgrowth of the proposal..." Id. This rule was adopted in 1991 pursuant to a public notice, Notice of Proposed Rule Making, 5 FCC Rcd. 2766 (1990)(proposing preference rules at the initiation of an academic organization) and ensuing Report and Order, 6 FCC Rcd. 3488 (1991), recon. in part on matters not relative here, 7 FCC Rcd. 1808 (1992), further recon. denied, 8 FCC Rcd. 1659 (1993)(adopting the preference rules based on highly favorable comments filed by a number of diverse parties including a variety of communications industry parties, trade associations, academics and professionals).

5. As will be demonstrated, ACT comes within these provisions of the pioneer's preference rules of the FCC. However, there has been a metamorphosis in the Commission's attitude about the pioneer's preference which is adverse to the position of ACT. This may be found at various places. In adjudications, without any change of the rule, the Commission has purported to adopt a grid of detailed requirements for eligibility for the preference regulations, which have come to favor entrenched, major companies with facilities and financial resources to conduct R&D that overwhelms individuals or small entreprenurial entities such as ACT. See, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd. 5676 (1992)(relative to narrowband claimants); Tentative Decision and Memorandum Opinion and Order, 7 FCC RCd. 7794 (1992) (relative to broadband claimants); First Report and Order, 8 FCC Rcd. 7162 (1993)(relative to narrowband claimants); Third Report and

Order, supra, to which the instant petition is addressed (relative to broadband claimants).

6. Moreover, what obviously is at work here is a disenchantment on the part of the Commission with the pioneer's preference itself, leading to the notice of proposed rule making, Review of the Pioneer's Preference Rules, 8 FCC Rcd. 7692 (released October 21, 1993, bearing ET Docket Number 93-266) in which the Commission advanced a proposal to abandon the pioneer's preference, including the possibility of abandoning the preference retroactively with respect to various programs including the PCS program. ACT and other parties filed comments urging that the preference not be applied retroactively to the PCS program.[1] Following the issuance of that notice and contemporaneously with the issuance of the Third Report and Order to which this petition is directed, the Commission in ET Docket Number 93-266 adopted a First Report and Order, released January 28, 1994, FCC 93-551, stating that it would be inequitable to apply any such change or abolition of the preference to the three parties who are being awarded the preference in the instant broadband PCS matter. Slip opinion at ¶9 and n. 25. This followed the spate of ex parte contacts by those three entities, about which we shall have more to say later.

7. In this melancholy process, the individual and the small business entreprenuer have been short changed. We echo the concern of Congress that the small business entrepreneur not get lost in the shuffle amidst the communications conglomerates who have become players in the PCS sweepstakes. Omnibus Budget Reconciliation Act of 1993, adding a new provision to the Communications Act, 47 U.S.C. §309(j). The three award winners, APC-Post, Cox and Omnipoint, it is fair to say, are not individuals or small business entreprenuers. ACT, on the other

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[1] This was designated a restricted proceeding under the ex parte rules with respect to all contested pioneer's preferences, which includes the preference requests of APC-Post, Cox and Omnipoint. 8 FCC Rcd. at 7695, ¶23.

hand, is a good case in point. ACT and its leader, Matt Edwards, have devoted years of time, energy and unique talents, and have spent in excess of $400,000, in the course of their pioneering role in the PCS regulatory program. Four hundred thousand dollars to small business entrepreneurs like Mr. Edwards and individual investors in ACT is, relatively, a greater commitment to the development of PCS than, for example, the $10 million budget which the Washington Post states it has for PCS development. Gen. Docket 90-314, Comments of APC-Post dated January 29, 1993 at 2.

8. ACT cannot compete with the major communications companies when it comes to in-house R&D, paid studies by outside professionals, elaborate presentations by blue chip law firms and staffs of house counsel, etc. etc. However, on an honest playing field, it can, and should be permitted to, compete with all other parties based upon its unique and valuable contribution to the PCS program in accord with the letter of the pioneer preference regulations as presently written in the rule books, which have never been changed notwithstanding the Commission's (unlawful) effort to place into effect new standards favoring the large companies and its eleventh-hour desire to get out of the pioneer preference business altogether.

B.

ACT's unique pioneering credentials

9. Matt Edwards, the chief executive officer and leader of ACT, personally wrote and filed the first rule making petition that was the genesis of the development of the PCS regulatory program, whether that be viewed in the narrowband context or the broadband context. The petition was filed on September 22, 1989, some seven weeks before a second petition was filed, and more than a year before a third petition was filed, relative to what has become the PCS program. Mr. Edwards' petition (and other related pioneering work) was filed and done before the Commission ever initiated the idea of a pioneer's preference award, which was commenced by a rule making notice in April 1990 and for which

rules were adopted by the Commission in 1991. See citations in ¶4, supra. Accordingly, Mr. Edwards did not have an opportunity to fit his pioneering activities into any regulatory mode for securing a preference, an opportunity that has been enjoyed by parties who became active in the PCS program at a later date.

10. Mr. Edwards' initial rule making petition was filed in the name of Cellular 21, Inc., a New Jersey corporation of which Mr. Edwards was the President and Chief Operating Officer. In the early years, Mr. Edwards also initiated activities including FCC applications for experimental authorizations in the names of two sole proprietorships, Cellular II America and Personal Communications Systems. He retained all rights, which subsequently were assigned to ACT. The pioneering petition for rule making filed in September 1989 was assigned the file number RM-7140, which graces the caption in the generic PCS rule making proceeding in which the instant Third Report and Order has been issued.

11. That this was the very first, initiating petition in the PCS movement is not our grandiose prose in support of a preference. It comes straight from the Commission itself. See Notice of Inquiry, 5 FCC Rcd. 3995, ¶¶1, 8, n. 7 (1990); Broadband Decision, supra, 8 FCC Rcd. at 7702, ¶3, n. 3, indicating that the Commission "began its investigation of PCS in 1989, in response to" the petition of Cellular 21, Inc., filed in September 1989, another, subsequent petition filed in November 1989 and a third petition filed more than a year later, in February 1991. Thus, ACT, of which Mr. Edwards is the Chief Executive Officer, has the unique claim of being the first party to file a petition for rule making and enlist the attention of the Commission to the prospects of what has become the PCS services.[2]

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[2] This information is taken from two Commission documents cited in the text above. It also may be found in three documents which ACT has filed and to which reference will hereinafter be made. These are: Petition of ACT, filed July 25, 1991 (for pioneer's preference, hereinafter referred to as "ACT's PP Petition"), Reply Comments of ACT (relative to pioneer's preference, hereinafter referred to as "ACT's PP Reply") and Comments of ACT, filed November 6, 1992 (addressed to

12. Mr. Edwards also has the unique claim of being the first party to secure an experimental license to test his innovative ideas regarding the new technology that was to become known as PCS. During the early and formative period, Mr. Edwards demonstrated redundant compliance with the Commission's expectation that proponents of a request for a pioneer's preference conduct experiments to verify the worth of their innovative proposals. He:

(a) Was the first to obtain from the FCC an experimental license relative to the PCS regulatory program. This was in July 1989, for the Elmira, New York area. It was filed in the name of Cellular II America, a sole proprietorship, and proposed to locate the experimental facility at the headend of a cable television system. ACT's PP Reply at 1.

(b) Operated a PCS microcell at the Commission's offices at 2025 M Street for the purpose of demonstrating a prototype PCS system. This was in the Fall or December 1989. ACT's PP Petition at 10, ACT's PP Tentative Decision Comments at 1.

(c) Obtained from the FCC an experimental license and implemented the first working universal cordless public phone system[3] in America, also obtained paging licenses for test operations in conjunction with the universal cordless telephone operations. This was in Monticello, New York, and thus reflected an operating test experience in a primarily suburban environment. The system commenced operation in September 1990. ACT's PP Petition at 9-11, ACT's PP Reply at 2, ACT's PP Tentative Decision Comments at 1.

(d) In the Elmira and Monticello experimental applications, was

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tentative decision regarding pioneer's preferences, hereinafter referred to as "ACT's PP Tentative Decision Comments"). For citations in the text above to our filing of the first rule making petition, see ACT's PP Petition at 9, ACT's PP Reply at 1-2 and ACT's PP Tentative Decision Comments at 1.

[3] Incorrectly referred to as a CT-2 system. The system developed by Mr. Edwards involved a digital cordless telephone handset which accesses the public telepoint network and also interfaces with a wireless PBX in the office.

the first to suggest the use of cable infrastructures, including the use of consumers' cable boxes for distribution and reception. ACT's Petition at 9.

(e) Obtained from the FCC an experimental license and implemented another universal cordless telephone system in the South Street Seaport in the heart of New York City, also obtained paging licenses for test operations in conjunction with the universal cordless telephone operations. This system reflected operating test experience in a urban environment. It commenced operation in January 1991. ACT's PP Petition at 10-11, ACT's PP Reply at 2.

(f) Obtained from the New York Public Service Commission the first Certificate of Public Convenience and Necessity for the universal cordless telephone services. ACT's PP Petition at 10.

(g) Filed with the New York Public Service Commission the first tariff for the universal cordless telephone services. This tariff became effective in September 1991. ACT's PP Petition at 10.

(h) Obtained from the FCC a special temporary authority to demonstrate and experiment with an indoor, wireless, PBX-based trial at the Marriott Hotel in Newark, New Jersey. ACT's PP Petition at 3.

(i) Demonstrated the universal cordless telephone systems at various trade shows, seminars, press conferences and hearings. ACT's PP Petition at 10.

(j) Because of ACT's early efforts relative to PCS, was solicited to bid on the construction of PCS experiments by Cox, US West and Hong Kong's CT-2 system. ACT's PP Tentative Decision Comments at next to last page, n. 4.

(k) Was the subject of many articles in the trade press beginning in 1989 relative to his innovative work in the field including the early experimental licenses and operations, ACT's PP Petition at 14 and in Attachment 1, and was named a "Mover and Shaker" in the mobile communications industry in both 1989 and 1990 by RCR for his efforts in

promoting advanced cordless telephony, ACT's PP Reply at 4.

C.

The PCS program has been been a reasonable outgrowth of these unique pioneering efforts

13. Mr. Edwards and ACT, it is fair to say, took the Telepoint TC-2 cordless telephone system in use in the United Kingdom and advanced that system with experimental operations and proposals to this Commission which impacted in a most significant way the development of PCS in the course of this proceeding. The contributions of Mr. Edwards and ACT to that process are summarized in the following passages.

14. First, Mr. Edwards-ACT adapted the Telepoint system in Great Britain to then existing United States telephone technology, directing the CT-2 services, in the first instance, not merely to Telepoint users, but rather to the cordless telephone consumer market generally, providing a high quality cordless digital telephone for home and business use through the CT-2 base station marketed ubiquitously. This was a significant advancement of the CT-2 system at the time, and has served as a catalyst for further technological developments as the PCS program has developed. ACT's PP Petition at 6-7, ACT's PP Reply at 3. Broadband Decision at ¶¶8, 18, 22, 98, 111.

15. Second, Mr. Edwards-ACT proposed an advanced cordless telephone service that would share a frequency band with other users under technology that migrates and searches for the best available channel, avoiding frequencies in use by other parties, a dynamic spectrally-efficient means of communication as shown in the Monticello and New York City experimental operations. ACT's PP Petition at 7, 12-13, ACT's PP Tentative Decision Comments at the third page under the heading "ACT's Pioneering Concepts and Activities." This is the very concept which APC-Post developed and for which it received a pioneer's preference, Third Report and Order, supra, at ¶¶10-22, whose FAST system is a variant of the frequency sharing concept proposed by ACT in its original rule making petition. ACT's PP Tentative Decision Comments

at the 3rd, 4th, 9th and 10th pages and fn. 2.

16. Third, Mr. Edwards-ACT was the first to propose the use of cable television systems in the PCS process, in applications for experimental licenses for Elmira and Monticello, New York. See ¶¶12(a) and 12(d), supra. This is the very concept which Cox developed and for which it received a pioneer's preference. Third Report and Order, supra, at ¶¶37-45.

17. Fourth, Mr. Edwards-ACT conducted experiments and signalled the future relationship between paging operations and PCS, as shown in test operations in Monticello and New York City, see ¶¶12(c) and 12(e), supra, ACT's PP Petition at 4, 16, ACT's PP Tentative Decision Comments on 3rd and 4th pages, which has become an integral part of the PCS program, particularly under the narrowband decision. First Report and Order, 8 FCC Rcd. 7162 (1993) (Narrowband Decision).

18. Fifth, Mr. Edwards-ACT conducted experiments at the Marriott Hotel in Newark, New Jersey, and signalled the future use of wireless Private Branch Exchanges in the PCS program, see ¶12(h), supra, and ACT's PP Reply at 8, which is an integral part of the PCS program. Broadband Decision at ¶¶8, 18, 22, 79, 98, 111.

19. Sixth, Mr. Edwards-ACT proposed to employ a spectrum that borders on other spectrum available for partial sharing to make use of the search technology employing dynamic allocation channel techniques, ACT's PP Petition at 15-17, which the Commission has employed in the Broadband Decision (using a different portion of the spectrum) placing the Part 15 operation surrounded on both sides by microwave bands.

20. Seventh, Mr. Edwards-ACT was the first party to propose the use of Time Division Duplex technology for the PCS program, a highly spectrum-efficient technology in which both the transmit and receive functions occur on a single channel, rather than a channel pair, ACT's PP Petition at 13, which is an integral part of the PCS program. Broadband Decision at ¶9.

21. Eighth, Mr. Edwards-ACT proposed a system compatible with unlicensed PCS operations by parties defining their own service areas, which became part of the Part 15 regulations for the PCS program. Broadband Decision at ¶¶72, 79-92, 178-186.

22. Ninth, Mr. Edwards-ACT proposed a finite limit on the number of licensed operators in any given market for various public interest reasons including protection against fraud and misuse in the absence of a reasoned clearing house for roaming, ACT's PP Petition at 18, and in the Broadband Decision the Commission did adopt such a finite limit on the number of licensed operators in any given market.

D.
The pioneer's preference is merited

23. No one person or entity can claim credit for the massive PCS program that has developed in this nation since 1989. Many parties have contributed to that development. A broad-based preference program is required in order to recognize this. Regretably, the time for making such decisions has arrived when the Commission is in no mood to do so. To the contrary, the tenor of the Commission's recent inquiry in ET Docket Number 93-266 is an apparent mindset at the FCC to distance itself from the prioneer's preference program. This is reflected in the text of the rule making notice, Review of the Pioneer's Preference Rules, supra, as well as in the dissenting and concurring statement of Commissioner Barrett. 8 FCC Rcd. at 7696. In this process, the Commission has (unlawfully, we believe) undertaken to walk away from the pioneer's preference program, has avoided the hard work of allocating preferences among all requesting parties who have shown entitlement, and has undermined the intent and language of the regulation that it adopted and published in 1991, and in that form is still on the books.

24. We submit that the problem the Commission is having with the pioneer's preference program is that the FCC is being too restrictive in its administration of the program. That program, as applied to PCS, should be expanded, not diminished. The potential scope of PCS is

enormous. Indeed, PCS may have more impact on communications in our nation than any regulatory program in the Commission's history. Various parties have contributed in valuable ways to this process. Communications conglomerates have contributed with their extensive resources (money, technical staff, existing communications facilities at hand) providing more comprehensive R&D than smaller entreprenuers can provide. Smaller entrepreneurs have brought their creative genius and early pioneering of ideas, concepts and experimentation to the table. PCS has come into being as a result of the innovative work of a number of parties, both large and small, and all who have made a significant contribution to the process should receive credit and be rewarded.

25. It is astonishing that for the PCS communications services, the Commission has awarded only four preferences out of some 70 parties whose pioneering work has sufficient merit to warrant detailed consideration by the Commission. The initial preference in the Narrowband Proceeding is the subject of petitions for reconsideration and notices of appeal raising the charge that this single selection has been an arbitrary and capricious one. The three preferences in the Broadband Proceeding no doubt will likewise be the subject of the charge that such a limited selection is arbitrary and capricious. Certainly, as things now stand, that has been the case with respect to the pioneer's preference request of ACT.

26. Where there has been such widespread, meaningful contribution to the ideas and state of the art resulting in the enormously important PSC communications services, the more reasoned and legally supportable agency decision-making is to award pioneer's preferences to each claimant, large and small, who has made a signficant contribution to that process, and not attempt to single out only a favored few when this, of necessity, must disregard valuable pioneering contributions by a number of other parties.

27. For example, one has to believe -- that the unique filing of

the seminal petition for rule making leading to the very establishment of the PCS program, the related early and extensive experimentation in support of that petition and concerning key elements of what was to become the PCS program, the submission of ideas and proposals to the Commission based upon this work that relate to many aspects of the regulatory program as it has developed, and the fact that those initial ideas have been taken, expanded and refined by other parties with the resources to conduct heavy R&D beyond the capabilities of individuals and small entreprenuers, including two of the three parties receiving awards relative to broadband services -- merits a pioneer's preference to Mr. Edwards and to ACT.

28. Comparable, persuasive analyses may be made by other parties in the presentation of petitions for reconsideration regarding their cases for a preference. The Commission may, in reasoned and fair decision-making, award a half-dozen additional preferences, a dozen, or even more. There are an awful lot of frequencies to be assigned throughout the nation in this matter. There also are a number of deserving parties who have worked long and hard to assist in the development of the PCS program for which those frequencies have now been assigned. It is better that a (relatively small) number of those frequencies be assigned to expert, knowledgeable and dedicated pioneers who have participated throughout these proceedings than to award only four frequencies to the select few and leave the remainder entirely to the unknown and unexplored maw of competitive bidding. There will still be ample frequencies available for that process and the resulting monetary benefit to the United States Treasury if the Commission does its job and arrives at a fair allocation of frequencies to the entire body of parties deserving of such recognition. One of whom is ACT.

E.
Requested award to ACT

29. Because the pioneering efforts have been in the New York City area, ACT should be granted its preference for a license for that area.

We request a license for 10 MHZ that is closest to Part 15 frequencies to take advantage of ACT's technology and proposals for merging the use of dedicated and shared frequencies.

F.
Commission's previous confusing and cryptic treatment of ACT's pioneer preference request

30. When the Commission split the narrowband proceeding off from the main PCS proceeding, it placed requests for pioneer's preferences into two groups, one relatively small group for consideration in the narrowband proceeding and a much larger group for consideration in the broadband proceeding. The pioneer's preference request of ACT was placed in the latter group. Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd. 7794 (1992). Nonetheless, the Commission purported to address the ACT preference request when it issued its Narrowband Decision, 8 FCC Rcd. at 7176, ¶82. When considered in light of the Broadband Decision handed down a few months later, this made no sense whatever. In the separated narrowband proceeding, ACT's pioneering petition for rule making in RM-7140 was removed from the caption, there was no reference to ACT or any of its ideas and proposals in the text of the decision as it related to its pioneering role initiating the PCS rule making proceeding or as it related to the substance of the new rules adopted, and the brief paragraph denying ACT's preference request was cryptic, unanalytical, and made no mention of virtually any of the previously asserted grounds for a preference that we have again detailed in this petition. Moreover, the Commission erroneously indicated that ACT had failed to file an objection to the tentative decision not to award it any preference. ACT's objections to that tentative decision were in fact filed on November 6, 1992, and have been repeatedly referred to supra.

31. The foregoing collection of errors was made clear when the Commission issued its substantive decision regarding the broadband rules in the Broadband Decision, 8 FCC Rcd. 7700, supra. In that document,

the pioneering petition for rule making in RM-7140 was included in the caption, the opening text of the document referred to the pioneering filing of that petition by Mr. Edwards' company, and there were repeated references to the proposals of ACT in the text of the report and order. 8 FCC Rcd. 7700, at ¶¶3, n. 3, 39, n. 40, 72, 99, Appendix Two at 7870. To rectify this error, ACT filed a petition for reconsideration of the Commission's decision denying its preference, a copy of which is attached as Appendix A for handy reference. Said petition for reconsideration was published by the Commission in a public notice dated December 13, 1993, Petitions for Reconsideration and Clarification of Actions in Rule Making Procceding, Report No. 1992. To our knowledge, no responsive pleadings were ever filed.

32. The contribution on the part of Mr. Edwards and ACT to the PCS program embraces both the narrowband and the broadband aspects of the program, but by far the most signficant contributions have been with regard to the broadband aspect of the program. ACT is entitled to a reasoned analysis of its request, taking into account its contribution to the broadband aspect of the program and also taking into account the comments that it filed following the tentative decision not to award a preference. Such a reasoned analysis should now be made in response to the instant petition for reconsideration.

III.
The pioneer's preference awards to APC-Post, Cox and Omnipoint should be rescinded

33. The pioneer's preference awards to these three parties have been valued in the hundreds of millions of dollars, maybe in the billions. Rumor has it that the lobbying in this proceeding has been fierce, also that in the end only a few major companies would be favored to the exclusion of the individuals and small entrepreneurs. The latter part of the rumor has proved to be true. The truth of the former part of the rumor remains to be seen. Of course, we cannot sustain a petition of alleged wrongdoing on the basis of a rumor. Here is what we

have at this juncture.

34. Counsel for Pacific Bell has filed a letter addressed to Managing Director Andrew S. Fishel dated January 26, 1994, a copy of which is attached as Appendix B. Responses were filed by APC-Post, Cox and Omnipoint. Then, counsel for Pacific Bell filed a reply dated February 23, 1994, a copy of which is attached as Appendix C. These letters provide an analysis of recent ex parte documents and reflect a persuasive case that the Commission's ex parte regulations have been violated by the three parties with respect to their pioneer's preferences in this proceeding. We incorporate these letters by reference.

35. In rule making proceedings, the normal way of proceeding is to file written comments when they are due, file written reply comments when they are due, and await the Commission's decision. In major proceedings, a tour of the Commissioner's offices on the eighth floor and perhaps other senior officials may be arranged. There may be a followup contact or two. In truly monumental proceedings, maybe even three or four. But not hundreds. Consider what has happened here, where, it so happens, megabucks in free licenses are on the line.

36. The pioneer's preference aspect of this proceeding has been a restricted proceeding relative to any preference request that was opposed when preference requests, and replies, were filed in the latter part of 1991, Report and Order, 6 FCC Rcd. 3488, 3500, n. 9 (1991), a status that was also made clear in Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd. 7794, 7813, ¶50 (1992), a status that again was made clear in Review of the Pioneer's Preference Rules, 8 FCC Rcd. 7692, 7695, ¶23 (October 1993). Attached as Appendix D is a listing of the dates and numbers of the ex parte contacts made by the three winners here, i.e., APC-Post, Cox and Omnipoint, during the period from the beginning of 1992 to the present time. These three tentative selectees made an aggregate of 121 ex parte contacts of the Commission

during a period of 26 months, an average of nearly five such ex parte contacts per month! This doesn't even count 29 ex parte contacts by something called "PCS Action," also listed in Appendix D. This is a consortium of a number of parties in the PCS proceeding, including APC-Post, Cox and Omnipoint, making comprehensive presentations on the merits of the proposed PCS regulatory program. That's more than one ex parte contact per month with such comprehensive presentations, yet these three parties needed to make five additional ex parte contacts per month, also purportedly to discuss the merits of the proposed PCS regulatory program.

37. The merits of the PCS substantive rule making proceeding were not restricted and it was permissible to make contacts regarding that subject matter. However, such a bifurcation is deceptive and not real. This is so because when a party such as APC-Post, Cox or Omnipoint would be talking about the substance of the technical, legal and regulatory proposals it had made on the merits of the PCS proceeding, by very definition APC-Post, Cox and Omnipoint would also be talking about the substance of their presentations for a pioneer's preference. This is so because their pioneer's preference request was premised on what they were proposing for adoption under the PCS rules. The two could not be separated intellectually or conceptually. And even if that separation could have been accomplished, what earthly reason did they have to visit the Commission on an ex parte basis on the average of 5 times a month over a more than two year period, particularly when the consortium of which they were a part was doing so on the average of more than once a month as well?

38. And even if that separation could have been accomplished and even if a heavy schdule of ex parte contacts were required while the Commission was deliberating on the merits of the PCS program, what earthly reason did they have to visit the Commission on an ex parte basis even more frequently after the Broadband Decision came down in

October 1993...when...it just so happens, the final decision on their awards had not yet been made? Appendix D shows that APC-Post, Cox and Omnipoint made 7 ex parte contacts in November 1993 and 12 ex parte contacts in December 1993 ending with the last 2 of those contacts on December 22nd and no contacts thereafter. The Commission announced its final decision granting their preferences on December 23rd, which was no doubt a warmly-received and hard-earned Christmas present.

39. If the merits of the PCS program provided a cover for the blitzkreig of ex parte lobbying contacts up until October 1993 when the Broadband Decision was handed down, APC-Post, Cox and Omnipoint got a pre-Christmas gift when the Commission in October opened up a proceeding concerning whether it should jettison the pioneer's preference altogether and perhaps do so retroactively with respect to the PCS program. This provided another cover for continuing ex parte lobbying contacts. Although, this time, the cover was even more transparent than a discussion of the merits of the PCS program.

40. Here, the student of the Commission's ex parte rules and practices must believe: that contacts are made with regard to the esoteric and antiseptic question of whether preferences should be abandoned retroactively; that this occurred without any discussion of the loss that would be visited upon these three parties as the tentative selectees of preference awards; that there would be no reference to their equities in prosecuting their proposals in the PCS docket with an expectation of a preference award; that these contacts were not intended to have any favorable influence on the Commission's staff toward finalization of the tentative awards to these three parties, who had beaten a path to the Commission's door for the past two years, at the expense of ACT and many other parties who played the game by the rules, filed papers in support of their preference claims, serving same on the other parties, and awaited the Commission's decision. And even if a separation could have been made between the abstract idea of abandoning

the preference program and the private interests of the three tentative awardees who camped on the Commission's doorstep, what earthly reason did these parties have to make some 19 ex parte contacts in a period of less than two months, only to stop abruptly on December 22, 1993, the day before the announcement that there awards had become final?

41. There is a passage in the dissenting statement of Commissioner Barrett to the Broadband Decision, 8 FCC Rcd. at 7857, that bears scrutiny on the subject of ex parte influence. The Broadband Decision was addressed to the merits of the PCS regulatory program. The decision on pioneer's preferences was scheduled to be issued later. Commissioner Barrett was addressing whether markets should be defined as Major Trading Areas (MTAs) or Basic Trading Areas (BTAs). He expressed concern that the Commission's Broadband Decision regarding the frequencies assigned to such areas would severely complicate making a decision on the pioneer's preference issue since the award of such frequencies might be excessive in the case of MTAs or inadequate in the case of BTAs. Commissioner Barrett expressed concern that in the latter situation, awards would be a fraction of the spectrum size which APC-Post, Cox and Omnipoint advocated, "in the lobbying efforts of the tentative pioneer preference designees." For sure, Commissioner Barrett did not miss the nexus between the substance of the PCS program and the private interests being advocated by these parties in their massive lobbying activities.

42. The ex parte rules require that a written report be filed concerning contacts that are made. 47 C.F.R. §1.1206(a)(2). That rule requires a written report which summarizes the "data and arguments" presented to the Commission. It is obviously intended to assure that all interested parties will be able to determine from these reports exactly what information and arguments have been presented to the agency ex parte.

43. Perhaps these reports will dispel doubts concerning the

nature of the contacts that were made during the period after the Broadband Decision was rendered and while the final decision on the preferences sought by APC-Post, Cox and Omnipoint was still pending. Perhaps these reports will clearly identify the subjects discussed and disclaim any discussion of the prohibited subjects. Perhaps these reports will show that the parties and the Commission have carried on unrestricted conversations, fully and openly disclosed, reflecting an unimpeachable compliance with and administration of the ex parte rules.

44. Perhaps not. We have attached as Appendix E copies of the "form" written reports of ex parte contacts made by APC-Post, Cox and Omnipoint during the months of November and December, following the Broadband Decision in October.[4] These "form" letters say that there was a discussion of the PCS docket proceeding...and nothing more. The PCS docket proceeding subsumed both the merits of the PCS program, dealt with in the Second Report and Order, supra, and the pioneer's preference matter, dealt with in the Third Report and Order, supra. The bare reference to the docket number provides no information concerning which of the subjects was discussed. There is no report of the "data" presented from which an understanding of the substance of the discussion could be discerned. There is no report of the "arguments" presented from which the nature of the pitch to the government official could be discerned. There was no attempt to comply with the plain English language in the regulation.

45. Counsel for Pacific Bell, whose letters are attached as Appendices B and C, expresses confidence in the Commission's staff in their administration of the ex parte rules here. With all due respect to esteemed counsel and to the Commission, we do not share that confidence. There have been vastly too many contacts for all of them to be addressed to the merits of the substantive matters without being

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[4] Excluding only a small handful of letters providing more information, usually by attaching a copy of a fact sheet or position paper that was discussed.

addressed to the preference claims as well. It is too difficult to separate the merits of the PCS regulatory program and the merits of the preference award for the Commission's adoption of the proposals of APC-Post, Cox and Omnipoint that are included in that regulatory program. It is even more difficult to separate the abstract question of a retroactive abandonment of the preference program for PCS pioneers when the three tentative selectees of the pioneers preferences for PCS are making the pitch.

46. No. This doesn't ring true. The repeated appearances of these parties, about as often as some hard-working government officials see their spouses, under such strange, unreal, contrived circumstances, has to have had a pernicious, lobbying purpose and effect on the FCC officials. When you add to that mix the utter failure of the parties to file written reports summarizing the data and arguments that were made, submitting instead "form" letters which don't even purport to comply with the ex parte regulations, the evidence is compelling that no real effort was made either (a) to comply with or (b) to enforce those regulations.[5]

47. We are serving a copy of this petition on Mr. Fishel as notice of a claim of ex parte violations pursuant to 47 C.F.R. §1.1214.

48. We ask that the final award of preferences to APC-Post, Cox and Omnipoint be rescinded and set aside and that the prima facie matter of their apparent violation of the ex parte rules be designated for hearing in accordance with 47 C.F.R. §1.1216. Such hearing should be held before an independent master in light of the fact that officials of the Commission will be witnesses and that relevant documents must be

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[5] The Commission is not above reproach for the administration of its ex parte regulations, which are designed so that all parties in interest in a given matter have fair disclosure of the nature and substance of communications addressed to the agency. See, Motion for Extraordinary Relief, filed February 22, 1994, relative to a report of the FCC's Inspector General, dated November 22, 1993, in re Press Broadcasting Company, Inc., Case No. 93-1867, United States Court of Appeals for the District of Columbia Circuit, and Order entered by the Court on March 4, 1994.