

reconsider its denial of their pioneer's preference requests as reflected in paragraphs 159-166 of the Third Report and Order. In addition, AMT and DSST requested that the Commission reconsider its grant of preferences to APC, Cox and Omnipoint Communications, Inc. ("Omnipoint") to the extent that such grants are based upon an inconsistent application of relevant criteria between AMT/DSST and APC, Cox and Omnipoint or on a record tainted by procedural inadequacies.

AMT and DSST noted, inter alia, in their Joint Petition that the denials of their requests are predicated upon an inconsistent and incompatible application of criteria between AMT/DSST on the one hand, and APC, Cox and Omnipoint on the other. AMT and DSST particularly noted that the FCC credited the work of both Cox and Omnipoint outside the 2 GHz PCS band yet denied AMT and DSST similar credit for the extensive work of Cylink Corp. ("Cylink") in developing and deploying spread spectrum radios.

AMT and DSST further noted that the FCC premised its denial of their Request in substantial part upon a perceived incompatibility between the AMT/DSST spectrum proposal and that adopted by the FCC in its Second Report and Order in this Docket.² At the same time, the FCC granted the pioneer's preference request of Cox despite the fact that it made no spectrum proposal whatsoever, granted the request of Omnipoint

²Amendment of the Commission's Rules to Establish New Personal Communications Services (Second Report and Order), 8 FCC Rcd 7700 (1994) ("Second Report and Order").

despite the fact that it had at one point actually opposed the 30 MHz bandwidth assignments adopted by the FCC for the pioneer's preferences and granted the request of APC despite the fact that its spectrum proposal required more spectrum than that provided by the Commission. AMT and DSST believe that the responses of Cox and APC, and the lack of any response from Omnipoint, on these issues, indeed, highlight the inconsistent and incompatible treatment accorded between AMT and DSST and the three preference selectees.³

APC's Comments on the Joint Petition state (at 8, n. 14) that "[e]ven a grant of AMT/DSST's request ... would not require reconsideration of APC's grant." AMT and DSST agree that a grant of their Request For Pioneer's Preference (the "Request") would not require the reconsideration of the grants of preferences to APC, Cox or Omnipoint. However, given the bedrock administrative requirement that the FCC must accord even treatment to similarly-situated parties, the continued denial of AMT's and DSST's Request on the grounds stated in the Third Report and Order, in fact, would require the reconsideration of the grants to APC, Cox and Omnipoint. See Cotton Petroleum Corporation, et.al. v. U.S. Dept. of the Interior, 870 F.2d 155 (10th Cir. 1989); Green Country Mobilephone, Inc. v. FCC, 246 App. D.C. 366, 765 F.2d 235 (D.C. Cir. 1985). Thus, to the extent that APC suggests that AMT and DSST have not requested any

³Omnipoint submitted no Comment or Opposition to the AMT/DSST Joint Petition.

reconsideration that may impact the grant of its preference, it is in error.⁴

APC acknowledges that its preference request initially sought 50 MHz to implement its system, but notes that it subsequently "amended its proposal to propose two 40 MHz MTA spectrum blocks." APC, accordingly, suggests that the FCC's adoption of two 30 MHz MTA allocations (with the capacity to aggregate to 40 MHz) is a "reasonable outgrowth" of its proposal. The record in this proceeding, however, firmly establishes that whatever spectrum proposal APC migrated to during the course of this Docket, its proposal as of May 4, 1992 -- the deadline for submission of pioneer's preference requests -- was for "a division of the 1.85 - 1.99 GHz band based on two common carrier licenses per market, each operating in a total of 50 MHz." APC Supplement to Request For Pioneer's Preference, Gen. Docket No. 90-314, File No. PP-06, May 4, 1992 at 23 (emphasis supplied).

APC's Comments on the AMT/DSST Joint Petition thus fully evidence the inconsistency in treatment accorded between APC and AMT/DSST. To this end, although the AMT/DSST Request was denied in part because of perceived incompatibility between the spectrum proposal contained in the AMT/DSST proposal as of the May 4, 1992 deadline for preference requests, APC appears to

⁴APC similarly errs in stating that AMT and DSST requested reconsideration of the APC, Cox and Omnipoint preferences in the Summary to the Joint Petition, but not in the Petition itself. APC Comments at 8, n. 14. Indeed, AMT and DSST expressly requested such reconsideration on the first page of their Joint Petition.

have been credited for positions it assumed after the deadline for preference submissions. AMT and DSST note in addition that, unlike APC, after the May 4, 1992 deadline, they supported the allocation of PCS licenses in the 30 MHz blocks ultimately provided to the preference selectees. This support was expressly acknowledged by the Commission in the Second Report and Order, 8 FCC Rcd at 7872.

Moreover, as noted in their Joint Petition, AMT and DSST believe that the spectrum proposal accompanying their preference request -- which suggested the allocation of 5 MHz blocks -- reflects a PCS architecture that is compatible, and fully functional, with 10, 20 or 30 MHz licenses.

In contrast, a PCS architecture that relies upon 50 MHz (or 40 MHz) allocations, such as that proposed by APC, clearly must be compromised in some fashion to fit within the smaller bandwidth allocations adopted by the Commission. Accordingly, AMT and DSST do not agree with APC that the 30 MHz (or 10 or 20 MHz) PCS allocations adopted by the FCC is a reasonable outgrowth of APC's proposal.

In its Opposition, Cox comments only briefly upon the AMT/DSST Joint Petition, agreeing with AMT/DSST that "its [Cox's] preference request did not include a licensed bandwidth recommendation." Cox Opposition at 8. Cox suggests therefore that since it did not submit a bandwidth recommendation with its preference request, its request was fully compatible with any proposal adopted by the Commission. AMT and DSST believe that

the inequity in Cox's statement -- that it avoided any potential for the FCC to find its spectrum proposal incompatible simply by submitting no proposal -- is manifest.

In any event, AMT and DSST believe that the submission of a spectrum proposal to facilitate a full evaluation of the merits of a preference request is required by Section 1.402 of the Rules, which provides that "[t]he preference request must contain pertinent information concerning its plan for implementing service, the frequencies it proposes to use, the area for which the preference is sought" (emphasis added). In adopting this Rule in Establishment of Procedures to Provide a Preference to Applicants proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991), recon., 7 FCC Rcd 1808 (1992), further recon. den., 8 FCC Rcd 1659 (1993), the FCC made clear its intent that all preference applicants submit all pertinent information necessary to enable it to assess the innovativeness of the proposal. Fundamental to this analysis is an evaluation of the spectral efficiency of the proposal, which requires, among other things, the identification of the bandwidth necessary to implement the proposal. Accordingly, Cox's failure to provide a spectrum proposal with its preference request, in fact, was in derogation of its obligations under Section 1.402. That failure most certainly should not form the basis for preferred treatment for Cox over other preference applicants, such as AMT/DSST, that submitted a complete proposal that provided all pertinent information concerning their spectrum proposal.

For these reasons, and for those set forth in AMT's and DSST's Joint Petition For Reconsideration, AMT and DSST respectfully urge the FCC to reconsider its Third Report and Order in this Docket, and, upon such reconsideration, to grant the AMT/DSST Request.

Respectfully submitted,

ADVANCED MOBILECOMM TECHNOLOGIES, INC.
DIGITAL SPREAD SPECTRUM TECHNOLOGIES, INC.

By: 
Robert B. Kelly

KELLY, HUNTER, MOW & POVICH, P.C.
1133 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 466-2425

THEIR COUNSEL

May 4, 1994

CERTIFICATE OF SERVICE

I, Shiona Baum, hereby certify that a copy of the foregoing document was mailed, postage prepaid, this 4th day of May, 1994, to the following parties:

Jonathan D. Blake, Esquire
Kurt A. Wimmer, Esquire
Ellen K. Snyder, Esquire
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Counsel for American Personal Communications

Mark J. Tauber, Esq.
Nora E. Garrotte, Esq.
Piper & Marbury
1200 19th St., N.W.
Washington, D.C. 20036

Counsel for Omnipoint Communications, Inc.

Werner K. Hertenberger, Esq.
Laura H. Phillips, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Counsel to Cox Enterprises, Inc.

International Transcription Service
Suite 140
2100 M Street, N.W.
Washington, D.C. 20037


Shiona Baum