EX PARTE
90-314
93-266

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COVINGTON & BURLING
1201 PENNSYLVANIA AVENUE, N.W.
P.O. BOX 7566
WASHINGTON, D.C. 20044-7566
(202) 662-6000

TELEFAX: (202) 662-6291
TELEX: 89-593 (COVLING WSH)
CABLE: COVLING

LECONFIELD HOUSE
CURZON STREET
LONDON W1Y 8AS
ENGLAND
TELEPHONE 071-495-5655
TELEFAX: 071-495-3101

BRUSSELS CORRESPONDENT OFFICE
44 AVENUE DES ARTS
BRUSSELS 1040 BELGIUM
TELEPHONE 32-2-512-9890
TELEFAX 32-2-502 1598

KURT A. WIMMER
DIRECT DIAL NUMBER
(202) 662-5278

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May 12, 1994

Mr. Andrew S. Fishel, Managing Director
William E. Kennard, Esq., General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Messrs. Fishel and Kennard:

On January 16, 1994, Pacific Bell wrote you a letter alleging that American PCS, L.P. d/b/a American Personal Communications ("APC") and other broadband PCS pioneer preference awardees had engaged in improper ex parte contacts. An exchange of pleadings ensued. These same issues have now been raised in (1) a petition for reconsideration with respect to grant of those pioneer preference applications (which may be dismissed as untimely), (2) a request for judicial review of those grants and (3) a May 3 letter from the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. The latest effort to raise these same issues is a "Motion for Expedited Consideration And For A Briefing Schedule," filed by Pacific Bell on May 6, asking the Court of Appeals for the District of Columbia Circuit to resolve these issues.

Although the Commission's Rules do not require any action to be taken where no violation of the ex parte rules has taken place, in this case we believe that you should issue a decision on the merits of Pacific Bell's complaint and do so promptly. Paragraph 5 of the Subcommittee's letter asks for an "analysis" of these ex parte allegations to be undertaken by the FCC's General Counsel. Pacific Bell's judicial filings ask for court determination of these issues without regard to any decision by the Commission on their merits (and its letters to the Commission ask for no such determination).

As a principal target of Pacific Bell's ex parte allegations, APC has every reason to seek prompt exoneration from these charges. We believe that process should start at the Commission. And if it is not in your offices, we urge that the decision be made wherever is appropriate within the Commission.

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We believe also that the facts are straightforward.

(i) The Commission made clear that the PCS rule-making facet of Gen. Docket No. 90-314 was nonrestricted; that the discrete portion of that proceeding dealing with the merits of individual pioneer preference requests was restricted from the time such preference requests were formally opposed; and that E.T. Docket No. 93-266 dealing with whether possible termination of the pioneer preference policy should be retroactively applied to broadband PCS applications was not restricted.

(ii) APC confined its contacts to the unrestricted first and third proceedings, and, therefore, its contacts were permissible under both the Commission's rules and the written statements made by the Commission at the time it launched these proceedings.

(iii) Neither Pacific Bell nor any other party has presented <u>any</u> evidence, by affidavit or otherwise, that APC's contacts strayed beyond the permissible bounds of the first and third proceedings to deal with the impermissible subject matter of the second proceeding. Significantly, although all Commission officials were obligated by Section 1.1214 of the Rules to report any instances if this had occurred, none did so.

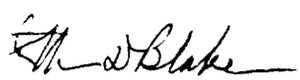
(iv) The <u>only</u> support advanced by the complainants is that APC filed several notifications of permissible, <u>ex parte</u> contacts on the first and third proceedings and that, therefore, it must have addressed the second proceeding (Pacific Bell) and that the second and third proceedings were so inextricably linked that APC could not have addressed the nonrestricted third proceeding without addressing the restricted second proceeding (Advanced Cordless Technologies). But neither theory is supported by anything more than empty rhetoric, and both are rebutted (a) by the silence of any Commission official as to any <u>ex parte</u> violation, which would have been promptly reported as required by the Commission's rules, (b) by the Commission's own designation of the first and third proceedings as nonrestricted for all parties including preference grantees and (c) by the repeated and consistent advice by the Commission's legal officials to APC.

(v) Pacific Bell claims that APC was required to describe in writing the substance of its permissible <u>ex</u>

parte contacts with Commission officials. But this is required only where the substance is not reflected in prior written submissions. The complained-of ex parte contacts covered no more than what was described in APC's October 28, 1993, written submission, and hence it complied with the Commission's notification requirements as well.[1/]

It would greatly serve both the Congressional and judicial processes if the Commission would promptly rule on these matters. As the most perfunctory reading of its latest court papers demonstrates, Pacific Bell is using the "pendency" of its complaint to cast a cloud over not only the pioneer preference proceeding but all of the Commission's proceedings concerning PCS auctions and the roll-out of PCS generally. Pacific Bell's baseless allegations should be resolved to clear the way for the prompt introduction of PCS.

Respectfully submitted,



Jonathan D. Blake

Attorney for American Personal Communications

cc: Michael Kellogg, Esq.
Gene A. Bechtel, Esq.
Gen. Docket 90-314
ET Docket 93-266

Courtesy copy: Parties of record

1/ On the few occasions when APC's discussions extended beyond the scope of its pleadings on file, appropriate notifications were filed.