

MAY 20 1994

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

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In re Request of	)	
	)	
AMERICAN PERSONAL COMMUNICATIONS	)	Gen. Docket
	)	90-314
For a Pioneer's Preference	)	No. PP-06
In the Licensing Process for	)	
Personal Communications Services	)	

TO: The Commission

RESPONSE TO REPLY TO  
OPPOSITIONS TO PETITION FOR RECONSIDERATION

American Personal Communications ("APC"),<sup>1/</sup> hereby responds to the Consolidated Reply ("Reply") of Advanced Cordless Technologies, Inc. ("ACT") and reaffirms its opposition to ACT's Petition for Reconsideration in the above-referenced matter. ACT's Reply is based on a faulty understanding of the ex parte law and an over-statement of how many ex parte contacts occurred. Even more fatal to the conclusions ACT reaches is its mistaken impression that the Commission's December 23, 1993 decision in ET Docket 93-266 was "restricted." The Reply, crafted with a careless treatment of the facts and the law, merits no consideration.

None of the points raised by ACT's Reply is new and each is inaccurate. At the outset, ACT admits that it does not "really know whether [APC's] contacts were proper or not,"

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

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but speculates that APC's and other pioneers' communications regarding PCS rule making must have been improper simply because pioneers made them (p.2). This is because, according to ACT, "the merits of the pioneers [sic.] preference matter, on the one hand, and the technical standards for PCS, on the other, cannot be separated intellectually or practically" and the Commission acted wrongly in attempting such a separation (p.2; emphasis in original). So ACT asserted in its Petition for Reconsideration. There, ACT declared that questions involved in the PCS rule making proceeding were too "esoteric and antiseptic" to merit discussion with the Commission.<sup>2/</sup> In its latest filing, ACT suggests that some discussion of PCS rule making issues might occur but "could, and likely would, have an impact on the preference aspect" (p.3).

ACT's attack on APC and other pioneers is based on its apparent inability to grasp the distinction between rule making issues and pioneer preference grants. To be perfectly clear, APC again states that it has always and will continue always to observe the Commission's ex parte rules without deviation. ACT's claim that the Commission, by designing restricted and non-restricted PCS proceedings as it did,

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<sup>2/</sup> ACT Petition at 24. The "non-restricted" issues in Docket 93-266 which could be discussed and which ACT dismisses as "esoteric and antiseptic," include whether the pioneer's preference rules should be eliminated or amended (Notice, 8 F.C.C. Rcd. at 7692-94); whether any changes in the rules should be applied to existing pioneer's preference requests (id. at 7694-95); and whether the scope of awards to pioneers should be modified (id. at 7693-94).

encouraged -- indeed required -- the violation of its own ex parte rules remains unsupported by any evidence or logic and is belied by history.<sup>3/</sup> Moreover, the implication of what ACT urges -- that parties cease to initiate or respond to requests for exchanges of views and information in a non-restricted proceeding if such exchanges could be construed as having any bearing on a restricted proceeding -- would destroy the careful balance the Commission has struck between free communication and fair play.<sup>4/</sup> It would dam the flow of useful information from industry to the Commission on vital regulatory issues and is not favored, much less required, by the Commission's rules.

ACT frames its second point by asking: "What do we know about their [pioneer's preference winners] various contacts [with the Commission]?" and answering less than trenchantly: "We know that there were a lot of them" (p.4; emphasis in original). The reason ACT believes there were so many contacts by pioneers is that ACT has engaged in double-,

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<sup>3/</sup> In fashioning its ex parte rules, the Commission expressly permitted a party to a restricted proceeding to make its views known in related non-restricted rule making proceedings so long as the merits of the restricted proceeding are not discussed. See Ex Parte Communications and Presentations in Commission Proceedings, Report & Order, 2 F.C.C. Rcd. 3011, 3012 (1987) ("Report & Order"); see also Report & Order, 1 F.C.C. 2d 49, 58 (1965).

<sup>4/</sup> The Commission's ex parte rules are designed to "achieve fundamental fairness and a full record, while permitting the vigorous exchange of information necessary for reasoned and informed decision-making." Report & Order, 2 F.C.C. Rcd. at 3012 (1987).

triple-, and even quadruple-counting of ex parte notifications. For example, ACT's Reply implies that APC had four oral and one written ex parte contacts with then-Chairman Quello on September 15, 1993.<sup>5/</sup> However, the record clearly demonstrates that APC had only one oral ex parte contact with then-Chairman Quello on that date in order to discuss "the topic of spectrum allocations for PCS and matters contained in APC's prior submissions."<sup>6/</sup> APC's three other ex parte contacts were written and properly included in the record.<sup>7/</sup> The alleged fifth ex parte contact simply did not take place.<sup>8/</sup>

ACT also misinterprets some of APC's ex parte letters. For example, ACT claims that APC met with then-

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<sup>5/</sup> ACT's chart has two entries for Chairman Quello on September 15th, "9/15/93 (2)" and "9/15/93 (W)(3)." According to ACT's own coding system "'(W)'" denotes a written Submission to the FCC employee" and "'(#)'" denotes the number of contacts by that party on that day." ACT Reply, Attachment A at p.1 (emphasis added). If ACT intended to report more than one written submission on the same day, it should have denoted this with multiple "(W)"s. It is unclear why ACT included written ex parte presentations in its chart since even ACT does not challenge that they were proper in all respects.

<sup>6/</sup> See Letter from Kurt A. Wimmer to William F. Caton, Gen. Docket No. 90-314, dated September 15, 1993.

<sup>7/</sup> ACT similarly mischaracterizes APC's ex parte contacts with Commissioners Barrett and Duggan and other FCC personnel on that day.

<sup>8/</sup> This is not the only instance in which ACT claims that APC made an ex parte contact that never occurred. For example, ACT claims that APC met with Renee Licht, the FCC Acting General Counsel, on September 16, 1993. See ACT Reply, Attachment A at p.8. There is nothing in the record to indicate that this meeting ever took place.

Chairman Quello on September 27th, September 28th and September 29th (pp.5-6). In questioning the purpose of these alleged visits, ACT ponders whether APC gave Commissioner Quello "follow-up quizzes" or spent time "reading APC's pleadings aloud. . . possibly in the hope that the then-Chairman might commit them to memory" (p.6). But APC spoke with Commissioner Quello only once -- by telephone -- in the September 27th through 29th time period.<sup>2/</sup>

APC did not speak with Commissioner Quello again until October 28, 1993.<sup>10/</sup> On October 28th, APC discussed with Commissioner Quello issues raised in its same-day submission concerning the review of the pioneer preference rules. As APC's October 28th written filing indicates, these issues are distinct from those in General Docket No. 90-314 which was the subject of APC's late September contact.

Yet another deficiency in ACT's count of APC's ex parte contacts is that ACT's chart frequently neglects to note that APC often met with more than one Commission staff member at the same time. For example, on January 18, 1994, APC met

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<sup>2/</sup> See Letter from Jonathan D. Blake to William F. Caton, Gen. Docket No. 90-314, dated September 29, 1993. Similarly, contrary to ACT's chart, APC spoke only once by telephone to Commissioner Barrett, Brian F. Fontes and Randall S. Coleman during this time period. See ACT Reply, Attachment A at pp.3-4.

<sup>10/</sup> See ACT Reply, Attachment A at p.1; see also Letter from Kurt A. Wimmer to William F. Caton, ET Docket No. 93-266, dated October 28, 1993.

with Chairman Hundt and his legal advisor, Karen Brinkmann.<sup>11/</sup> Although Chairman Hundt and Ms. Brinkmann attended the same presentation, ACT counted this meeting in its chart as two separate ex parte contacts.<sup>12/</sup> Similarly, on November 1, 1993, APC's counsel met with the FCC's Acting General Counsel, Renee Licht and two members of her staff, David Solomon and Peter Tenhula.<sup>13/</sup> Nevertheless, ACT's chart reports this meeting as three separate ex parte contacts, thereby again distorting APC's contacts with the Commission's staff. These are just some examples of the flaws in ACT's tabulation.

The claim that ex parte contacts are suspect simply because they are numerous is, moreover, pure sophistry. There simply is no correlation between the number of contacts in which a party engages and the propriety of those contacts.<sup>14/</sup> ACT, for all the rhetorical questions it puts to itself, has

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<sup>11/</sup> See Letter from Kurt A. Wimmer to William F. Caton, Gen. Docket No. 90-314, dated January 19, 1994.

<sup>12/</sup> See ACT Reply, Attachment A at pp.2,6.

<sup>13/</sup> See Letter from Kurt Wimmer to William F. Caton, ET Docket No. 93-266, Gen. Docket No. 90-314, dated November 2, 1993.

<sup>14/</sup> That ACT asks: "[W]hat on earth could all of these meetings have been about, since it defies credibility that they might have been limited... to restatements of previously-submitted positions?" (p. 6) suggests that ACT scarcely understands the careful inquiry the Commission has undertaken with respect to the fundamental issues listed supra, at n.2. Moreover, many of the contacts were brief, conducted by phone or in the course of other activities, and many were only status inquiries.

never asked or fairly answered why APC and other pioneers communicated with the Commission on PCS and preference rule making issues more often than other parties. As to the PCS rule making issues, pioneers, as industry leaders with significant experimental and research experience, were a most likely source of information for Commission officials deliberating over novel and difficult implementation issues. APC has participated in the unfolding of all aspects of PCS by sharing its accumulated knowledge about PCS technologies and capabilities with the Commission and the public as the service has matured. In addition to the pioneer preference and PCS rule making dockets, APC has made significant contributions to the spectrum reallocation docket (ET Docket 92-9), Congressional hearings, and innumerable informal industry-wide discussions on the launching of PCS. It also has licensed its Pathguard technology and shared the learning that made the technology possible in its quarterly reports to the Commission. After adding so much for so long to the development of this new service, APC was a natural, perhaps necessary, participant in the Commission's most recent non-restricted deliberations.

As to the non-restricted pioneer preference rule making issues, it hardly needs mention that pioneers have legitimate interests they are entitled to pursue with respect to proposals to eliminate preference rules in general. The Commission, by considering the preference rules in the open

air of a non-restricted proceeding, invited pioneers along with others to join in the discussion of these issues. APC has responded to that invitation in hopes of enhancing the fairness of the PCS proceedings and expediting the delivery of cost-effective, high quality PCS services to the public.

Finally, ACT asserts that APC must have discussed restricted topics because it had contacts with the Commission around the time the Commission adopted its pioneer preference decision on December 23, 1993 (p.7). This inference is based on a false assumption and is, therefore, completely invalid. ACT mistakenly believes that the "December, 1993 action was supposedly completely restricted" (p.7). Therefore, ACT asks: "What could there have been to discuss prior to that meeting, if not restricted matters which were obviously out of bounds? We frankly can't even begin to guess..." (p.7).

ACT is indeed in the dark on this matter. Two decisions were adopted on December 23, 1993 -- one in the restricted portion of the PCS rule making docket<sup>15/</sup> and one in the non-restricted pioneer preference rule making docket.<sup>16/</sup> APC's contacts were all confined to the non-restricted PCS

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<sup>15/</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report & Order, Gen. Docket No. 90-314, adopted December 23, 1993, released February 3, 1994.

<sup>16/</sup> Review of the Pioneer's Preference Rules, First Report & Order, ET Docket 93-266, adopted December 23, 1993, released January 28, 1994. The Commission designated Docket 93-266 a "non-restricted" proceeding in Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, 8 F.C.C. Rcd. 7692 (1993); 47 C.F.R. § 1.1204 (b)(7) (1992).

rule making proceeding; none touched on the restricted issues of which parties would receive pioneer preferences. ACT's misunderstanding of the facts blinds it to what its own graphs clearly show:<sup>17/</sup> that APC's contacts cluster around the Commission's adoption of rule making decisions on September 23, 1993<sup>18/</sup> and December 23, 1993, and were entirely permissible.

ACT's carelessness with the facts and carelessness with the law are all of a piece with its carelessness with the Commission's procedural requirements. ACT was 73 days late in filing a petition for reconsideration of the Commission's denial of its narrow-band PCS preference request.<sup>19/</sup> So it seized on the quite different broadband proceeding and sought to divert attention from the fatal defects of its position by distorting the record and law of this proceeding. That may be pioneering but it deserves nothing more than prompt dismissal.

As APC has stated before, it has reported even contacts with Commission personnel that did not constitute "presentations" in the formal sense, when the contacts were only casual, and when all matters discussed were limited to discussions of pleadings on file. The Commission should deny

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<sup>17/</sup> ACT Reply at Attachment B.

<sup>18/</sup> In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen Docket No. 30-314, Second Report & Order, 8 FCC Rcd. 7700 (1993).

<sup>19/</sup> See Memorandum Opinion & Order, GEN Docket No. 90-314, FCC 94-30 at ¶ 56.

ACT's petition for reconsideration and leave intact the pioneer preference award APC earned for over four years of creativity, investment, development, and industry leadership.

Respectfully submitted,

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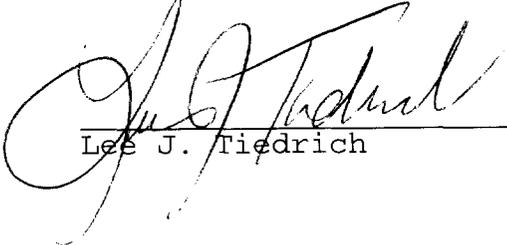
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**STAMP & RETURN**

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FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

11/17/94  
FCC 90-314

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

TO: The Commission

COMMENTS ON OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

American Personal Communications ("APC")<sup>1/</sup>, pursuant to Section 1.429(g) of the Commission's rules, hereby files comments in support of the Oppositions to Petitions for Reconsideration filed by Cox Enterprises, Inc. ("Cox") and Omnipoint Communications, Inc. ("Omnipoint") in the above-captioned proceeding.<sup>2/</sup> Cox and Omnipoint have opposed the petition of Advanced Cordless Technologies, Inc. ("ACT"), as relying on "rumor," "supplementary hysteria," and legally irrelevant factors to contend that the pioneer preference grantees violated the Commission's ex parte rules. See Cox Opposition at 2-4; Omnipoint Opposition at 3-6. APC agrees with Cox and Omnipoint -- based on the facts presented in their Oppositions and on analysis of ACT's unfounded and

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<sup>1/</sup> 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.

<sup>2/</sup>The Commission has awarded APC, Cox and Omnipoint pioneer preferences for their respective contributions to the development of broadband PCS technologies. Third Report and Order, Gen. Docket No. 90-314, FCC 93-550, adopted December 23, 1993, released February 3, 1994.

erroneous allegations against APC -- that ACT's petition completely lacks merit and therefore should be denied.

I. ACT'S CLAIMS OF IMPROPER EX PARTE CONTACTS PROVIDE NO BASIS FOR RECONSIDERING THE GRANTS OF THE PIONEER PREFERENCES.

As Cox and Omnipoint make clear, ACT's petition, stripped of its rhetoric, simply reiterates unfounded allegations previously raised by Pacific Bell and amounts to little more than a claim that the Third Report and Order was preceded by many ex parte contacts.<sup>3/</sup> Cox Opposition at 5; Omnipoint Opposition at 3. This charge is irrelevant since the Commission's rules do not limit the number of permissible ex parte contacts.<sup>4/</sup> Nevertheless, Cox and Omnipoint have further exposed the speciousness of ACT's claim by

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<sup>3/</sup>Based on numerous prior conversations with legal officials for the FCC, including the General Counsel's office, APC agrees with Cox and Omnipoint that there is a clear and defined distinction between the restricted and non-restricted aspects of this proceeding. Cox Opposition at 4-5; Omnipoint Opposition at 5-6. APC fully honored this clear and defined distinction and did not discuss any issues related to the restricted aspects of this proceeding in its permissible ex parte presentations.

<sup>4/</sup>Furthermore, those who have opposed APC's preference and APC's general PCS proposal also have reported numerous ex parte contacts. Bell Atlantic reported 32 ex parte contacts in 1993 and 6 in the first quarter of 1994; Pacific Bell reported 19 in 1993 and 10 in the first quarter of 1994; CTIA reported 68 in 1993 and 18 in the first quarter of 1994. These numbers do not demonstrate that any of these parties crossed the line between permissible rule making topics and the merits of an individual preference request. Similarly, the number of APC's contacts has no bearing on the propriety of the topics discussed in those contacts.

demonstrating that their ex parte presentations also were consistent with the Commission's rules.

As for the substance of APC's contacts with Commission personnel, they dealt exclusively with permissible rule making issues. ACT can point to no facts at all to the contrary because these facts do not exist.<sup>5/</sup>

ACT also criticizes APC's ex parte notifications. Under a correct reading of the Commission's rules, APC's notices were more than sufficient. But ACT's criticism is based on a misreading of Section 1.1206(a)(2), which it paraphrases as requiring "that a written report be filed concerning contacts that are made". Act Petition at 25. In fact, the rule requires such a report only when the "presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings". 47 C.F.R. § 1.1206(a)(2) (emphasis added). Moreover, in adopting the rule, the Commission made it clear that "persons making oral presentations that substantially

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<sup>5/</sup>ACT's argument misses its mark on other counts as well. First, ACT fails to point out that APC made only one contact in the month before it was tentatively awarded a pioneer's preference on October 8, 1992, and that was about PCS rule making issues. Second, ACT fails to point out that APC had far more contacts in the month before the PCS rule making decision than in the month before the preference rule making decision. Third, ACT's claim that APC "stop[ped] abruptly" making contacts after December 23, 1993, when its pioneer preference grant was finalized, ignores the fact that APC's sustained interest in PCS rule making issues continued to generate permissible presentations to the Commission after the year-end holiday lull.

reiterate their own written comments need not file such a memorandum."<sup>6/</sup>

When APC limited its discussions to matters that were contained in its documents already on file, APC was not required by the Commission's Rules to file any notifications whatsoever. APC, however, for the sake of complete disclosure, chose to report any meetings that occurred even if the discussions did not extend beyond matters already contained in written submissions,<sup>7/</sup> the contacts with Commission personnel were quite casual or they otherwise did not constitute "presentations" in a literal sense. On those few occasions when APC's discussions raised matters that were outside the scope of its filed submissions, those matters were properly summarized in APC's notifications.

II. ACT'S PETITION REITERATES CLAIMS THAT WERE DISMISSED IN THE NARROWBAND PCS PROCEEDING.

Omnipoint's Opposition also raises the important procedural fact that ACT's petition for reconsideration of the narrowband PCS pioneer preference decision in the First Report and Order was dismissed on statutory grounds because it was

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<sup>6/</sup> First Report, 2 F.C.C. Rcd. 3021, 3032 (1982).

<sup>7/</sup> Undersigned counsel advised this course because Commissioner offices and some other offices have come, as a matter of course, to expect the filing of such notices even though the substance of conversations does not go beyond written submissions.

filed 73 days late.<sup>8/</sup> Omnipoint Opposition at 2-3. Three days after the dismissal, ACT filed the instant petition challenging the *broadband* PCS pioneer preferences, even though the Commission did not address ACT's pioneer preference application in the Third Report and Order. Id. APC agrees with Omnipoint that ACT's petition is procedurally improper and therefore should be dismissed.<sup>2/</sup>

#### CONCLUSION

APC supports Cox's and Omnipoint's oppositions to ACT's petition for reconsideration. As Cox and Omnipoint have demonstrated -- and APC has further documented in these supporting comments -- the petition is based on speculation and innuendo and does not call into question the propriety of APC's, Cox's or Omnipoint's permissible ex parte contacts. Additionally, ACT's petition was filed simply to reassert

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<sup>8/</sup>APC filed its Opposition to petitions for reconsideration of the Third Report and Order less than one week late. The filing deadline for Oppositions is not statutory. Furthermore, APC has demonstrated "good cause" for its late filing.

<sup>2/</sup>As Omnipoint also discusses, ACT's petition violates the Commission's prescribed page limitations. Omnipoint Opposition to Motion to Strike at 1-3.

claims that were properly dismissed on statutory grounds in the narrowband aspects of this proceeding.

Respectfully submitted,

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Before the  
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APR 26 '94

FEDERAL COMMUNICATIONS  
COMMISSION  
SECRETARY

In re Request of )  
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For a Pioneer's Preference ) No. PP-06  
In the Licensing Process for )  
Personal Communications Services )

TO: The Commission

COMMENTS ON PETITIONS FOR RECONSIDERATION

The Commission's final designation of American Personal Communications ("APC")<sup>1/</sup> as a pioneer in personal communications services ("PCS") was an appropriate recognition of the contributions APC has made both to the PCS industry and to the Commission's efforts to bring PCS to the American public. The few petitions for reconsideration that were filed concerning APC's preference provide no basis for disturbing that correct and proper decision.<sup>2/</sup>

Only one of the seven petitioners, ACT, asks the Commission to reverse the grant of a preference to APC. ACT's

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<sup>1/</sup> 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.

<sup>2/</sup> APC here replies to petitions filed by Advanced Cordless Technologies, Inc. ("ACT"), Nextel Communications, Inc. ("Nextel"), QUALCOMM Incorporated ("QUALCOMM") and Advanced Mobilcomm Technologies, Inc./Digital Spread Spectrum Technologies, Inc. ("AMT/DSST"). Corporate Technology Partners filed a petition for reconsideration on April 7, 1994, but that petition has not been placed on public notice. APC will reply to it when and if comments are sought.

petition, however, is based solely on a legally incorrect and factually insufficient view of the Commission's ex parte requirements.<sup>3/</sup> As we have demonstrated in response to similarly baseless charges by Pacific Bell and as we show here, these claims provide no basis for reconsidering the grant of a preference to APC. Although we respond to certain issues raised by AMT/DSST and Nextel, nothing in those petitions calls into question the grant of a preference to APC. There is thus no basis in the record for reconsidering APC's preference, and the Third Report should stand.

I. ACT'S CLAIMS OF IMPROPER EX PARTE CONTACTS PROVIDE NO BASIS FOR RECONSIDERING THE GRANT OF A PREFERENCE TO APC.

APC has scrupulously complied with the Commission's ex parte rules and policies. In claiming to the contrary, ACT relies upon no evidence but merely parrots the baseless allegations earlier raised by Pacific Bell. APC has responded to those claims and will not repeat its response here.<sup>4/</sup> The kernel of what ACT advances in support of this allegation is the "rumor" that "the lobbying in this proceeding has been fierce" (p. 20). ACT admits that it "cannot sustain a petition of alleged wrongdoing on the basis of a rumor" and so

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<sup>3/</sup> Indeed, it is questionable whether ACT has standing to raise any of these claims against APC. Its preference request could be granted without requiring any modification to APC's preference.

<sup>4/</sup> APC's responses of February 4, 1994, March 8, 1994 and March 25, 1994 to Pacific Bell are incorporated herein by reference.

asks the Commission to consider "what we have at this juncture" (p. 20). What ACT has, however, is unsupported innuendo and a misconception of the ex parte rules.

ACT acknowledges that preference awards and the pioneer preference rule making are two separate proceedings and that, while the issue of who should receive a pioneer's preference could not be discussed, "the merits of the . . . rule making proceeding were not restricted and it was permissible to make contacts regarding that subject matter."<sup>5/</sup> However, ACT then asserts that "such a bifurcation is deceptive and not real" and claims that this "deception" transforms permissible ex parte contacts about preference rules into impermissible contacts about preference awards.

In other words, ACT argues that APC's contacts could not really have been about the "esoteric and antiseptic question of whether preferences should be abandoned retroactively" (p. 24). But these issues, which ACT admits could be discussed, are precisely what APC and the Commission cared about -- such fundamental issues as whether the pioneer's preference rules should be eliminated or amended; whether **any** changes in the rules should be applied to existing

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<sup>5/</sup> Id. at 22. The Commission designated Docket 93-266 a "non-restricted" proceeding in Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, 8 F.C.C. Rcd. 7692 (1993) (the "Notice").

pioneer's preference requests; and whether the scope of awards to pioneers should be modified.<sup>5/</sup>

The Commission's Notice did not ask about the merits of APC's preference request or anybody else's; there was no indication that that issue underlay the Commission's Notice; and APC most assuredly did not discuss the merits of its request. If ACT's complaint is that one can't separate the generic preference rule making issues from the merits of individual preferences, its complaint lies with the Commission, which issued the Notice on the basis of that distinction. APC played by the rules as properly established by the Commission.<sup>2/</sup>

As for ACT's claims that a party is incapable of remaining silent on one issue while speaking on another, the Commission long ago dismissed these concerns by permitting a party to a restricted proceeding to make its views known in related non-restricted rule making proceedings so long as the

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<sup>5/</sup> Notice, 8 F.C.C. Rcd. at 7692-94, 7694-95, 7693-94.

<sup>2/</sup> ACT's suggestion that the Commission's potential elimination or scaling back of the hotly debated preference policy did not warrant comment scarcely requires a response. Interest in pioneer preference policy issues preceded and has survived the awards. The Commission sought and APC and others expressed comments on the issue of whether the preference rules should be abolished or modified. APC did not discuss the merits of any preference request, including its own.

merits of the restricted proceeding are not discussed.<sup>8/</sup> The General Counsel recently has reaffirmed this proposition.<sup>2/</sup>

APC was careful to fully honor the line the Commission has drawn between restricted and non-restricted proceedings. In two meetings with the Commission's Office of General Counsel, APC confirmed this distinction, and APC frequently reaffirmed it with Commission personnel before addressing permissible rule making topics. By the time APC held its first discussion on these topics, it had filed a paper that described its arguments in favor of maintaining the preference rules and granting preference awards of significant scope.<sup>10/</sup> At all times, APC's positions on the rule making topics discussed were in the public record.

ACT submits a tally of the number of ex parte notices filed by APC in ET Docket 93-266, a non-restricted proceeding, as if this number revealed anything but an active docket in which the Commission specifically invited ex parte

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<sup>8/</sup> See Ex Parte Communications and Presentations in Commission Proceedings, Report & Order, 2 F.C.C. Rcd. 3011, 3012 (1987); see also Report & Order, 1 F.C.C. 49, 58 (1965).

<sup>2/</sup> See Letter from Renee Licht, FCC Acting General Counsel, to Robert A. Mazer, Nov. 18, 1993 (applicants for low-earth orbit satellite service could permissibly discuss general LEO rule making issues without raising an ex parte concern).

<sup>10/</sup> APC Position Paper, filed September 27, 1993, Gen. Docket 90-314. This paper was filed in Gen. Docket 90-314 rather than in ET Docket 93-266 because the latter docket did not exist until October 21, 1993. APC filed a second position paper on these same topics on October 4, 1993 and a Request for Separate and Expedited Treatment of "Existing Pioneer Preference" Issues in ET Docket 93-266 on October 28, 1993.

visits.<sup>11/</sup> The issue is not how many contacts APC had, but whether discussions were limited to permissible topics.<sup>12/</sup> APC's meetings with Commission personnel dealt entirely with permissible rule making issues, and ACT can point to no facts at all to the contrary because those facts do not exist.

Those who have opposed APC's preference and APC's general PCS proposal also have reported numerous ex parte contacts. Bell Atlantic reported 32 ex parte contacts in 1993 and 6 in the first quarter of 1994; Pacific Bell reported 19 in 1993 and 10 in the first quarter of 1994; CTIA reported 68 in 1993 and 18 in the first quarter of 1994. These numbers do not demonstrate that any of these parties crossed the line between permissible rule making topics and the merits of an individual preference request. Similarly, the number of notifications APC filed has no bearing on the propriety of the topics discussed in its meetings.

ACT's argument misses its mark on other counts as well. First, ACT fails to point out that APC made only one contact in the month before it was tentatively awarded a pioneer's preference on October 8, 1992, and that was about PCS rule making issues. Second, ACT fails to point out that

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<sup>11/</sup> See Remarks of Commissioner Duggan at FCC Open Meeting, Oct. 21, 1993 ("I invite not only comments from all the parties, but I invite visits to my office and every effort to convince me and to argue").

<sup>12/</sup> ACT also skews its analysis by including contacts by PCS Action, Inc., an organization of which APC is a member, but which has never taken a position on preference issues.