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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket 93-266
	)	
	)	
	)	

TO: The Commission

COMMENTS ON PETITION FOR RECONSIDERATION
OR, ALTERNATIVELY, REQUEST FOR CLARIFICATION

American Personal Communications ("APC"),[1] urges the Commission to sever the Petition for Reconsideration or, in the alternative, Request for Clarification ("Petition") of CELSAT, INC., ("CELSAT") of the Commission's First Report and Order ("Order") in this proceeding[2] and consider the issues raised by CELSAT in the context of CELSAT's pioneer preference request. In the alternative, the Commission should deem the Petition a request for clarification and promptly dispose of the matter. This approach would permit judicial review to move forward expeditiously, as several appealing parties have requested.[3]

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[1] 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.

[2] In the Matter of Review of the Pioneer's Preference Rules, First Report and Order, 9 FCC Rcd. 609 (1994).

[3] Consolidated petitions for review of the Order by disappointed broadband PCS pioneer preference applicants are

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In its Order, the Commission decided to continue to apply its existing pioneer preference rules to all proceedings in which Tentative Decisions had been issued.[4] This finding was correct in all respects; neither CELSAT nor any other party challenges that decision before the Commission (although it is the subject of petitions for judicial review). APC and CELSAT are each parties to different proceedings affected by the Order and stand before the Commission in different postures. APC was a pioneer preference applicant in the broadband Personal Communications Services ("PCS") proceeding whose request for a preference had been tentatively granted.[5]

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[3] (...continued)
pending in the United States Court of Appeals for the District of Columbia. Two parties have filed motions for expedited consideration of the appeals. See Pacific Bell, Motion for Expedited Consideration and For a Briefing Schedule, Pacific Bell v. FCC, 94-1148 (May 6, 1994); Bell Atlantic, Motion for Expedited Consideration, Bell Atlantic Personal Communications, Inc. v. FCC, 94-1157 and consolidated cases (May 6, 1994).

[4] This category included three proceedings: Establishment of New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd. 7794 (1992) (tentatively granting preferences to APC, Cox Enterprises, Inc., and Omnipoint Communications, Inc.); Local Multipoint Distribution Service ["LMDS"], Notice of Proposed Rule Making, Order, Tentative Decision and Order on Reconsideration, CC Docket No. 92-297, 8 FCC Rcd. 557 (1993) (tentatively granting preference to Suite 12 Group); and Allocation of Bands for Use by Mobile-Satellite Service, Notice of Proposed Rule Making and Tentative Decision, ET Docket No. 92-28, 7 FCC Rcd. 6414 (1992) (tentatively denying five requests for preferences). See Order at n. 1.

[5] See Establishment of New Personal Communications Services, Tentative Decision and Memorandum Opinion and Order, GEN Docket No. 90-314, 7 FCC Rcd. 7794 (1992).

CELSAT apparently is a pioneer preference applicant in the Mobile-Satellite Service ("MSS") proceeding whose request for a preference had not been expressly granted or denied in a decision tentatively finding that no preference award was merited.[6] Therefore, it was unclear, at least to CELSAT, whether the Commission would consider its request "pending" at the time of the Order and governed by existing preference rules. APC's preference was finalized[7] whereas CELSAT's request for a preference still may be pending.[8]

The stated rationale underlying the Order was that it "would be inequitable to apply any changes" in the preference rules where parties had "expended not inconsiderable resources" in justifiable reliance on those rules.[9] CELSAT does not challenge this reasoning or its application to the four parties to other proceedings, including APC, who had been tentatively granted preferences. On the contrary, CELSAT seeks to ensure that its request for a preference in ET Docket No. 92-28, like the requests of those four parties, would be governed by existing pioneer preference

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[6] See Allocation of Bands for Use by Mobile-Satellite Service, Notice of Proposed Rule Making and Tentative Decision, ET Docket No. 92-28, 7 FCC Rcd. 6414 (1992).

[7] See Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 FCC Rcd. 1339 (1994).

[8] APC takes no position on the merits of CELSAT's request for a pioneer preference.

[9] Order at ¶ 9.

rules. The principal relief CELSAT seeks is clarification of the Order that the existing rules will apply to its preference request because that request was part of the MSS proceeding, the Commission's "limited" decision in that proceeding did not finally determine the status of CELSAT's request, and CELSAT relied on the continuing applicability of the existing preference rules.[10/]

Each of CELSAT's contentions may and should be considered independently of the issues decided in the Order. Those issues, as framed in the Commission's Notice of Proposed Rule Making ("Notice"),[11/] were whether the pioneer preference rules should survive the transition to competitive bidding[12/] and whether, if retained, the rules should be amended.[13/] The Commission specifically queried whether repeal or amendment of the rules should apply to the PCS and LMDS proceedings in which tentative preference grants had been

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[10/] It should be noted that CELSAT, in its comments to the Notice, grouped its request with the "approximately twelve requests ... for which tentative decisions have not been issued." Notice at ¶ 20; See Comments of CELSAT at p. 3. CELSAT now asserts that it is part, "(albeit an unfinished part)," of a proceeding in which a tentative decision has been issued. See Petition at p. 6. This change in CELSAT's position adds to the confusion surrounding the treatment of its preference request but, like CELSAT's other contentions, requires no re-examination of the Order's desiderata.

[11/] Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, ET Docket No. 93-266, 8 FCC Rcd. 7692 (1993).

[12/] See Notice at ¶ 11.

[13/] See Notice at ¶ 12.

issued and to those proceedings in which tentative decisions had not been issued.[14] The Order's discussion was almost entirely confined to whether the Commission had the authority to change the pioneer preference rules to the detriment of pending applications[15] and whether such change would be equitable.[16]

The Commission's consideration of CELSAT's clarification request will in no way touch on these issues. Rather, it will depend on an assessment of issues peculiar to ET Docket No. 92-28 such as the classification of CELSAT's preference request, the implication of the Commission's decision to withhold a tentative decision on that request, and whether CELSAT justifiably relied on existing preference rules. How the Commission clarifies these issues bears no relationship to the Order and is of discernible importance to few if any parties in ET Docket No. 93-266, other than CELSAT.[17] Furthermore, because CELSAT's position is unique,

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[14] See Notice at ¶¶ 19, 20.

[15] See Order at ¶¶ 3, 7, 9, n.7, n.24. See generally comments of Nextel Communications, Inc., Paging Network, Inc., and PageMart, Inc.

[16] See Order at ¶¶ 3-5, 8, 9. See generally comments of APC, Cox Enterprises, Inc., Henry Geller, Rockwell International Corp., and Suite 12 Group.

[17] Forty parties responded to the Notice with comments. Of these, only three (CELSAT, TRW, Inc. ("TRW"), and Motorola Satellite ("Motorola")) had applied for preferences in the MSS proceeding. CELSAT identified itself as having one of approximately 12 pending requests and urged the Commission not to repeal or modify the preference rules or apply any

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the Commission's clarification of its Order with respect to CELSAT's preference request will not apply to any other party.

CELSAT petitions for reconsideration only to the extent that the Commission will not clarify its Order as CELSAT desires. But CELSAT presents nothing for the Commission to reconsider and the Commission, therefore, should decline to re-open its decision in ET Docket No. 93-266 to settle questions more properly considered as part of ET Docket No. 92-28.

Because the issues CELSAT's Petition places before the Commission are so narrow and easily separable from the issues decided in the Order, the Commission should deny the Petition insofar as it requests reconsideration, sever the request for clarification and immediately order that all issues not raised by CELSAT's petition have been finally decided.[17/] Alternatively, the Commission should deem the

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[16/] (...continued)
its decision not to award a preference in the MSS proceeding regardless of any contemplated changes to the preference rules. See Comments of TRW at pp. 5-6. Motorola urged the Commission to award it a pioneer preference and to apply the existing preference rules to Motorola's request. See Comments of Motorola at p. 10.

[17/] The Commission might also deny the Petition insofar as it requests reconsideration while at the same time clarifying its Order as it has the authority to supply additional explanation in an order which denies reconsideration but, through that denial, effectively affirms the prior decision. Practice and Procedure, 46 RR 2d 524 (1979).

Petition a request for clarification and promptly issue an order disposing of the matter.

Respectfully submitted,

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May 24, 1994

CERTIFICATE OF SERVICE

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