GEN. DKT. NO. 90-314

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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June 3, 1994

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

The Honorable John D. Dingell
Chairman
Subcommittee on Oversight and
Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515-6116

Re: Narrowband (900 MHz) PCS Pioneer's Preferences

Dear Chairman Dingell:

This letter responds to your letter dated May 3, 1994, requesting that the Federal Communications Commission ("Commission") investigate allegations related to the grant of certain pioneer's preferences. As explained below, our investigation included an examination of the various proceedings in which the Commission awarded pioneer's preferences, an examination of the ex parte notices that were filed in the various dockets related to the PCS and pioneer's preference proceedings, and inquiries of over 120 current and former Commissioners and Commission staff. The Subcommittee's letter alleges that there were "egregious and repeated" violations of the Commission's ex parte rules in connection with the pioneer's preference awards. Our investigation uncovered no such violations by the Commissioners or the Commission staff. We also determined that the process for awarding pioneer's preferences afforded ample opportunity for public comment, and in fact, ample comment was received from interested parties.

The pioneer's preference recipients are American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox"), Mobile Telecommunication Technologies Corporation ("Mtel") and Omnipoint Communications, Inc. ("Omnipoint"). APC, Cox and Omnipoint received pioneer's preferences for broadband (2 GHz) PCS, and Mtel received a pioneer's preference for narrowband (900 MHz) PCS. This letter contains our response to each of the questions posed by the Subcommittee related to Mtel's narrowband PCS pioneer's preference. Issues related to the broadband PCS pioneer's preferences awarded to APC, Cox and Omnipoint are being addressed in a separate letter also being sent today. There are no claims before the Commission of any procedural impropriety regarding the grant of a pioneer's preference to Mtel.

The Subcommittee's inquiries involve several interrelated Commission proceedings, which are summarized briefly below as background for our responses to the Subcommittee's questions. On April 9, 1991, the Commission adopted rules to establish a pioneer's preference program designed to encourage and reward innovators of new communications services or technologies. See Report and Order in Gen. Docket No. 90-217, 6 FCC Rcd 3488 (1991),[1] recon. granted in part, 7 FCC Rcd 1808 (1992),[2] further recon. denied, 8 FCC Rcd 1659 (1993)[3]; 47 C.F.R. §§ 1.402-1.403, § 5.207. In order to qualify for a preference under these rules, a requester must propose a new service or substantial enhancement to an existing service. To be granted, a request must be supported by a demonstration of its technical feasibility. If the requirements of the rules are met, the requester will be awarded a pioneer's preference. The application filed by the pioneer's preference recipient for a license in the geographic area of its preference award is not subject to competing applications. As many requests for preferences as satisfy the standards set forth in the rules may be granted, although the Commission has indicated that it would not award preferences where other frequencies would not be available in the market for non-recipients of pioneer's preferences. Memorandum Opinion and Order in Gen. Docket No. 90-217, 8 FCC Rcd at 1659 n.4.

The Commission formally addressed the subject of allocating spectrum for PCS for the first time on June 14, 1990, when it adopted a notice of inquiry in response to petitions for rulemakings which specifically requested allocation of spectrum for PCS. See Notice of Inquiry in Gen. Docket 90-314, 5 FCC Rcd 3995 (1990).[4] On October 25, 1991, the Commission issued a Policy Statement and Order in Gen. Docket 90-314, 6 FCC Rcd 6601

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[1] Chairman Sikes and Commissioners Quello, Marshall, Barrett and Duggan voted in favor of the Report and Order. Commissioners Marshall and Duggan also issued separate statements.

[2] Chairman Sikes and Commissioners Quello, Marshall, Barrett and Duggan voted in favor of the Memorandum Opinion and Order.

[3] Commissioners Quello, Barrett and Duggan voted in favor of the Memorandum Opinion and Order. Commissioner Marshall did not participate in this decision.

[4] This was a decision by the full Commission. Individual votes were not noted.

(1991),[5] in which it indicated that it intended to define PCS broadly, to adopt regulations to promote the rapid development of PCS, and to promote competition in PCS and in telecommunications in general.

On July 16, 1992, the Commission proposed the establishment of both narrowband and broadband PCS services and made a tentative award of a pioneer's preference to Mtel for a license for the 900 MHz narrowband service. See Notice of Proposed Rule Making and Tentative Decision in Gen. Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992).[6] On October 8, 1992, the Commission tentatively concluded that pioneer's preferences should be awarded to APC, Cox, and Omnipoint for their innovative efforts in the development of broadband PCS services. See Tentative Decision and Memorandum Opinion and Order in Gen. Docket No. 90-314, 7 FCC Rcd 7794 (1992),[7] appeal pending sub nom. Adams Telecom, Inc. v. FCC, No. 93-1103 (D.C. Cir. filed February 2, 1993).

On June 24, 1993, the Commission adopted final rules for the establishment of narrowband PCS and made final its tentative award of a pioneer's preference to Mtel. See First Report and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993),[8] appeal pending sub nom. BellSouth Corp. v. FCC, No. 93-1518 (D.C. Cir. filed August 20, 1993). As noted above, there are no claims before the Commission of any procedural impropriety regarding the grant of a pioneer's preference to Mtel. (Allegations of impropriety before the Commission related to grants of pioneer's preferences in the broadband PCS service are addressed in a separate response filed today).

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[5] Chairman Sikes and Commissioners Quello, Barrett, Marshall and Duggan voted in favor of the Policy Statement. Commissioner Barrett issued a separate statement.

[6] Chairman Sikes and Commissioners Barrett, Duggan and Marshall voted in favor of the NPRM. Commissioner Quello concurred in a separate statement. Commissioners Barrett and Marshall also issued separate statements.

[7] Chairman Sikes and Commissioners Quello, Barrett and Marshall voted in favor of the Tentative Decision. Commissioner Duggan concurred and Commissioner Barrett issued a separate statement.

[8] Interim Chairman Quello and Commissioners Barrett and Duggan voted in favor of the First Report and Order. Commissioner Barrett issued a separate statement.

In August, 1993, Congress enacted legislation authorizing the Commission to conduct competitive bidding for resolving mutually exclusive applications in certain services. In response, the Commission commenced a rulemaking proceeding on October 21, 1993, to consider "whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding" and, alternatively, "whether if we retain the preference rules, we should amend them to better work with our competitive bidding authority." See Notice of Proposed Rule Making in ET Docket No. 93-266, 8 FCC Rcd 7692, 7693-94 (1993) (the pioneer's preference review proceeding).[9]

In the NPRM, the Commission indicated that, as a matter of equity because final preference grants already had been made, "nothing in this review will affect" pioneer's preference decisions in narrowband PCS and the non-geostationary (NVNG) mobile satellite service below 1 GHz (so-called "Little LEOs"). Thus, the Commission determined that its authority to conduct auctions would not affect Mtel's pioneer's preference for narrowband PCS. With respect to broadband PCS and other services for which tentative pioneer's preference grants or denials had been made, the Commission requested "comment on whether any repeal or amendment of our rules should apply." Id. at 7694-95.

On December 23, 1993, the Commission decided that, as a matter of equity, the existing preference rules should continue to apply in the proceedings (such as broadband PCS) in which tentative preferences already had been granted or denied.[10] Thus, recipients of preferences for these services would not have to pay for any license they may receive as a result of a preference. See First Report and Order in ET Docket No. 93-266, 9 FCC Rcd 605 (1994).[11] The Commission concluded, however, that action on the basic underlying question in that proceeding -- whether to repeal, retain, or amend the pioneer's preference rules -- should be deferred to a later Report and Order.

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[9] Interim Chairman Quello and Commissioner Duggan voted in favor of the NPRM. Commissioner Barrett disapproved in part and concurred in part in a separate statement.

[10] Commissioners Quello, Barrett and Duggan voted in favor of the First Report and Order. Chairman Hundt did not participate in the decision.

[11] The Commission also reiterated the decision it made in the Notice, namely that any changes in the pioneer's preference rules would not apply to narrowband PCS.

On December 23, 1993, the Commission took final action on the broadband PCS pioneer's preference requests by affirming its tentative awards of pioneer's preferences for PCS broadband licenses to APC, Cox and Omnipoint. See Third Report and Order in Docket 90-314, 9 FCC Rcd 1337 (1994),[12] petitions for recon. pending, appeals pending sub nom. Pacific Bell v. FCC, No. 94-1148 (D.C. Cir. filed March 1, 1994). Chairman Hundt recused himself from both the First Report and Order and the Third Report and Order because his former law firm represented one of the parties to the preference proceedings.

On February 3, 1994, in response to petitions for reconsideration challenging various aspects of Mtel's narrowband pioneer's preference, the Commission reaffirmed its grant of a nationwide 50 KHz pioneer's preference to Mtel. In so doing, it reaffirmed that Mtel would not be required to make any payment (other than standard filing fees) for its license. See Memorandum Opinion and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 1309 (1994).[13]

Different ex parte rules apply to various aspects of the pioneer's preference, PCS and related proceedings. For example, the pioneer's preference review (ET Docket No. 93-266) and PCS spectrum allocation (Gen. Docket No. 90-314, ET Docket No. 92-100) rulemaking proceedings are non-restricted proceedings in which ex parte communications are permissible but must be disclosed. See 47 C.F.R. § 1.1206. Although the pioneer's preference requests were considered in the context of the PCS spectrum allocation rulemaking proceedings, they are treated separately within the rulemaking dockets as adjudicative-type proceedings rather than rulemakings. Each pioneer's preference proceeding is assigned a "PP" docket number within the rulemaking docket. These adjudicatory proceedings to determine who may receive a PCS pioneer's preference are restricted once they are formally opposed, at which time ex parte presentations are prohibited. See 47 C.F.R. § 1.1208.

Under the Commission's rules, however, status inquiries as well as communications that are "inadvertently or casually made" are not considered ex parte presentations. 47 C.F.R. § 1.1202(a).

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[12] Commissioners Quello, Barrett and Duggan voted in favor of the Third Report and Order. Each issued a separate statement. Chairman Hundt did not participate in the decision.

[13] Chairman Hundt and Commissioners Quello and Barrett voted in favor of the Memorandum Opinion and Order. Commissioner Barrett issued a separate statement.

In addition, the pendency of a restricted adjudicatory proceeding does not preclude parties from making permissible ex parte presentations in related rulemaking proceedings, so long as no presentations are made regarding the restricted adjudications. See Report and Order in Gen. Docket No. 86-225, 2 FCC Rcd 3011, 3014 (1987). For example, a pioneer's preference recipient could make an ex parte presentation generally about rules that may ultimately affect its preference request so long as it does not specifically address the merits of its particular preference request. See Report and Order in Gen. Docket No. 90-217, 6 FCC Rcd at 3493, 3500 n.9.

Following are the responses to the questions posed by the Subcommittee with respect to narrowband PCS pioneer's preference issues. All responses apply to events which occurred through May 13, 1994, unless otherwise indicated in our response or by the context of the question.

In responding to this and other questions in your letter, we have reviewed the ex parte notices filed in the relevant rulemaking dockets and information provided by current and former Commissioners and Commission staff involved in the relevant proceedings. These individuals reviewed their calendars, notes, phone logs and recollections of events during this period. Information provided by these individuals was used to cross-check items filed with the Commission and vice versa. It is important to note, however, that some individuals could not recall the details of some contacts. In addition, the Office of General Counsel has not contacted any individuals outside the Commission in relation to our response to your letter, other than former Commissioners and their staffs who were at the Commission during or after January, 1992.[14] Consistent with discussions with your staff we have not included pleadings and other formal filings within the scope of our investigation.

1. **Was the Commission's decision in the matter styled "ET Docket No. 93-266" made at an open meeting? Or was this decision made using the Commission's "circulation" procedures?**

The First Report and Order in ET Docket No. 93-266 (the pioneer's preference review proceeding) principally addressed broadband PCS pioneer's preference issues. Thus, this question is answered in our separate response which addresses broadband

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[14] The introductory pages to Exhibit 2 identify the Commissioners and Commission staff who had contacts with the pioneer's preference recipients.

PCS.

2. **It is my understanding that the Commission's practice is to release immediately the text of Commission decisions made using the Commission's "circulation" procedures. It is also my understanding that the "circulation" practice involves a series of sequential edits to tentative decisions by the participating Commissioners, and accompanying "pink sheets" to colleagues explaining the reasons for changes.**

   a. **When was the text of the Commission's decision in the above-referenced Docket released?**

The First Report and Order in ET Docket No. 93-266 principally addressed broadband PCS pioneer's preference issues. Thus, this question is answered in our separate response which addresses broadband PCS.

   b. **Please describe the "circulation" process to the Subcommittee in detail.**

The Commission takes action either at formal Commission meetings or by circulation. The circulation process involves "the submission of a document to each of the Commissioners for approval." 47 C.F.R. § 0.5(d). The majority of the Commission's decisions are adopted on circulation.

The circulation process is conducted through either of two methods. Most commonly, a draft decision document prepared by the Commission staff is formally distributed to the Commissioners for review, and voting is accomplished through the Commission's electronic voting system. Then, each Commissioner registers his or her vote by computer. Occasionally, when time is of the essence, a manual process is used. With the manual process, a draft decision document prepared by the relevant staff is brought to the Commissioners, either at the same time or sequentially. Each Commissioner is then asked to register his or her vote by initialing a "Request for Special Action by Circulation" form (the so-called "pink sheet").

Under both methods, the circulation process involves an informal editing process. As Commissioners review and vote an item and before the item is finalized for release, the Commissioners (and their staffs, as well as other Commission staff) may propose edits to the item. To the extent these edits are substantive, they are reviewed and approved by all of the Commissioners voting for the item before the item is finalized for release.

c. **In formulating your answer to question 2(a) above, did you have access to the "pink sheets"? Were you able to determine whether significant changes were made after the announcement of the decision on December 23 and prior to the release of the text of the Commission's decision?**

The First Report and Order in ET Docket No. 93-266 principally addressed broadband PCS pioneer's preference issues. Thus, this question is answered in our separate response which addresseses broadband PCS.

d. **Are you aware of any cases involving other Commission decisions that were made "on circulation" in which the text of the decision was not released for more than 30 days?**

Yes. For example, between January 1, 1993 and May 6, 1994, we have identified thirty-five (35) Commission decisions made on circulation that were released more than thirty days after the decision was adopted.

3. **Are you able to account for the delay in the release of this text?**

The First Report and Order in ET Docket No. 93-266 principally addressed broadband PCS pioneer's preference issues. Thus, this question is answered in our separate response addressing broadband PCS.

4. **During the period between the announcement of a decision and the release of the text of that decision, it is my understanding that the subject proceeding is restricted under the Commission's rules. Are you aware of any contacts by entities designated as "pioneers" during the period beginning when the Commission's decision was announced and ending when the text of that decision was released? In your response, please include any contacts in the above-referenced proceeding and any other proceedings, including filings made with respect to experimental licenses.**

We have identified no contacts by Mtel between the time the First Report and Order was issued and the time it was released.

5. **Please obtain copies of [correspondence cited in Question 5 of the Subcommittee's letter] and other relevant correspondence and submit to the Subcommittee your analysis of the allegations contained therein. Please supply any documents necessary to support your conclusions.**

These letters did not address narrowband PCS pioneer's preference issues. Thus, this question will be addressed in our separate response which addresses broadband PCS.

6. **On what date, or dates, did the Commission's "Pioneer Preference" process become a restricted proceeding? Did the Commission issue any announcement or otherwise inform the public as to the date or the nature of the restrictions that would pertain? If so, please provide copies of any such announcements to the Subcommittee.**

As noted previously, each pioneer's preference request is treated as an individual adjudication within a larger Commission rulemaking docket concerning the proposed new service at issue. In the case of narrowband PCS services, the applicable dockets were Gen. Docket No. 90-314 and ET Docket No. 92-100. When a request for a preference is filed with the Commission, that request is assigned a "PP" number within the existing docket. Each application for a pioneer's preference becomes restricted under the ex parte rules on the date a filing is made formally opposing the request.

Mtel's preference request was formally opposed, and became restricted on June 1, 1992. Both before and after this date, the Commission issued announcements informing the public of the restricted nature of the pioneer's preference proceedings, either generally or with respect to narrowband PCS. First, on May 13, 1991, the Commission released a Report and Order in Gen. Docket No. 90-217 adopting the pioneer's preference rules. 6 FCC Rcd 3488 (1991). In that Report and Order, the Commission explained that any request for a pioneer's preference would become restricted upon the filing of a formal opposition. 6 FCC Rcd 3493.

On June 15, 1992, fourteen days after the Mtel request became restricted, the Commission staff issued a public notice explaining that the ex parte restrictions applied to pioneer's preference requests at the time at which the requests were formally opposed. Public Notice, Ex Parte Presentations Relating to Requests for Pioneer's Preferences, 7 FCC Rcd 4046 (Chief Engineer 1992).

On August 14, 1992, the Commission released a Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992) in the narrowband PCS proceeding (Gen. Docket No. 90-314). In the NPRM, the Commission stated that the pioneer's preference decisions announced therein were restricted adjudicative proceedings, and that ex parte presentations were prohibited until the proceeding was no longer subject to administrative or

judicial review. Id. at 5734, ¶ 145; 5741, ¶ 167.

Copies of the foregoing documents are attached as Exhibit 1.

7. **Did the staff that was preparing recommendations to the Commissioners with respect to "Pioneer Preference" designations have substantive contact of any sort with applicants after the date on which the preference proceeding was considered restricted? For example, were any of the staff who participated in making recommendations to the Commission on pioneer preference entitlements also reviewing reports concerning experimental licenses filed by the applicants after the date the proceeding was considered restricted?**

Yes, the staff that was preparing recommendations to the Commission had substantive contact with Mtel after the date on which its pioneer's preference request became restricted. See Exhibit 2, provided in response to Question 8. As noted above, contacts with respect to the various rulemaking proceedings were not prohibited under the ex parte rules. Similarly, status inquiries and casual remarks were not prohibited under the ex parte rules.

Several of the Commission staff members worked on both the pioneer's preference requests and the various PCS-related rulemaking proceedings. This is consistent with general Commission practice to assign staff to multiple projects involving similar issues or requiring similar expertise. With respect to your specific example, some of the staff who made recommendations to the Commission concerning preference requests also reviewed experimental license applications and reports.

8. **Please identify the dates, participants in, and specific subjects of all meetings, conversations or communications of any sort between Commission staff or Commissioners and any of the four applicants ultimately designated as "pioneers" after the dates on which the Commission considers the proceedings to have been restricted. Please include any contacts which addressed personal communications services in general; experimental licenses held by applicants (including technical trials or reports of any sort related thereto); or any contacts related to the "pioneer preference" rules as considered in Docket 93-266 or more generally. In your response, please include a listing of all contacts, including those considered to be status inquiries.**

Please provide a copy of all written materials submitted to the Commissioners or staff with respect to the above issues.

A list of all such contacts that we have identified with respect to Mtel is attached as Exhibit 2. As noted above, contacts with respect to the various rulemaking proceedings are not prohibited under the ex parte rules if disclosed. Similarly, status inquiries and casual remarks are not prohibited under the ex parte rules. The copies that we have been able to identify of written materials submitted to the Commissioners or staff during these contacts are attached as Exhibit 3. Copies of the relevant ex parte notices are attached as Exhibit 4.

9. a. **Do any of the technical or other reports on the experimental licenses of the four applicants who received a "pioneer preference" award, filed on or after the dates on which the Commission considers the PCS "Pioneer Preference" proceeding to have become restricted, address or respond to arguments made by commenters concerning any of the recipient's qualifications to receive a pioneer preference?**

Yes. Based on our review of the experimental license reports filed by Mtel, we have identified only one such report, the June 29, 1992 report identified in Question 9(b). That report was served on the parties to the Mtel pioneer's preference proceeding.

b. **If your answer to the above [Question 9(a)] is "no", please address your understanding of the meaning of Mtel's statement in its progress report, filed June 29, 1992, that "Mtel decided to revise its planned test schedules and first evaluate its Multi-Carrier Modulation ("MCM") techniques in order to conclusively address comments made by other parties in response to Mtel's June 1, 1992, MMM Technical Feasibility Demonstration," and its submission therein of materials bolstering its claim that it could achieve the data rates for which it ultimately was awarded a preference.**

The answer to Question 9(a) is "Yes."

c. **Were any of the reports filed in the Experimental License files by the four "Pioneer Preference" recipients served by those recipients on parties opposing their "Pioneer Preference" awards? Did the Commission's rules require service of these reports on the entities opposing the "Pioneer Preference" awards made by the Commission?**

Some (but not all) of the experimental license reports, including the Mtel report referenced above, were served. The

Commission's rules do not explicitly provide for service of the experimental reports. As explained below in response to Question 9(d), the reports were available to the public.

d. **Were any procedures established by the Commission to notify opponents to the awards that the reports had been received, or that the recipients had met with Commissioners or Commission staff regarding the experimental licenses, or reports associated therewith? If not, would such notice and opportunity to comment have been proper?**

Yes. On May 10, 1991, the Chief of the Frequency Allocations Branch of the Office of Engineering and Technology filed a memorandum in Gen. Docket No. 90-314, indicating that PCS experimental license reports were being incorporated into the docket, and that such reports were available for public inspection and copying. Based on the recollections of the Commission staff persons involved in the experimental licensing process, numerous parties inspected and copied the documents. No procedures were established to notify the public of any meetings by pioneer's preference requesters regarding their experimental reports. Because numerous parties inspected and copied the reports, it does not appear that additional notice and comment procedures were necessary.

e. **Has the Commission determined that no ex parte information received by the Commissioners or Commission staff on or after the dates on which the proceedings became restricted was considered by the staff in its recommendations that the "Pioneer Preference" recipients were so entitled? If so, what is the basis for such a determination?**

As noted above, ex parte presentations in the rulemaking proceedings were not prohibited so long as they did not address the merits of the pioneer's preference requests. In addition, status requests and casual or incidental remarks were not prohibited. We have not identified any contacts that fall outside these categories of permissible communications. The Commission's rules require that impermissible ex parte presentations in restricted proceedings be reported to the Managing Director by the person to whom the presentation is addressed, 47 C.F.R. § 1.1212. We have confirmed that no such reports have been made regarding Mtel.

f. **Has the Commission determined that no ex parte information received by the Commissioners themselves, either directly or through the staff, on or after the**

date the proceedings became restricted, was considered in determining whether the recipients were entitled to "Pioneer Preferences"? If so, what is the basis for such a determination?

Based on our interviews with the Commissioners and their staffs, we have determined that after the Mtel pioneer's preference proceeding became restricted, none of the Commissioners received ex parte presentations which addressed the merits of the Mtel pioneer's preference request or were otherwise outside the categories of permissible communications. In addition, before receiving ex parte presentations by pioneer's preference recipients, the Commissioners or their staffs reminded the recipients that discussion of the merits of contested pioneer's preference requests is prohibited.

10. With respect to the four entities ultimately designated as recipients of "Pioneer Preference" awards, please respond to the following questions:

a. On what dates did Commission personnel visit the sites at which experiments were conducted to verify the results of the trials?

Commission staff did not visit any test sites to verify Mtel trial results. On February 25, 1993, several Commission personnel and numerous other individuals attended a demonstration of an existing nationwide paging network operated by SkyTel, a subsidiary of Mtel.

b. Please furnish the Subcommittee with the names and titles of all such personnel.

Dr. Thomas Stanley, the Commission's Chief Engineer, Thomas Mooring, an Electronics Engineer, and Fred Thomas, an Electronics Engineer, all of whom work in the Commission's Office of Engineering and Technology, attended the demonstration.

c. Please describe the reports that were drafted subsequent to site visits.

Not applicable.

d. How were such reports treated by the Commission? Were they placed in the Public File? Were they released to the public so as to permit comments? Please detail any comments that were received by the Commission in response to their release to the public.

Not applicable.

e. Did the Commission establish an internal review process for such reports? Please list the names and titles of all Commission personnel involved in such a review.

Not applicable.

f. Did the Commission establish a "Peer Review" process for the independent review of testing results? If so, please furnish the Subcommittee with a description of such a process, including the names and credentials of any "Peer Review" panel that examined and verified test results.

No.

11. With respect to the site visits referred to above, please furnish the Subcommittee with the following information:

a. During the conduct of the testing, how many channels were utilized for each applicant during each test?

Not applicable.

b. What channel assignments were utilized for each test? Were these the same channel assignments, or at least in the same frequency band, as the assignments that had been granted for the four recipients of the "Pioneer Preference" designation? If not, how does the Commission intend to enforce its condition that "each licensee must build a system that substantially uses the design and technologies upon which its preference award is based"?

No such testing occurred. As in all cases in which it imposes conditions on licenses, the Commission has available the full range of sanctions provided in the Communications Act to discipline Mtel if it violates a condition of its license. For example, the Commission could fine Mtel, issue a cease and desist order, revoke its license or decline to renew its license. The Commission has not indicated specifically which of these enforcement mechanisms would be invoked in the event that Mtel were to violate a condition of its license.

c. During the conduct of the testing, how many base stations were built for each of the four applicants? How far apart were the base stations? During the course of the site visits, how many handsets were the

Commission personnel able to verify were deployed? How many hand-offs were recorded by Commission personnel?

Not applicable.

12. a. **During the course of the Committee's deliberations concerning the auctioning provisions of last year's "Omnibus Budget Reconciliation Act," there were varying estimates of the amount of revenue that would be received by the Government as the result of assigning frequencies by competitive bidding. It is my understanding that the most recent estimate by the Office of Management and Budget is $30 per "pop" (unit of population). Using this estimate, please furnish the Subcommittee with an analysis of revenue foregone directly for the four licenses that will not be issued by competitive bidding procedures if the Commission issues licenses to the four recipients of "Pioneer Preference" awards.**

We have not independently estimated the auction revenue foregone for the Mtel narrowband PCS pioneer's preference award. Developing an accurate estimate of foregone revenue is difficult. There are no established numerical values for the nationwide market for narrowband PCS, for the spectrum being used for PCS or for the PCS technology itself, which is new.

We are not aware of any OMB estimates of $30 per unit of population, or "pop." However, the House Budget Committee estimated in 1993 that total broadband PCS revenues would be approximately $10 billion. Dividing $10 billion by the U.S. population of approximately 250 million results in an average estimated value of $40 per pop for all 120 MHz of spectrum allocated to broadband PCS. Thus, the 30 MHz of PCS spectrum awarded to each of the broadband PCS pioneer's preference recipients would represent approximately $10 per pop. Using the results of the calculations for broadband PCS, the 0.5 MHz nationwide narrowband pioneer's preference awarded to Mtel would represent an estimated $4 million in foregone revenue.

b. **In addition, please furnish the Subcommittee with your analysis of the effect that issuing these four licenses at no cost to the licensee is likely to have on those who might be prospective bidders for one of the remaining licenses. Please make every attempt to quantify the impact of issuing these licenses without a cost on the bidding strategies of potential bidders.**

The net effect of awarding licenses under the pioneer's

preference rules on the value of the remaining PCS licenses cannot be quantified easily. It could result in an increase or a decrease in auction revenues derived from the remaining licenses, depending on the circumstances. The Commission's staff believes that issuing these licenses prior to auctioning the remaining licenses could affect the strategies of potential bidders and the ultimate assignment of licenses. The effect on bidding for the remaining licenses is likely to depend on whether those licenses are complements or substitutes for the licenses awarded under the pioneer's preference rules. Once the pioneer's preference licenses have been issued, bidders (other than the pioneer awarded a license) interested in licenses that are close substitutes for pioneer's preference licenses would likely be willing to pay more for these remaining licenses. This is because there is one less close substitute available for auctioning. On the other hand, bidders (other than the pioneer awarded a license) interested in complementary licenses (i.e., licenses that bidders may wish to combine with the license awarded to the pioneer) would likely be willing to pay less for such remaining licenses than if all the complementary licenses were up for auction at the same time.

As noted above, our review of the PCS and pioneer's preference proceedings, the relevant ex parte notices, and information provided by current and former Commissioners and Commission staff uncovered no misconduct by the Commission in these proceedings. I trust that the foregoing is fully responsive to your inquiries and addresses your concern about possible improprieties by the Commission related to the grant of a pioneer's preference to Mtel. Should you require any additional information in this regard, please contact me.

Sincerely,

William E. Kennard

William E. Kennard
General Counsel

cc (w/attachments): The Honorable Dan Schaefer, Ranking Republican Member
Subcommittee on Oversight and Investigations

Attachments:

Exhibit 1: Notices Regarding Ex Parte Restrictions (Question 6)

Exhibit 2: Substantive Contact Between Commission Staff and Mtel After Proceeding Became Restricted (Question 8)

Exhibit 3: Materials Submitted By Mtel During Meetings With Commission Personnel (Question 8)

Exhibit 4: Ex Parte Notices

EXHIBIT 2

Substantive Contact Between Commission Staff and Mtel After Proceeding Became Restricted

(Question 8)

REPORTED CONTACTS WITH COMMISSION PERSONNEL

The following chart lists contacts with Commissioners and Commission staff members reported by Mobile Telecommunications Technologies, Inc. (Mtel) after its pioneer's preference request became a restricted proceeding within Gen. Docket No. 90-314 on June 1, 1992. The list is derived from the Commission's docket files in the following proceedings: ET Docket No. 93-266 (Review of the Pioneer's Preference Rules); PP Docket No. 93-253 (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding); ET Docket No. 92-9 (Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies); Gen Docket No. 90-314 and ET Docket No. 92-100 (Amendment of the Commission's Rules to Establish New Personal Communications services; and Gen. Docket No. 90-217 (Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services).

The following Commission personnel participated in contacts:

Kathleen Q. Abernathy -- Assistant to Commissioner Marshall
Beverly G. Baker -- Deputy Chief, Private Radio Bureau (PRB)
Commissioner Andrew C. Barrett
Donald Campbell -- Office of Engineering and Technology (OET)
Kelly Cameron -- Legal Assistant to Bureau Chief, Common Carrier Bureau (CCB)
Jonathan V. Cohen -- Special Assistant to Interim Chairman Quello; Office of Plans and Policy (OPP)
Randall S. Coleman -- Assistant to Commissioner Duggan
Thomas P. Derenge -- OET
Richard Engelman -- Chief, Technical Standards Branch, OET
Brian F. Fontes -- Chief of Staff to Interim Chairman Quello; Senior Legal Advisor to Commissioner Quello
Bruce A. Franca -- Deputy Chief Engineer
Donald H. Gips -- Deputy Chief, OPP
Phillip Inglis -- OET
Edward R. Jacobs -- Deputy Chief, Land Mobile and Microwave Division, PRB
Stevenson S. Kaminer -- Assistant to Commissioner Marshall, Legal Counsel, OET
Julius Knapp -- Chief, Authorization and Evaluation Division, OET
Evan R. Kwerel -- OPP
Damon Ladson -- OET
Martin D. Liebman -- Deputy Chief, Rules Branch, Land Mobile and Microwave Division, PRB
Paul Marrangoni -- OET

Commissioner Sherrie Marshall
Maura McGowan -- OET
Tom Mooring -- OET
John Morgan -- OET
Kent Y. Nakamura -- Legal Counsel, PRB
F. Ronald Netro -- Engineering Assistant, PRB
Robert M. Pepper -- Chief, OPP
Larry Petak -- OET
Nam P. Pham -- OET
Commissioner and Interim Chairman James H. Quello
Karen Rackley -- PRB
David P. Reed -- OPP
John A. Reed -- OET
Liz Ross-Meltzer -- CCB
Greg Rosston -- OPP
Anthony Serafini -- OET
David R. Siddall -- Chief, Frequency Allocations Branch, OET
Rodney Small -- OET
Thomas P. Stanley -- Chief Engineer
Fred Thomas -- OET
John R. Williams -- OPP
Frank Wright -- OET

ET Docket No. 93-266 (Pioneer's Preference Review)[1]

Letter	Meeting	Participants[2]	Subject

No contacts were reported by Mtel.

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[1] This was not a restricted proceeding under the Commission's ex parte rules.

[2] Where no meeting is indicated, the "participants" are the recipients of the written presentation indicated under "letter."

ET Docket No. 92-100 (Narrowband PCS)[3]

Letter	Meeting	Participants	Subject
6-15-93	6-14-93	Fontes, Cohen	issues, channelization plans attachment
6-11-93	6-11-93	Abernathy	channelization plans attachment
6-11-93	6-11-93	Coleman	channelization plans attachment
6-4-93 (filed 6-7-93)	6-1-93	Quello	comments[4]
6-4-93 (filed 6-7-93)	6-1-93	Barrett	comments
3-16-93	3-16-93	Siddall, Thomas, Mooring	comments
2-11-93	2-9-93	Pepper and staff	comments
2-11-93	2-9-93	Barrett and staff	comments
2-11-93	2-9-93	Stanley and staff	comments
2-11-93	2-9-93	Marshall and staff	comments

[3] The only aspects of this proceeding that were restricted under the Commission's ex parte rules were the individual pioneer's preference requests that were formally opposed. Each pioneer's preference request was assigned a separate "PP" docket number (an adjudicatory proceeding) within the larger rulemaking docket.

[4] The term "comments" is used throughout this Exhibit 2 to indicate that materials previously filed with the Commission were the subject of the meeting.

2-11-93	2-9-93	Baker and staff	comments
2-11-93	2-9-93	Duggan and staff	comments
2-11-93	2-9-93	Quello and staff	comments
6-24-92	6-24-92	Franca, Siddall	rulemaking petition, channel availability attachment
6-24-92	6-24-92	Pepper	rulemaking petition, channel availability attachment
6-24-92	6-24-92	Abernathy, Farquhar	rulemaking petition, channel availability attachment
6-24-92	6-24-92	Kuchera	rulemaking petition, channel availability attachment
6-24-92	6-24-92	Fontes	rulemaking petition, channel availability attachment

Gen. Docket No. 90-314 (Broadband and Narrowband PCS)[5]

Letter	Meeting	Participants	Subject
6-15-93	6-14-93	Fontes, Cohen	issues, channelization plans
6-11-93	6-11-93	Abernathy	channelization plans attachment
6-11-93	6-11-93	Coleman	channelization plans attachment
6-4-93 (filed 6-7-93)	6-1-93	Quello	comments
6-4-93 (filed 6-7-93)	6-1-93	Barrett	comments
3-16-93	3-16-93	Siddall, Thomas, Mooring	comments
2-11-93	2-9-93	Pepper and staff	comments
2-11-93	2-9-93	Barrett and staff	comments
2-11-93	2-9-93	Stanley and staff	comments
2-11-93	2-9-93	Marshall and staff	comments
2-11-93	2-9-93	Baker and staff	comments
2-11-93	2-9-93	Duggan and staff	comments

[5] The only aspects of this proceeding that were restricted under the Commission's ex parte rules were the individual pioneer's preference requests that were formally opposed. Each pioneer's preference request was assigned a separate "PP" docket number (an adjudicatory proceeding) within the larger rulemaking docket.

2-11-93 2-9-93 Quello and staff comments