

EX PARTE OR LATE FILED
COVINGTON & BURLING

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

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

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

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

WRITER'S DIRECT DIAL NUMBER

DOCKET FILE COPY ORIGINAL

July 13, 1994

BY MESSENGER

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: ET Docket 93-266

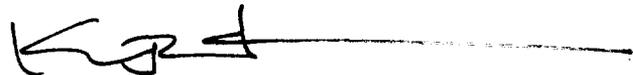
Dear Mr. Caton:

American Personal Communications notifies the Commission that the attached pleading today has been provided to the Chairman, Commissioners and certain FCC personnel.

The pleading, which was filed with the United States Court of Appeals yesterday, demonstrates that the Commission quite clearly would have prevailed had it defended the First Report in this docket before the court and suggests certain procedural refinements to expedite the decisionmaking process.

APC believes that the Commission should carefully consider the points in its pleading when it deals with this issue on reconsideration, remand or both.

Very truly yours,



Jonathan D. Blake
Kurt A. Wimmer

Attorney for American
Personal Communications

cc: Attached List

No. of Copies rec'd
List ABCDE



ATTACHMENT

The Hon. Reed Hundt
The Hon. James H. Quello
The Hon. Andrew C. Barrett
The Hon. Rachelle B. Chong
The Hon. Susan P. Ness
Blair Levin, Esq.
Karen Brinkmann, Esq.
Rudolfo Lujan Baca, Esq.
Lauren J. Belvin, Esq.
Byron F. Marchant, Esq.
James L. Casserly, Esq.
David R. Siddall, Esq.
Mary McManus, Esq.
Jane E. Mago, Esq.
Richard K. Welch, Esq.
Jill Lockett, Esq.
Dr. Thomas P. Stanley
Dr. Robert M. Pepper, Chief
Mr. Donald Gips, Deputy Chief
William E. Kennard, Esq.
Peter A. Tenhula, Esq.
David Solomon, Esq.
Mr. Ralph A. Haller, Chief

RECEIVED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JUL 15 1994

RECEIVED IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

<hr/>)
PACIFIC BELL, <u>et al.</u> ,)
)
	Petitioners,)
)
	v.)
)
FEDERAL COMMUNICATIONS COMMISSION)
and THE UNITED STATES OF AMERICA,)
)
	Respondents.)
<hr/>)

No. 94 - 1148 (and consolidated cases)

RESPONSE TO EMERGENCY MOTION TO REMAND

Intervenor American Personal Communications (APC) responds to the FCC's emergency motion both to dispel the misimpression that Petitioners' arguments have merit (FCC Motion 4) and to correct errors in both the FCC's proposed relief and its proposed procedures. While the Commission apparently seeks to have this Court remand the case, the proper course under Circuit Rule 41(b) is to remand only the record so that the Court will retain jurisdiction over the case.

Overridingly, APC will demonstrate that the FCC's January 28, 1994, order, Review of Pioneer's Preference Rules, First Report and Order, 9 FCC Rcd 605, 610, ¶ 9 (1994), in which the FCC decided to take final action on long-pending and tentatively granted broad-brand PCS pioneer preferences, pending any final decision whether to revise the "pioneer" rules, was entirely consistent with the FCC's newly granted auction authority in § 309(j) of the Communications Act. Moreover, the Commission's January 28 order properly recognized that all relevant equitable considerations supported its action.

The Commission's present change of heart with respect to that order has developed because the Commission either has undertaken an inadequate analysis of Petitioners' legal arguments or has succumbed to a temptation which Congress specifically ruled out when enacting § 309(j): that "important Commission policy objectives should not be sacrificed in the interest of maximizing revenues from auctions." H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993).

I. BACKGROUND

Prior to 1991, all FCC licenses were given away for free. These licenses were valuable -- some extremely so. For example, Petitioners PacBell and Bell Atlantic already received "for free" a set aside extremely valuable licenses for cellular service. See supra, pp. 5-6, n.2. In 1991, however, the FCC had a better idea: It would use these valuable licenses as incentives "to encourage the investment of money and energy to develop new ideas" concerning communications services and technologies, Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Report and Order, 6 FCC Rcd 3488, 3493, ¶ 44 (1991), and the public would reap the benefit of these pioneering efforts in the form of "new and innovative communications services." Id. at 3490, ¶ 19. The Commission therefore provided that the "significant reward," id. at 3490, ¶ 18, waiting for a successful pioneer at the end of its innovative efforts would be that its application for an FCC license would "not be subject to mutually exclusive applications." Id. at 3498 (setting forth 47 CFR § 1.402(b), now codified at § 1.402(d)). The

bottom line for prospective pioneers was this: Hard work would be rewarded with something of great value -- an FCC license not subject to "mutually exclusive applications."

In August of 1993, Congress had another idea: It authorized the FCC to auction all licenses that were subject to "mutually exclusive applications." This "competitive bidding" authority was designed to replace the two techniques that the FCC had previously used to resolve "mutually exclusive applications" -- the "lottery" system, which had given rise to "get rich quick" schemes by "firms that would submit an application for a fee, so-called 'licensing mills,'" and "[c]omparative hearings [which] frequently have been time consuming, causing technological progress and the delivery of services to suffer." H.R. Rep. No. 111 at 248. Congress expressly warned the Commission, however, that the statute did not

"relieve the Commission of the obligation in the public interest to continue to use . . . threshold qualifications . . . and other means in order to avoid mutual exclusivity"

§ 309(j)(6)(E), and it directed that nothing in the statute would affect the FCC's pioneer policy, § 309(j)(6)(G).

In response to the enactment of § 309(j), the Petitioners in this case have come up with a very bad idea, indeed one with no legal basis: They propose that the Commission charge successful pioneers for their licenses even though they have spent millions of dollars and years of effort in pursuit of what the FCC promised them: a license "not subject to mutually exclusive

applications." To a successful pioneer such as APC, this means: After you have worked to get a license, you must pay for it too.

In support of that argument, Petitioners have filed with this Court a brief short on law and facts, but long on deceptive rethoric: For example, they accuse the FCC of playing "Santa Claus" merely because it had proposed to confer the reward it had previously promised to the pioneers who had already undertaken enormous efforts in reliance on the Commission's express assurances. Petitioners also claim that, after the enactment of § 309(j), awarding successful pioneers licenses as promised would constitute "an unprecedented windfall." But these licenses did not become valuable overnight; they have always been so. That is why, years before the enactment of § 309(j), the Commission could hold out as a "significant reward," 6 FCC Rcd at 3490, ¶ 18, the "guarantee" of a license, id., at 3492, ¶ 32, and thereby "encourage the investment of money and energy to develop new ideas," id. It surely provides no "windfall" for the Commission to deliver the promised reward after pioneers have invested large amounts of money and energy in good faith reliance on the Commission's prior commitment.

Incredibly, the FCC has filed with this Court a motion stating its belief that "this Court would ultimately vacate the Commission's orders and remand for further proceedings." FCC Motion 3. We file this response principally to reply to that assertion. In disposing of the Commission's emergency motion, this Court should not labor under any misimpression that there is any

merit to Petitioners' contentions or that the orders on review here are legally deficient in any respect.

II. SECTION 309(j) DOES NOT AFFECT THE COMMISSION'S PIONEER RULES.

A. Section 309(j) Requires The FCC to Continue Using Pioneer Rules and Similar Devices to Avoid Mutually Exclusive Applications.

The major thrust of Petitioners' brief is designed to leave the misimpression that § 309(j) created a regime whereby the FCC is expected to sell as many radio licenses as possible. Thus, their brief bristles with rhetoric condemning the Commission "for choosing to give away, for nothing," PCS licenses, instead of selling them. Petr. Br. 14. The Commission's action is characterized as an "unprecedented" or "gigantic give-away," resulting in an "unprecedented windfall."^{1/} Id. at 17, 19-20.

Turning from the rhetoric of Petitioners' argument to the language of § 309(j), it is obvious that this view of the statute is wrong. The statute applies only "[i]f mutually exclusive applications are accepted for filing." § 309(j)(1). Only then does "the Commission . . . have the authority . . . to grant . . . [a] license or permit . . . through the use of a system

^{1/} For PacBell and Bell Atlantic to denounce any FCC policy as an "unprecedented" windfall is, to put it mildly, ironic. Both of these LECs benefitted from what was a true windfall: the set-aside for wireline carriers of 50% of all of the cellular telephone licenses issued in the 1980s. See Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems, 86 F.C.C.2d 469, 493 (1981), modified, 89 F.C.C.2d 58, modified further, 90 F.C.C.2d 571 (1982), pet. for rev. dismissed sub nom. United States v. FCC, No. 92-1526 (D.C. Cir. Mar. 3, 1983).

of competitive bidding" Id. Thus, § 309(j) was intended solely to resolve mutually exclusive applications.

The FCC's pioneer rules exempt pioneers from the mutual exclusivity process by establishing "threshold eligibility standards designed to serve the public interest." Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 8 FCC Rcd 1659, 1659 ¶ 6 (1993); see also id. at 1660, ¶ 7.^{2/} Congress made it quite clear that the Commission would not find in § 309(j) any justification for abandoning such threshold standards and forcing applications into the mutual-exclusivity process so that more licenses could be sold. Section 309(j)(6) -- the controlling "rules of construction" -- states that

"Nothing in this subsection, or in the use of competitive bidding, shall --

* * * *

(E) be constructed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." (emphasis added).

^{2/} On March 8, 1993, 8 FCC Rcd 1659, the Commission rejected arguments based upon Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), and United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), that the Commission could not avoid comparative hearings, for what would otherwise be mutually exclusive applications, through pioneer awards. The FCC found that its new preference rules "fit comfortably within this body of caselaw," id. at ¶ 7, because it was well established that it could, by rule, "establish[] threshold eligibility standards designed to serve the public interest," which exempted pioneers from the "mutual exclusivity" that required comparative hearings, id. at ¶ 6.

The legislative history confirms the plain meaning of this provision. For example, the 1993 House Report on § 309(j)(6)(E) specifically instructed the Commission that

"the licensing process . . . should not be influenced by the expectation of federal revenues and the committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so."

H.R. Rep. No. 111 at 258.

Even more pointedly, Congressman Dingell, Chairman of the House Committee, wrote the FCC shortly after the enactment of § 309(j) to express concern that

"the Commission has failed to take notice of important statutory language in the new law [§ 309(j)(6)(E)], as well as relevant legislative history, which requires the Commission to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means in order to avoid mutual exclusivity . . . and thereby avoid auctions and lotteries." (emphasis added.)

He thus reminded the Commission that

"the competitive bidding authority was always intended to address those situations where the Commission could not either narrow the field of applicants or select between applicants based upon substantive policy considerations."

Letter of Congressman John D. Dingell to James H. Quello, Acting Chairman, FCC, dated November 15, 1993.

Thus, § 309(j)(6)(E), standing alone, exposes the error in Petitioners' view of the statute. But there is more, for Congress prescribed still another "rule of construction" that § 309(j) shall not

be construed to prevent the Commission from awarding licenses to those persons who make significant contributions to the development of a new telecommunications service or technology.

§ 309(j)(6)(G). This language paraphrases the FCC's pioneer rules, see 47 C.F.R. § 1.402(a), and clearly refers to the FCC's pioneer policy.^{3/}

Thus, the Commission has "the obligation in the public interest . . . to avoid mutually exclusivity," § 309(j)(6)(E), and the statute expressly states that it does not prevent the Commission from awarding pioneer preferences, § 309(j)(6)(G). It is, therefore, doubly clear that § 309(j) does not interfere with the FCC's pioneer preference policy.

The terms of § 309(j), as well as its legislative history, thus dispel the smoke screen laid down by Petitioners: § 309(j) allows competitive bidding only when the FCC is confronted with mutually exclusive applications; the FCC was instructed to avoid mutual exclusivity through, inter alia, "threshold standards," such as the pioneer rules; competitive bidding was not intended to displace pioneer preferences; and the Commission was explicitly directed not to subvert its public interest responsibilities to federal revenue concerns.

^{3/} Again, the legislative history is perfectly consistent with the plain meaning of the statute. See H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 485 (1993) (§ 309(j)(6)(G) specifically contemplates the "Pioneer's Preference" policy of the FCC); S. Rep. No. 36, 103d Cong., 1st Sess. 73 (1993) (the 1993 Act was not intended to affect the FCC's "efforts to encourage the provision of new technologies and services by entrepreneurs and innovators").

B. The Rationale for Pioneer Rules is Unaffected by § 309(j).

Petitioners' policy arguments (Br. 15, 16) contending that the rationale for the pioneer rules "evaporated" with the enactment of § 309(j) is as misconceived as their view of the statute. In promulgating the pioneer rules, the FCC recognized that a pioneer preference "could foster a host of valuable new technologies and services for the public." 6 FCC Rcd at 3490, ¶ 18. By holding out a "significant reward," the Commission believed that it could "induce innovators to present their proposals to the Commission in a timely manner" id., and that this would "serve the public interest in encouraging new and innovative communications services," id. ¶ 19. The Commission ultimately concluded that pioneers would be encouraged to develop such services by "effectively . . . guarantee[ing] the innovative party a license in the new service," id. at 3492, ¶ 32.

These policy determinations are as valid today as they were when the pioneer rules were adopted. The contention that pioneers can "test the value of their ideas in the marketplace" (Petr. Br. 15) is absurd. For example, one of APC's chief contributions was an extensive, innovative study that aided the Commission in finding usable spectrum for PCS without relocating incumbent licensees. See Amendment of Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 FCC Rcd. 1337, 1339-40, 1342-43, ¶ 11, ¶ 29, ¶¶ 35-36 (1994). That pioneering work has no "marketplace" value; it is akin to basic research which, once publicly disclosed, has little or no private value.

The same observation applies to the argument that pioneers can "control[]" whether they receive a license by outbidding others. Petr. Br. 12. Capital will not be attracted to pioneering innovations, like APC's basic work, that have vast public benefits but have little or no private value. "Control" over the award of licenses, if all were subject to competitive bidding, would slip into the hands of large entrenched entities, such as PacBell and Bell Atlantic, who are LECs and either own or have hugely profited from the cellular operations with which PCS is designed to compete.

The other form of preferences in bidding proposed by Petitioners -- installment payments, discounts -- id. at 22-23, clearly are inconsistent with the FCC's rationale for its pioneer rules. In denying reconsideration of the pioneer rules, the FCC rejected a comparable argument that pioneers should merely receive "weighted preferences" in a comparative hearing, because they "would provide no assurance to the innovative party that it would, in fact, receive a license." Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Memorandum Opinion and Order, 7 FCC Rcd 1808, 1809 ¶ 8 (1992). Petitioners' argument that pioneer preferences will confer an unfair competitive advantage upon intervenors distorts the FCC's rationale for PCS and ignores the relevant provisions of § 309(j). PCS was designed to create a competitive alternative to services offered by cellular operators and LECs. See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, 7742, ¶ 97,

¶ 112 (1993). Of course, cellular operators received their licenses for free, so they would not be at any competitive disadvantage. Furthermore, PacBell's and Bell Atlantic's arguments that pioneer grants to APC, Cox and Omnipoint, whose experience in telephony and whose assets are dwarfed by these telecommunications giants, would be anticompetitive is ridiculous. Finally, the argument that a license awarded without charge to pioneers creates an unfair competitive advantage, as against those who paid at auction under § 309(j), is inconsistent with Congress' clearly stated intention that the FCC's new auction authority should have no effect upon its pioneer policy.

III. THE COMMISSION PROVIDED A MORE THAN ADEQUATE JUSTIFICATION FOR NOT APPLYING ANY POSSIBLE FUTURE CHANGES IN PIONEER'S PREFERENCE RULES TO THE PCS PIONEERS.

In 1991, when it published its pioneer rules, the Commission promised successful pioneers that their "application[s] for a construction permit or license will not be subject to mutually exclusive applications." 6 FCC Rcd at 3498 (adding 47 CFR § 1.402(b), emphasis added). Seeking that reward, both intervenors and the unsuccessful pioneers spent millions developing innovations and, in compliance with the Commission's pioneer rules, they disclosed those innovations to the public.

Section 309(j) could be applied to the pioneer program only if, as Petitioner PacBell noted in its earlier filings,^{4/} the Commission "reconfigure[d] the [pioneer] awards so as to make them subject to mutually exclusive applications." However, for the

^{4/} Reply of Pacific Bell On Its Motion For Expedited Consideration 8 n.7 (May 24, 1994).

pioneers, especially those who had been tentatively awarded a preference, such a "reconfiguration" -- removing or significantly modifying the single reward promised for their already-completed efforts -- could only be viewed as "the ultimate public policy 'bait and switch.'" Review of the Pioneer's Preference Rules, Notice of Proposed Rulemaking, 8 FCC Rcd 7692, 7696 (1993) (Statement of Commissioner Barrett). The Commission rightly found that course of action inequitable. Contrary to Petitioners' arguments, the reasoning in the orders on review here is consistent with bedrock legal principles that have long afforded special protections to reliance interests.

A. The Pioneers' Reliance Interests.

In promulgating its pioneer rules, the FCC emphasized that the "guarantee" of a license to pioneers was necessary "to encourage the development of new services and new technologies," 6 FCC Rcd. at 3492, ¶ 32, and this "significant reward" would "induce innovators to present their proposals to the Commission in a timely manner," id., ¶ 18. The Commission was particularly concerned with reducing "risk and uncertainty" faced by innovating parties, and agreed with commentators who argued that, "since a preference is intended to encourage the investment of money and energy to develop new ideas, the Commission's standards [for awarding preferences] must have certainty." Id. at 3493, ¶ 44; see also id. at 3494, ¶ 47. The Commission clearly intended that its standards for awarding preferences would be relied upon both by "innovators and financial institutions" who would be given "sufficient certainty" that the necessary investments could take

place. Id. See also id. at 3490, ¶ 20 ("Given our decision to adopt a standard for awarding a preference, we believe that the financial community will generally be able to judge whether an applicant's proposal is sufficiently innovative and valuable to warrant investment").

In sum, the pioneer program was designed to induce parties to invest money and energy in developing innovations, and that is exactly what happened. Over the next two years, parties such as APC spent many millions of dollars developing innovative technologies. See, e.g., APC Supplement to Request for Pioneer's Preference 3 (May 4, 1992) (noting over \$10 million expended to date on innovative work). Significantly, "in reliance on the continued applicability of the pioneer's preference rules," they "publicly disclosed" the "substantial detail of their system designs" in filings with the Commission. Review of Pioneer's Preference Rules, First Report and Order, 9 FCC Rcd 605, 610, ¶ 9 (1994). This process of innovation and disclosure was precisely what the Commission intended to "induce" by holding out the "reward" of the guaranteed license. 6 FCC Rcd at 3490, ¶ 18.

On these facts, this case presents a textbook example of reasonable reliance. It is blackletter law that a private party cannot revoke offer, including an offer for a reward, as to parties who have already taken action in reasonable reliance on the offer. See, e.g., Restatement (Second) Contracts §45 at 120 (illustrations 4, 5) (1981) (rewards revoked after action in reliance constitute breach). An enforceable obligation is recognized in such circumstances precisely "to protect the offeree in justifiable

reliance on the offeror's promise." Id. at 118 (comment b). Pioneers were promised the reward of a license that would "not be subject to mutually exclusive applications." 47 CFR §1.402(b). That promise was what the pioneer applicants relied upon, and that reliance was precisely what the pioneer's preference program was intended to foster.^{5/}

B. Protection of Reliance Interests.

Petitioners argue that the Commission's respect for parties' reliance interests protects merely "private interests," not the "public interest," Petr. Br. 23-24. That argument is profoundly wrong.

The Commission instituted the pioneer's preference program specifically to "serve the public interest in encouraging new an innovative communications." 6 FCC Rcd at 3490, ¶ 19. To that end, the Commission gave express assurances that successful pioneers would receive a "reward" for their efforts in the form of a "guarantee[d]" license, and it adopted rules designed to provide as much "certainty" as possible. See, supra, pp. 14-15. Respecting the reliance interests here obviously furthers the public interest because it furthers the ability of industry, financial institutions, and indeed the entire public to take the

^{5/} Petitioners have no basis for contending that no pioneer preference recipient "submitted its application in reliance on the fact that preference awards would be free." Petr. Br. 21. As Petitioners note elsewhere in their brief, see id. at 19, all FCC licenses were free when the preferences recipients submitted their applications, and therefore they could reasonably expect (and could reasonably seek investment capital expecting) that the Commission's guarantee of a license was a guarantee of a free license.

government at its word and to place faith in the stability of existing regulatory regimes.

The protection of reliance interests resonates throughout public law. In reviewing the rationality of legislation, the Supreme Court in Nordlinger v. Hahn, 112 S.Ct. 2326, 2333 (1992), held that protecting such interests not only is "a legitimate governmental objective," but also provides "an exceedingly persuasive justification" for legislation. Nordlinger also noted that in many other areas of constitutional law "the Court has not hesitated to recognize the legitimacy of protecting reliance and expectational interests." Id. n.4 (citing Fourth Amendment, takings, and procedural due process cases).

Protection of reliance interests is of particular importance where, as here, the question concerns the timing of changes in law. One of the most fundamental canons of statutory construction -- the presumption against retroactivity -- has been applied because of "the unfairness of imposing new burdens on person after the fact." Landgraf v. USI Film Products, 62 U.S.L.W. 4255, 4263 (April 26, 1994). While the FCC below held that "[a]pplying modifications to the pioneer's preference rules prospectively to pending pioneer's preference requests would not constitute retroactive rulemaking," 9 FCC Rcd. 610 n.24 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219-20 (1988) (Scalia, J., concurring)),^{5/} that does not negate the enormous

^{5/} APC argued below, and continues to maintain, that it would clearly constitute retroactive rulemaking to apply any change in the pioneer's preference rules to those parties who,
(continued...)

reliance interests at stake here. Bowen did not identify some magical bright line, on one side of which an agency has license to upset expectations, while on the other side it is absolutely forbidden to do so. Determining the "line" itself is not an exact science, but an equitable judgment guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations." Landgraf, 62 U.S.L.W. at 4263. Indeed, "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." Id.

Moreover, hesitancy to unsettle reasonable reliance may dictate timing. As Justice Scalia noted in his concurring opinion in Bowen, "[a] rule that has unreasonable secondary retroactivity - - for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule -- may for that reason be 'arbitrary' or 'capricious' . . . and thus invalid." 488 U.S. at 220 (citation omitted). Thus, in National Assn. of Independent Television Producers and Distributors v. FCC, 502 F.2d 249, 253 (2d Cir. 1974) (NAITPD), the court ordered the FCC to suspend operation of a rule change for over a year because an earlier effective date would not adequately protect parties who had produced television programs "in reliance on the [old] rule." As in this case, the parties whose reliance interests were found worthy of protection in NAITPD "had good

§/ (...continued)

through enormous efforts undertaken in reliance on rules and the express assurances of the FCC, have already earned the right to the benefit promised under the rules.

reason to rely" on the old rule because the Commission "did not merely acquiesce in [the parties'] activities, it invited and encouraged them." Id. at 255.

In other circumstances, where agencies have mitigated the retrospective effects of rule changes, this Court has applauded, not disparaged, their decisions. In City of Chicago v. FPC, 385 F.2d 629, 642 (D.C. Cir. 1967), this Court commended "[t]he good sense and reasonableness, and hence presumptive validity, of a determination to start the effectiveness of a new policy with the date of public awareness [of the policy]."^{2/} Indeed, the FPC had reasoned that its order was "'the most equitable resolution' it could reach," 385 F.2d at 642, and the court commended the agency:

[W]hen an agency is exercising power entrusted to it by Congress, it may have recourse to equitable conceptions in striving for the reasonableness that broadly identifies the ambit of sound discretion. Conceptions of equity are not a special province of the courts but may properly be invoked by administrative agencies seeking to achieve "the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice."

Id. at 642-43 (quoting Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 160 (D.C. Cir. 1967)); compare ABF Freight System, Inc. v. NLRB, 114 S.Ct. 835, 842 (1994) (Scalia, J., concurring in the judgment) (where administrative agency ignores traditional equitable principles, its action comes to "the very precipice of the tolerable").

^{2/} See also, Williams Natural Gas Co. v. FERC, 943 F.2d 1320, 1336 (D.C. Cir. 1991).

IV. THE FCC'S PROPOSED RELIEF AND PROCEDURES ARE FLAWED.

Both the Commission and Petitioners seem to be asking this Court to remand the case back to the administrative level. See FCC Motion 5; Response of Petitioners to FCC Motion 2 (July 11, 1994). While APC does not oppose a remand, the proper course under this Court's Circuit Rules is to remand only the record, not the case. Both the FCC and Petitioners also attempt to establish a briefing schedule for the proceedings following remand. While APC fully supports the goal of keeping this case on an expedited schedule and maintaining the October 11, 1994 oral argument date, it is too speculative to establish a new briefing schedule now, without even knowing whether (as seems likely) some or all of parties will realign themselves from one side of the case to the other. Instead, motions to establish a new briefing schedule should be due two days after the FCC issues its decision on reconsideration.

Under Circuit Rule 41(b), the remand of a "case" deprives the Court of jurisdiction, requiring a new petition for review following action after remand. See also Handbook of Practice and Internal Procedures 73-74 (D.C. Cir. 1993 ed.) (discussing motions to remand). By contrast, if only the record is remanded, the Court retains jurisdiction. Both the FCC and the Petitioners envision that the Court should retain jurisdiction over this case (indeed, they even want to establish a briefing schedule now for the proceedings following the remand). Furthermore, there is absolutely no need for the Court to remand the case because, as the FCC correctly notes, it already has full jurisdiction over the

case through the pending petitions for reconsideration.^{8/} FCC Motion 3, n.2 (citing Wrather-Alvarez Broadcasting v. FCC, 248 F.2d 646, 649 (D.C. Cir. 1957)). To the extent that the FCC wants a signal from this Court to avoid any "unseemly conflict" in jurisdiction, id. at 3-4 n.2, suspension of the current briefing schedule and a remand of the record will provide that signal. Thus, a remand of the record, not of the case, is clearly the appropriate course of action in this context.^{9/}

Assuming that the Court takes that action, it would be unwise at this time to establish a briefing schedule for the proceedings following remand. We now have no idea of the type of arguments that may have to developed following the FCC's action on remand, nor do we even know which parties will be on which side of the case. In addition, the briefing schedules proposed by both the Commission and the Petitioners may be inequitable depending on the outcome of the Commission's reconsideration decision.^{10/}

^{8/} Because the FCC already has jurisdiction to modify part or all the January 28 order, there is no need for this Court to vacate part or all of that order, as Petitioners suggest. Petr. Response 2. Furthermore, such action by the Court could be misinterpreted either as a limitation on the FCC's flexibility in its reconsideration proceedings or, worse still, as a merits ruling by the Court, which would be clearly inappropriate given that all parties have not had an opportunity to brief the case.

^{9/} By construing the FCC's motion for remand to be a motion for remand of the record only, the Court will moot the FCC's Motion For Leave To File Dispositive Motion Out Of Time, since the remand will not be dispositive of the case.

^{10/} For example, if the FCC drastically alters its orders and reasoning, the three-week briefing schedule proposed by the FCC may not allow sufficient time for briefs to be prepared by parties who, though previously supporting the FCC, might now
(continued...)

Accordingly, APC proposes that, if the Court grants the FCC's emergency motion, it should direct that the Commission file its order on remand with the Court on the day that it is released, and that the parties to this proceeding (including all intervenors) file within two days motions proposing a new briefing schedule. The Court should act on those proposals as expeditiously as possible, with the goal of maintaining the October 11, 1994 argument date.

Respectfully submitted,

Ed Bruce

E. Edward Bruce
Robert A. Long
John F. Duffy
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5284

Attorneys for
American Personal Communications

Dated: July 12, 1994

^{10/} (...continued)

have to challenge it. Also, the schedule proposed by the FCC fails to provide for briefs by supporting intervenors. Petitioners' two-week briefing schedule is even more unfair, especially given that they had months after the FCC's January 28 order to prepare their arguments challenging that ruling.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PACIFIC BELL, <u>et al.</u> ,)	
)	
Petitioners,)	
)	
v.)	No. 94 - 1148 (and
)	consolidated cases)
FEDERAL COMMUNICATIONS COMMISSION)	
and THE UNITED STATES OF AMERICA,)	
)	
Respondents.)	
)	

CERTIFICATE OF SERVICE

I, John Duffy, certify that on this 12th day of July, 1994, I caused copies of the foregoing RESPONSE TO EMERGENCY MOTION FOR REMAND to be served by first-class mail, postage prepaid, on the parties on the attached service list.



John Duffy

Organization

Address

Advanced Cordless
Technologies, Inc.

Gene A. Bechtel, Esq.
Bechtel & Cole, Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036

Advanced MobileComm
Technologies, Inc. and
Digital Spread Spectrum
Technologies, Inc.

Robert B. Kelly, Esq.
Laura C. Mow, Esq.
Kelly, Hunter, Mow & Povich
Seventh Floor
1133 Connecticut Avenue, N.W.
Washington, D.C. 20036

AirTouch Paging

Mark A. Stachiw, Esq.
AirTouch Paging
Three Forest Drive
12221 Merit Drive #800
Dallas, TX 75251

Bell Atlantic Personal
Communications, Inc.

Gary M. Epstein, Esq.
Maureen E. Mahoney, Esq.
James H. Barker, Esq.
Latham & Watkins
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Broadband Communications
Corporation
and
PCN America, Inc.

Albert H. Kramer, Esq.
David B. Jeppsen, Esq.
Keck, Mahin & Cate
1201 New York Avenue
Penthouse Suite
Washington, D.C. 20005

Cablevision Systems
Corporation

Charles D. Ferris, Esq.
James A. Kirkland, Esq.
Kecia Boney, Esq.
Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

Cox Enterprises

Werner K. Hartenberger, Esq.
Laura H. Phillips, Esq.
Timothy J. O'Rourke, Esq.
Dow, Lohnes & Albertson
Suite 500
1255 23rd Street, N.W.
Washington, D.C. 20037

Organization

Address

Department of Justice

Robert B. Nicholson, Esq.
Robert J. Wiggers, Esq.
U.S. Department of Justice
Appellate Section
Antitrust Division
Room 3224
9th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Echo Group L.P.

Thomas J. Casey, Esq.
Jay L. Birnbaum, Esq.
Skadden, Arps, Slate, Meagher
& Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

Federal Communications
Commission

William E. Kennard, Esq.
Christopher J. Wright, Esq.
John E. Ingle, Esq.
James M. Carr, Esq.
Federal Communications
Commission
Room 614
1919 M Street, N.W.
Washington, D.C. 20554

Freeman Engineering
Associates, Inc.

Harold Mordkofsky, Esq.
Robert M. Jackson, Esq.
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037

Mobile Telecommunications
Technologies Corporation

Ray Michael Senkowski, Esq.
Daniel E. Troy, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
4th Floor
Washington, D.C. 20006-2359

Omnipoint Communications,
Inc.

Douglas Smith, Esq.
Mark J. Tauber, Esq.
Emilio W. Cividanes, Esq.
Mark J. O'Connor, Esq.
Piper & Marbury
1200 19th Street, N.W.
Washington, D.C. 20036