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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OFFICE OF GENERAL COUNSEL

SEP 2 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

MEMORANDUM

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: Bell Atlantic Personal Communications, Inc. v. FCC & USA, No. 94-1601, Viacom International Inc. v. FCC & USA, No. 94-1606, Omnipoint Communications, Inc. v. FCC & USA, No. 94-1607, and Advanced Cordless Technologies, Inc. v. FCC & USA, No. 94-1608. Filing of four new Petitions for Review filed in the United States Court of Appeals for the D.C. Cir.

DATE: September 2, 1994

Docket No(s). ET 93-266 and GEN 90-314

File No(s). PP-6, PP-52 and PP-58

This is to advise you that on August 29, 1994, Bell Atlantic Personal Communications, Inc.; on August 30, 1994, Viacom International Inc. and Omnipoint Communications, Inc.; and on August 31, 1994, Advanced Cordless Technologies, Inc., filed Section 402(a) Petitions for Review in the U.S. Court of Appeals for the D.C. Circuit. The FCC underlying decisions are: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 1337 (1994)(FCC 93-550) and In the Matter of Review of the Pioneer's Preference Rules & In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 94-209, released August 9, 1994.

Challenge to FCC amended pioneer's preference rule, as applied to broadband personal communication services so as to require preference winners to pay for their licenses an amount keyed to the auction prices paid for similar licenses. Petitions challenges both the decision to charge for the pioneers' licenses and the earlier decisions to grant pioneer's preference to three applicants.

Due to a change in the Communications Act, it will not be nessary to notify the parties of this filing.

The Court has docketed these cases as Nos. 94-1601, 94-1606, 94-1607 and 94-1608 and the attorneys assigned to handle the litigation of these cases are John E. Ingle and James Carr.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

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

BELL ATLANTIC PERSONAL COMMUNICATIONS, INC. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents.

Case No. 94-1681
Filed 8/29/94

PETITION FOR REVIEW

Bell Atlantic Personal Communications, Inc. ("Bell Atlantic"), pursuant to 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344, and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of the Federal Communications Commission's Memorandum Opinion and Order on Remand in the matters of Review of the Pioneer's Preference Rules, ET Docket No. 93-266 and Amendment of the Commission's Rules to Establish New Personal Communications Services, Gen. Docket No. 90-314, PP-6, PP-52, and PP-58 (released August 9, 1994) (the "Remand Order"). A summary of this order was published in the Federal Register on August 18, 1994. See 59 Fed. Reg. 42,521 (August 18, 1994). To the extent that the Remand Order implicitly affirmed certain aspects of the Commission's reasoning and decisions set forth in its Third Report and Order in the matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 1337 (1994) ("Awards Order"), Bell Atlantic seeks review of reasoning and decisions set forth in that order as well. Venue is proper under 28 U.S.C. § 2343.

The Remand Order was issued after this Court, by order dated July 26, 1994, remanded the case of Pacific Bell v. FCC, No. 94-1148 (and consolidated cases) at the Commission's request. See Federal Communications Commission, Emergency Motion for Remand (July 8, 1994). On remand, the Commission amended its pioneer's preference rules, 47 C.F.R. § 1.402. The amendments require certain recipients of pioneer's preferences to pay for the licenses awarded. With respect to the pioneer's preferences for broadband Personal Communications Services ("PCS"), the Commission decided, in determining the amounts that would be charged for each license, that broadband preference winners will have a choice of paying either (i) ninety percent (90%) of the winning bid for the other 30 MHz license in the same market; or (ii) ninety percent (90%) of the adjusted value of the license calculated through reference to the average population price for the 30 MHz licenses in the top 10 markets established at auction.

The Commission's Remand Order declined to revisit or address other significant issues raised by the collective petitioners in the Pacific Bell consolidated cases, including the FCC's decision to award broadband preferences to three parties, American Personal Communications (an affiliate of The Washington Post), Cox Enterprises, Inc., and Omnipoint Communications, Inc.; the FCC's decision to deny numerous other preference requests, including Bell Atlantic's; or the FCC's decision to award the broadband preference winners licenses of size, geographic scope and value that far exceeded their alleged contributions as "pioneers."

Relief from the Commission's Remand Order -- and from the Commission's earlier decisions in the Third Report and Order in the matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 1337 (1994) ("Awards Order") -- is sought on the grounds that the decisions are arbitrary, capricious and otherwise contrary to law. Bell Atlantic contends, among other things, that the FCC still has failed to distinguish adequately between those parties that were awarded preferences and those that were not, or to justify its decision to award regional licenses so large in scope that the preference winners will be unjustly enriched in contravention of the public interest.

Bell Atlantic requests that this Court hold unlawful, vacate, enjoin, and set aside both the Remand Order and the earlier Awards Order, and that the Court grant such other and further relief as may be proper and just under the circumstances.[1]

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1. Because the award of a pioneer's preference is not itself the grant of a license, review under 47 U.S.C. § 402(a) is appropriate rather than appeal under 47 U.S.C. § 402(b). If this Court decides otherwise, Bell Atlantic respectfully requests that this petition for review be construed as a timely notice of appeal.

Respectfully submitted,

BELL ATLANTIC PERSONAL COMMUNICATIONS, INC.

Gary M. Epstein (D.C. Bar No. 23499)
Maureen E. Mahoney (D.C. Bar No. 343111)
James H. Barker (D.C. Bar No. 430262)
LATHAM & WATKINS
Suite 1300
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 637-2000

and

William L. Roughton
of Counsel
for BELL ATLANTIC PERSONAL
COMMUNICATIONS, INC.

Attorneys for Petitioner Bell Atlantic
Personal Communications, Inc.

August 29, 1994

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

Viacom International Inc.,	)	
	)	
Petitioner	)	
	)	
v.	)	No. 94-1606
	)	Filed: 8/30/94
Federal Communications Commission and United States of America	)	
	)	
Respondents	)	

PETITION FOR REVIEW

Viacom International Inc. ("Viacom"), pursuant to Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and Rule 15 of the Federal Rules of Appellate Procedure, hereby submits this Petition for Review of the Third Report and Order of the Federal Communications Commission ("FCC") in General Docket No. 90-314, released February 3, 1994 (copy attached).[1]

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[1] In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 93-550 (released February 3, 1994), reported at 9 FCC Rcd 1337 (1994) and 59 Fed. Reg. 9419 (1994). Viacom initially filed this Petition on March 3, 1994. Viacom International Inc. v. FCC, No. 94-1153 (D.C. Cir., filed March 3, 1993). As set forth in footnote 2 of that filing, it was not then clear whether an appeal taken from an FCC denial of a pioneer's preference in General Docket No. 90-314 must be filed as a Section 402(a) petition for review of an adverse FCC action in an informal rulemaking or as a Section 402(b) appeal from an FCC denial of an application for a construction permit or license. Viacom therefore filed a Section 402(b) Notice of Appeal of the Third Report and Order simultaneously with its initial Petition, and requested that this Court dismiss one or the other in the event that the Court ruled on which jurisdictional provision applies. Since the FCC did not object to any petitions for review of the Third Report and Order as improperly filed under Section 402(a), Viacom is resubmitting its Petition without simultaneously filing a Section 402(b) appeal. If, however, this Court rules that

(continued...)

STATEMENT OF THE NATURE OF THE PROCEEDING

In the Third Report and Order the FCC denied Viacom's request for a "pioneer's preference" for a personal communications service ("PCS") license. At the same time, the FCC granted a pioneer's preference for a PCS license to three other applicants, none of whose requests were mutually exclusive with that of Viacom.[2]

FACTS ON WHICH VENUE IS BASED

This Court is the appropriate venue for this action under 47 U.S.C. § 402(a) and 28 U.S.C. § 2343.

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[1] (...continued)
Section 402(b) is the appropriate jurisdictional provision, Viacom requests that this Petition (which is timely filed under Section 402(a) or 402(b)) be treated as a Section 402(b) Notice of Appeal and processed accordingly. See Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1136 n.1 (D.C. Cir. 1976).

[2] After consolidating Viacom's initial Petition with a number of other appeals of the Third Report and Order, this Court remanded the consolidated cases to the FCC for further proceedings. Pacific Bell v. FCC, No. 94-1148, slip op. at 2 (D.C. Cir., released July 26, 1994). In their jointly-filed Supplemental Comments on Remand, Viacom and a number of other appellants (the "Joint Petitioners") asked the FCC to address on remand the issue which the Joint Petitioners had raised on appeal, i.e., the FCC's failure to explain why it had granted pioneer's preferences to some applicants but not to others. See Supplemental Comments on Remand of the Joint Petitioners, ET Docket 93-266 and GEN Docket No. 90-314, filed August 2, 1994. The FCC nonetheless limited its ruling on remand to the question of whether successful pioneer's preference applicants must pay for their licenses; it did not address the question of whether it had sufficiently explained its reasons for granting some pioneer's preference requests but not others. Memorandum Opinion and Order on Remand (ET Docket No. 93-266, GEN Docket No. 90-314), FCC 94-209 (released August 9, 1994). The FCC's limited ruling on remand thus requires Viacom to resubmit its Petition to once again request review of the FCC's denial of Viacom's pioneer's preference request as set forth in the Third Report and Order.

GROUNDS ON WHICH RELIEF IS SOUGHT

1. The FCC's action denying Viacom's request for a pioneer's preference for a PCS license was arbitrary and capricious, an abuse of discretion, unsupported by substantial evidence, and contrary to established FCC precedent. In particular, the FCC did not adequately explain why the proposals of the three successful applicants are entitled to a pioneer's preference but Viacom's proposal is not.

2. The FCC misapplied its own criteria in denying Viacom's pioneer's preference request. Specifically, the FCC had stated that proposals that promise to enable the sharing or co-use of allocated spectrum may qualify for a pioneer's preference, yet denied Viacom's request even though it proposed an innovative spectrum-sharing methodology.

STATEMENT OF REQUESTED RELIEF

Viacom requests that this Court vacate the FCC's denial of Viacom's pioneer's preference request and remand that decision to the FCC for further proceedings, and grant such other and further relief as may be just and proper.

Respectfully submitted,

VIACOM INTERNATIONAL INC.

By: _____
George H. Shapiro

By: _____
Robert D. Primosch

ARENT FOX KINTNER PLOTKIN
& KAHN
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
202/857-6022

Its Attorneys

August 30, 1994

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

AUG 31 8 45 '94

OMNIPOINT COMMUNICATIONS, INC.	)	
	)	
Petitioner,	)	
	)	Case No.
v.	)	94-1607
	)	Filed: 8/30/94
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA	)	
	)	
Respondents.	)	

PETITION FOR REVIEW

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys and pursuant to 47 U.S.C. §402(a), 28 U.S.C. §§ 2342, 2344 and Rule 15(a) of the Federal Rules of Appellate Procedure, hereby petitions the Court for review of the order of the Federal Communications Commission entitled, "In the Matter of Review of the Pioneer's Preference Rules and In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services," Memorandum Opinion and Order, ET Docket No. 93-266, GEN Docket No. 90-314, PP-6, PP-52, and PP-58, FCC 94-209 (released August 9, 1994) (the "Order"), a copy of which is attached hereto.

In the Order, the Commission reversed its earlier decision[1] and amended its pioneer's preference rules to require recipients of broadband PCS pioneer's preferences to pay for their licenses. The payment, which becomes a condition to the license grant, would approximate 90% of the winning bid for comparable licenses awarded in the Commission's upcoming broadband PCS auctions.

Relief is sought on the ground that the Order is arbitrary, capricious and otherwise contrary to law.

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1 "In the Matter of Review of the Pioneer's Preference Rules," First Report and Order, 9 FCC Rcd. 605 (1994).

As a recipient of a broadband PCS pioneer's preference, Omnipoint is a party aggrieved by the Order.

Venue is proper under 28 U.S.C. § 2343.

Omnipoint requests that this Court hold unlawful, vacate, enjoin, and set-aside the Commission's Order.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By: Mark J. O'Connor

Mark J. Tauber
Emilio W. Cividanes
Mark J. O'Connor

Piper & Marbury
1200 19th Street, N.W.
7th Floor
Washington, D.C. 20036
(202) 861-3900

Its Attorneys

Date: August 30, 1994

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

ADVANCED CORDLESS TECHNOLOGIES, INC. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, and, UNITED STATES OF AMERICA, Respondents.	)	Case No. 94-1608 Filed: 8/31/94

PETITION FOR REVIEW

Advanced Cordless Technologies, Inc. (ACT or petitioner) petitions this Court to review the Memorandum Opinion and Order on Remand released by the Federal Communications Commission (Commission or FCC), slip opinion, FCC 94-209, attached (the Remand Decision).

This petition is filed pursuant to 47 U.S.C. §402(a) since it relates to an award of pioneer's preferences which is not a grant of a license. If this Court determines that the award of a pioneer's preference is for jurisdictional purposes the equivalent of a grant of a license, ACT requests that this petition for review by accepted as a notice of appeal pursuant to 47 U.S.C. §402(b).

ACT has sought from the Commission an award of a pioneer's preference in the matter of Personal Communications Services (PCS). It has pending before this Court an appeal from the Commission's denial of its claim for a preference in the so-called narrowband aspects of the PCS proceedings. Advanced

Cordless Technologies, Inc. v. FCC, 94-1296, filed April 4, 1994. It has pending before the Commission a petition for reconsideration of the Commission's denial of its claim for a preference in the so-called broadband aspects of the PCS proceedings. Petition for Reconsideration filed March 7, 1994 of the agency's Third Report and Order, 9 FCC Rcd. 1337 (1994).

In the Remand Order, the Commission has decided that the preference to be awarded under the so-called broadband aspects of the PCS proceedings is now changed from the previously announced unconditional award of spectrum to a relatively small discount on the price to be paid for the spectrum. This change in the groundrules under which ACT has participated in the PCS proceedings is unlawful, arbitrary and capricious.

In the Remand Order, the Commission has determined that allegations of ex parte violations in the award of broadband preferences to American Personal Communications (APC), Cox Enterprises, Inc. (Cox) and Omnipoint Communications, Inc. (Omnipoint) are without merit, affirming a letter by its Managing Director. Remand Decision at ¶37. In making this determination, the Commission characterizes the letter as "addressing these issues" that were raised in the briefs to this Court filed by "petitioners and amicus curiae" in the earlier appellate proceeding resulting in the remand, i.e, Pacific Bell v. FCC, 94-1148, et al. Petitioner ACT is the party who filed the amicus brief referred to, which sets forth allegations and arguments that are also contained in its petition for reconsideration that

is pending before the Commission. The allegations and arguments regarding ex parte violations in our amicus brief and pending petition for reconsideration are not identical to the allegations and arguments made by Pacific Bell and other petitioners in the earlier appellate proceeding. Our allegations and arguments are broader and more extensive than those of Pacific Bell and other petitioners. The Commission's Remand Decision is unlawful, arbitrary and capricious in affirming the letter of the Managing Director and rejecting both (i) allegations and arguments advanced by Pacific Bell and other petitioners and (ii) allegations and arguments advanced by ACT in its amicus brief.

We request relief from this Court to reverse and set aside the Remand Decision.

Respectfully submitted,

Gene A. Bechtel

Bechtel & Cole, Chartered
Suite 250
1901 L Street, N.W.
Washington, D.C. 20036
Telephone 202-833-4190
Telecopier 202-833-3084

Counsel for Advanced Cordless Technologies, Inc.

August 31, 1994