OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: Suite 12 Group v. FCC & USA, No. 94-1635. Filing of a new Petition for Review filed in the United States Court of Appeals for the D.C. Circuit.

DATE: September 27, 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 September 22, 1994, Suite 12 Group filed a Section 402(a) Petition 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. Petitioner 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 this case as No. 94-1635 and the attorneys assigned to handle the litigation of this case 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

SUITE 12 GROUP, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	No. 94-1635 Filed: 9/22/94

PETITION FOR REVIEW

Suite 12 Group ("Suite 12"), pursuant to 28 U.S.C. §§2342 and 2344, 47 U.S.C. §402(a), and Rule 15(a) of the Federal Rules of Appellate Procedure, petitions this Court for review of an order of the Federal Communications Commission ("Commission"), entitled Memorandum Opinion and Order on Remand, FCC 94-209, released August 9, 1994, in ET Docket No. 93-266 and GEN Docket No. 90-314 (PP-6, PP-52, and PP-58) (the "Remand Order"). Venue is proper in this Court pursuant to 28 U.S.C. §2343.[1/]

[1/] Several other appeals to this Court from the same agency order have been consolidated, or are pending consolidation, with Case No. 94-1549. To the best of Petitioner's knowledge, those cases are: **No. 94-1549**, American Personal Communications v. FCC (Aug. 10, 1994); **No. 94-1577**, American Personal Communications v. FCC (Aug. 19, 1994); **No. 94-1589**, Cox Enterprises, Inc. v. FCC (Aug. 24, 1994); **No. 94-1601**, Bell Atlantic Personal Communications, Inc. v. FCC (Aug. 29, 1994); **No. 94-1607**, Omnipoint Communications, Inc. v. FCC (Aug. 30, 1994); and **No.**
(continued...)

In the Remand Order, the Commission modified its Pioneer's Preference rules, 47 C.F.R. §1.402, to require that persons receiving Pioneer's Preferences in proceedings where tentative (but not final) decisions had been reached as of August 10, 1993, will be required to pay for their licenses, with the amount of the payment to be determined on a case-by-case basis. Petitioner Suite 12 received such a Pioneer's Preference in the Local Multipoint Distribution Service ("LMDS") and would therefore be required to pay for its license.

The Commission's Pioneer's Preference program guaranteed that successful pioneers would receive a Commission license as a reward for developing innovations in telecommunications technology. Petitioner Suite 12 and its third party investors relied on that guarantee by investing millions of dollars and spending a great deal of effort on developing innovative LMDS technology. The Commission has no authority to impose an after-the-fact requirement that pioneers now pay enormous sums for those previously guaranteed licenses. Such action vitiates the government's prior commitments, on which the Commission encouraged parties to rely, and constitutes unlawful retroactive rulemaking.

1/ (...continued)
94-1608, Advanced Cordless Technologies, Inc. v. FCC (Aug. 31, 1994). Petitioner Suite 12 believes that consolidation of this appeal with those cases would be appropriate.

In imposing a requirement that pioneers pay substantial sums to the United States Treasury as a condition of receiving their licenses, the Commission clearly exceeded its statutory authority under the Communications Act. Neither Section 4(i), 47 U.S.C. §154(i), nor any other provision of the Act can be relied upon for the drastic and unprecedented requirement that pioneer licensees pay huge sums to the United States Treasury as a condition for obtaining their licenses.

The Commission also has no basis in the record for levying the enormous charges imposed by the Remand Order. The sums exacted are based on amounts collected through a system for allocating licenses that is wholly inapplicable to pioneers -- the competitive bidding system established under Section 309(j) of the Act, 47 U.S.C. §309(j). The Commission appeared to believe that the charges imposed by the Remand Order would remedy some sort of financial advantage held by pioneers over their competitors. Not only is there no basis in the record for that rationale, but the record affirmatively contradicts it.

For these and other reasons, Suite 12 contends that the Commission's attempt in the Remand Order to impose a payment condition on pioneers' licenses is unlawful, arbitrary and capricious, not supported by substantial evidence, and otherwise not in accordance with law.

Respectfully submitted,

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