

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Chief, PIRS

FROM: Associate General Counsel, Litigation Division

SUBJECT: Advanced MobileComm Technologies, Inc., and Digital Spread Spectrum Technologies v. FCC & USA, No. 95-1060. Filing of a new Joint Petition for Review filed in the United States Court of Appeals for the District of Columbia Circuit

DATE: January 24, 1995

Docket No(s). GEN 90-314

File No(s). PP-4, PP-16, PP-42, PP-45,
PP-51, PP-54, PP-68, PP-73

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This is to advise you that on January 23, 1995, Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc., filed a Section 402(a) Joint Petition for Review in the United States Court of Appeals for the District of Columbia Circuit of the FCC decision: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 94-304, released December 2, 1994.

In this proceeding, Petitioners challenge the denial of their Joint Request for pioneer's preferences for broadband personal communications services licenses and at the same time, pursuant to Title VIII of the GATT legislation, the FCC affirmed its grant of pioneer's preferences to three parties.

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

The Court has docketed this case as No. 95-1060 and the attorney assigned to handle the litigation of this case is James M. 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

JUN 24 3 56 PM '95

Advanced MobileComm Technologies,)
Inc., and)
Digital Spread Spectrum Technologies,)
Inc.)
Petitioners)
v.)
Federal Communications Commission)
and The United States of America)
Respondents)

OFFICE OF
GENERAL COUNSEL

No. 95- 1060

Filed: 1/23/95

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JOINT PETITION FOR REVIEW

Advanced MobileComm Technologies, Inc. ("AMT") and Digital Spread Spectrum Technologies, Inc. ("DSST"), 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 submit this Joint Petition For Review of the Memorandum Opinion and Order, FCC 94-304, released December 2, 1994 ("MO&O")¹ and the Third Report and Order, FCC 93-550, released February 3, 1994 ("Third Report and Order")² of the Federal Communications Commission in General Docket No. 90-314.³

¹In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, FCC 94-304 (released December 2, 1994) reported at 59 Fed. Reg. 66254 (1994).

²In 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).

³The FCC ruled in the MO&O upon eight petitions for reconsideration of the Third Report and Order, including the timely-filed Joint Petition For Reconsideration of AMT/DSST. In addition, currently pending before the Court are other petitions for review and notices of appeal of the Third Report and Order.

Copies of the MO&O and Third Report and Order are attached to this Joint Petition For Review.

1. In the MO&O the FCC affirmed the Third Report and Order's denial of the Joint Request of AMT/DSST for "pioneer's preferences" for broadband personal communications service ("PCS") licenses. At the same time and pursuant to Title VIII of the GATT legislation⁴, the FCC affirmed in the MO&O its grant of pioneer's preferences to three parties, American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox") and Omnipoint Communications, Inc. ("Omnipoint").⁵

FACTS ON WHICH VENUE IS BASED

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

American Personal Communications v. FCC, No. 94-1549 (and consolidated cases) (D.C. Cir.).

⁴Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, Title VIII, 108 Stat. 4809, to be codified at 47 U.S.C. §309(j)(13).

⁵Because of the procedural posture of the FCC's pioneer's preference program, there has been some uncertainty over whether an appeal pursuant to Section 402(b) of the Communications Act or review pursuant to Section 402(a) of that Act is the appropriate vehicle for seeking appellate relief from the FCC's pioneer's preference decisions. The FCC heretofore has not objected to any petitions for review of the Third Report and Order as improperly filed; hence, AMT and DSST are submitting the instant Joint Petition For Review. In the event that the Court subsequently should determine that the FCC's pioneer's preference decisions are licensing actions subject to Section 402(b) appeal, AMT and DSST request that this Joint Petition (which is timely filed under Section 402(a) or 402(b)) be considered 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).

GROUNDNS ON WHICH RELIEF IS SOUGHT

3. The FCC's actions denying AMT's and DSST's requests for pioneer's preferences for broadband PCS licenses were arbitrary, capricious, an abuse of discretion, unsupported by substantial precedent and contrary to established FCC precedent. The MO&O and the Third Report and Order apply inconsistent standards and criteria to similarly-situated parties in contravention of the requirements of the Administrative Procedure Act, 5 U.S.C. §551, et seq. ("APA"), apply standards and criteria in evaluating the pioneer's preference requests of AMT and DSST of which no prior notice and opportunity for comment had been provided in contravention of the APA and apply standards and criteria inconsistent with those of which the FCC had provided notice and comment in contravention of the APA and Section 1.402 of the FCC's Rules, 47 C.F.R. §1.402. The MO&O, in addition, improperly applies Title VIII of the GATT legislation.⁶ The MO&O and the Third Report and Order, moreover, are tainted by their reliance upon an earlier "Tentative Decision" issued on the basis of an incomplete and inadequate record.

4. AMT and DSST request that the MO&O and the Third Report and Order be vacated insofar as they deny AMT's and DSST's

⁶AMT and DSST do not petition for review of the MO&O on the grounds that Title VIII of the GATT legislation is unconstitutional. AMT and DSST note that the constitutionality of the GATT legislation, however, is before the Court in a separate action filed by Advanced Cordless Technologies, Inc. ("ACT") on January 3, 1995. ACT, in addition, has filed an action in district court challenging the constitutionality of the GATT legislation. See Advanced Cordless Technologies, Inc. v. FCC, Civ. No. 1:94CV02315 (D.D.C.) (NHJ).

requests for pioneer's preferences for broadband PCS licenses,
and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,
ADVANCED MOBILECOMM TECHNOLOGIES, INC.
DIGITAL SPREAD SPECTRUM TECHNOLOGIES,
INC.

By:



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THEIR COUNSEL

January 23, 1995