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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	
	)	

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PETITION FOR RECONSIDERATION AND REQUEST FOR DEFERRAL OF CELSAT AMERICA, INC.

By its attorneys, Celsat America, Inc. ("Celsat") hereby submits this Petition for Reconsideration and Request for Deferral ("Petition") concerning the Commission's decision and related filing deadline described herein that were adopted in the Third Report and Order, ET Docket No. 93-266, 60 Fed. Reg. 32116 (June 20, 1995) ("Third Report and Order").

STATEMENT OF INTEREST

In the Third Report and Order, the Commission implemented rules mandated by certain amendments to the Communications Act of 1934, as amended (the "Act"),[1] that were contained in the General Agreement on Tariffs and

[1] 47 U.S.C. §§ 151-712.

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Trade ("GATT") legislation.[2] Among other things, the GATT legislation amended Section 309(j)(13)(D) of the Act to subject all requests for pioneer's preference accepted for filing after September 1, 1994 to new requirements concerning award criteria, peer review, and unjust enrichment. In the Third Report and Order, the Commission adopted the new requirements but instead of applying them to applications accepted for filing after September 1, 1994 pursuant to Section 309(j)(13)(D)(iv), it applied them to any and all pending pioneer's preference requests accepted for filing (except for those applicants which were parties to proceedings in which tentative decisions have been made).

Celsat timely filed a pioneer's preference request on February 10, 1992 and the Commission placed it on public notice on March 9, 1992.[3] The Commission has deemed Celsat's request to be pending.[4] Therefore, because

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[2] Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), to be codified at 47 U.S.C. § 309(j)(13) (GATT Legislation).

[3] To clarify, Celsat, Inc. was the original petitioner for the Request for a Pioneer's Preference. Celsat, Inc. assigned its rights, title and interest in the Request for Pioneer's Preference to Celsat America, Inc., which is jointly owned by Celsat, Inc. (82%) and CCI Sub, Inc. (18%), a wholly owned subsidiary of Cellular Communications, Inc. See Second Amendment to Request for Pioneer's Preference, RM-7927, ET File No. PP-28 (November 28, 1994). Celsat America, Inc. is now regarded as the legally eligible candidate for the subject Pioneer's Preference pursuant to Section 1.402(a).

[4] See Memorandum Opinion and Order, ET Docket No. 93-266, 9 FCC Rcd 6837 (1994).

Celsat's pioneer's preference application was accepted for filing prior to September 1, 1994, it has a significant interest in the outcome of this rule making proceeding.[5]

DISCUSSION

I. Section 4(i) of the Communications Act of 1934 does not provide the FCC with the authority to take an action at variance with Section 309(j)(13)(D) of the Communications Act

Section 309(j)(13)(D) of the Act, enacted pursuant to the GATT legislation, requires that the Commission adopt new pioneer's preference requirements concerning award criteria, peer review and unjust enrichment and expressly prohibits the application of such new regulations issued to requests accepted for filing on or before September 1, 1994. Nevertheless, in the Third Report and Order, the Commission determined that

> pursuant to authority in Section 4(i), in conjunction with Sections 1, 303(r), 307, and 309 of the Communications Act,[6] it is in the public interest and in furtherance of our pioneer's preference policy in an auction environment to apply the rules adopted herein

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[5] Although Celsat did not file comments in response to the Further Notice of Proposed Rule Making, 60 Fed. Reg. 13396 (March 13, 1995) ("Further Notice"), Celsat was excluded from the list of parties contained in the Further Notice which was stated to entail the parties affected by the Commission's proposed rules. See Further Notice, 10 FCC Rcd 4523, n.2 and 4530, n. 46. The Third Report and Order stated that this omission of Celsat from the list of affected parties in the Further Notice was inadvertent. Third Report and Order, slip op. at 5, n. 17.

[6] 47 U.S.C. §§ 151, 303(r), 307, 309.

> to pending pioneer's preference proceedings that have not reached the tentative decision stage. We also continue to find it equitable to apply new rules to these proceedings. While each of the parties in these proceedings applied for a pioneer's preference before competitive bidding was authorized and before GATT legislation was enacted, none of these parties has been awarded even a tentative preference. Further, we do not believe that any of these parties had received the expectation of an award under existing pioneer's preference rules. Accordingly, parties with pending pioneer's preference applications on file with the Commission will have 30 days from the effective date of the rules adopted herein to amend their applications to bring them into conformance with the rules adopted herein and in the Second Report and Order in this proceeding.[7]

Section 4(i) of the Act does not provide the Commission with unlimited powers. Rather, Section 4(i) merely provides the Commission with authority to "issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[8] Therefore, Section 4(i) would only provide the Commission with the authority to apply the GATT-mandated pioneer's preference rules to any and all pending pioneer's preference requests (except those which were a party to proceedings in which tentative decisions were made) if, according to the plain meaning of Section 4(i), such an action would

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[7] Third Report and Order, slip op. at 10-11.

[8] 47 U.S.C. § 154(i) (emphasis added). In its entirety, Section 4(i) provides that the "Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

not contravene any other provision of the Act.[9] Celsat submits that because the Commission's subject decision in the Third Report and Order clearly conflicts with the statutory restriction contained in another provision of the Act, Section 309(j)(13)(D)(iv), the Commission has no authority for its action.[10]

It is well-settled principle of statutory construction that the plain meaning of a statute governs its interpretation.[11] In addition, although courts are generally inclined to defer to an expert agency's interpretation of its own enabling

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[9] In addition, the other provisions of the Act cited in the Third Report and Order, Sections 1, 303(r), 307 and 309, do not provide the necessary authority for the subject decision. Specifically, Section 1 is only a general statement of the Act's purpose; Section 303(r) contains the same kind of qualification on the scope of its authority as Section 4(i), and therefore fails to provide authority under the same analysis concerning Section 4(i) discussed in this Petition; Section 307 describes specific provisions of the Commission's licensing authority and does not empower the Commission to avoid other specific restrictions of the Act, and Section 309 contains the very restriction discussed herein prohibiting the decision adopted in the Third Report and Order. See 47 U.S.C. § 309(j)(13)(D)(iv).

[10] This Petition for Reconsideration does not concern the Commission's interpretation of applicability of the pioneer's preference payment-related provisions of the Act mandated by the GATT legislation. Specifically, the Third Report and Order states that the payment-related amendments to the Act apply to any licenses issued on or after August 1, 1994 regardless of when the applications were accepted for filing pursuant to Sections 309(j)(13)(B), (C) and (E). Indeed, this provision supports Celsat's position because it confirms that Congress knew how to apply elements of its pioneer's preference policy to pending applications regardless of their filing date. Thus, Congress' decision to exempt such applications already accepted for filing from new rules was a deliberate decision which the Commission is not empowered to overrule.

[11] See, e.g., Estate of Cowart v. Nicklos Drilling Co. 112 S.Ct 2589, 2594 (1992) (citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991)).

statute, the Supreme Court has held that "a reviewing court should not defer to any agency position which is contrary to an intent of Congress expressed in unambiguous terms."[12] Accordingly, because the subject decision in the Third Report and Order clearly conflicts with Section 309(j)(13)(D)(iv) of the Act, Celsat submits that the Commission has erred in determining that Section 4(i) provides the agency with the necessary authority for its action.[13]

The Supreme Court has also recognized that the "specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."[14] Pursuant to this principle of statutory interpretation, the specific restriction in Section 309(j)(13)(D)(iv) prevails over the broad, general provision of Section 4(i) of the Act. Therefore, Celsat submits that the Commission has improperly relied on Section 4(i) to avoid the express statutory restriction contained in Section 309(j)(13)(D)(iv) of the Act.

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12 Id.

13 Indeed, even in this proceeding the Commission conceded that Section 4(i) does not provide it with authority to "contravene an express prohibition or requirement of the Act, as the language of Section 4(i) itself makes clear." Second Report and Order and Further Notice of Proposed Rule Making, ET Docket No. 93-266, 10 FCC Rcd 4523, 4527 (emphasis added).

14 Kepner v. United States, 195 U.S. 100, 124 (1904), see also AT&T v. FCC, 487 F.2d 865, 877 (2d Cir. 1973).

Moreover, the Commission and the courts have consistently recognized that Section 4(i) does not provide the Commission with authority to take any action which would conflict with another provision of the Act. In a recent example, the Commission examined whether Section 4(i) provided the agency with discretion to impose a charge on pioneer's preference recipients.[15] In Nationwide, the Commission acknowledged that it

> could not rely upon Section 4(i) to contravene an express prohibition or requirement of the Act, as the language of Section 4(i) itself makes clear. Thus, if any provision of the Act prohibited the Commission from imposing a charge on a pioneer's preference recipient, Section 4(i) would not be an independent basis for such authority.[16]

Similarly, in Son Broadcasting, Inc.[17] the Commission considered whether Section 4(i) provided the agency with the authority to summarily grant an application under circumstances that would otherwise require an administrative hearing pursuant to Section 309. The Commission concluded that "[w]hile Sections 4(i) and (j) of the Act provide us with broad discretionary powers, they do not permit us to subvert the [Act's] other provisions."[18] Therefore, the

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[15] Nationwide Wireless Network Corp., 9 FCC Rcd 3635, 3650 (1994) ("Nationwide").

[16] Id. at 3650 (emphasis added).

[17] 88 FCC 2d 635 (1981).

[18] Id. at 639 (citations omitted).

Commission in Son Broadcasting denied the request to summarily grant the application pursuant to Section 4(i) and instead designated the proceeding to an administrative hearing pursuant to Section 309.[19] Further, in AT&T v. FCC[20] the Court of Appeals for the Second Circuit noted that "in exercising authority pursuant to Sections 4(i), 4(j) or 403, the Commission's action must not be inconsistent" with another section of the Act.[21]

Accordingly, because the subject decision in the Third Report and Order taken pursuant to Section 4(i) conflicts with Section 309(j)(13)(D)(iv), Celsat respectfully requests that the Commission observe the GATT legislation's amendments to the Act and limit the application of the new pioneer's preference requirements to requests accepted for filing after September 1, 1994. In addition,

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[19] Id. at 639-640.

[20] 487 F.2d 865 (2d Cir. 1973).

[21] Id. at 877. See FTC Communications, Inc. v. FCC, 750 F.2d 226, 232 (2d Cir. 1984). See also Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981) The court in Lincoln affirmed a Commission decision to require connecting carriers to file tariffs. The court found that although Section 203(a) of the Act does not provide the Commission with an affirmative grant of authority to impose a tariff requirement, the provision's language does not restrict the Commission from imposing such a requirement. Id. at 1108. Therefore, in the absence of any conflict between the Commission's requirement and the Act, the court in Lincoln held that Section 4(i) provides the Commission with the necessary authority to impose the tariff requirement. Id. at 1108-09. Unlike Lincoln, however, the subject decision directly conflicts with an express statutory restriction on the Commission's authority, and therefore Section 4(i) fails to provide the necessary authority

because the subject decision would requires Celsat and similarly situated applicants to conform their applications to the new requirements within 30 days of the effective date of the new rules (i.e., by September 20, 1995), Celsat respectfully requests that the Commission expeditiously defer the filing deadline until 30 days after the effective date of the Commission order which responds to this Petition for pioneer's preference requests accepted for filing on or before September 1, 1994.[22] Celsat submits that this deferral would serve the public interest by removing the cloud of uncertainty for Celsat and similarly situated applicants during the pendency of this Petition.

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[22] Celsat submits that this request to defer the filing deadline for amendments to certain pending pioneer's preference requests is not a "request for a stay" within the meaning of Section 1.44(e) of the Commission's Rules. Section 1.44(e) states that "[a]ny request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading." By contrast, in this Petition Celsat does not seek to stay any Commission decisions or orders. Rather, Celsat merely requests that the Commission defer a procedural application filing deadline until after the Commission responds to this Petition.

CONCLUSION

For the aforementioned reasons, Celsat respectfully requests that the Commission expeditiously reconsider its decision in the Third Report and Order to impose new pioneer's preference requirements on any and all pending pioneer's preference requests and defer the related filing deadline for pioneer's preference requests accepted for filing on or before September 1, 1994.

Respectfully submitted by:

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Dated: July 19, 1995

CERTIFICATE OF SERVICE

I, Tracey DeVaux, do hereby certify that a true and correct copy of the foregoing Comments was hand-delivered on this 19th day of July 1995 to the following persons:

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