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FCC PIONEER PREFERENCE POLICY

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
OVERSIGHT AND INVESTIGATIONS

AND THE

SUBCOMMITTEE ON
TELECOMMUNICATIONS AND FINANCE

OF THE

COMMITTEE ON
ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

OCTOBER 5, 1994

Serial No. 103–162

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FCC PIONEER PREFERENCE POLICY

WEDNESDAY, OCTOBER 5, 1994

HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS, AND THE SUBCOMMITTEE ON TELECOMMUNICATIONS AND FINANCE,

Washington, DC.

The subcommittees met, pursuant to notice, at 12:50 p.m., in room 2322, Rayburn House Office Building, Hon. John D. Dingell (chairman of the Subcommittee on Oversight and Investigations) presiding.

Mr. DINGELL. The subcommittee will come to order.

The Chair begins by an expression of apology to all present. This is a somewhat unique hearing and it has been called under somewhat narrow time constraints. The Chair advises that we are responding to the request of the leadership on both sides of the aisle and so it is unique not only that we are doing this in the time and fashion in which we are doing it, but it is also unique in that it is a joint hearing between the Subcommittee on Oversight and Investigations and the Subcommittee on Telecommunications and Finance Chaired by my able colleague, Mr. Markey.

Due to the Speaker's request today at the request of the leadership of the minority, the hearing will see the Chair waive the usual seven-day notice requirement under rule 4(a)(1) of committee rules.

Before we hear from our witnesses, the Chair has a brief reiteration of the facts in order to refresh the memories of my colleagues and of all here present.

Last December, the Federal Communications Commission issued an announcement that would award three pioneer preference decision designations which would result in three companies obtaining their PCS licenses for free. I stress the words "for free." This was done under a proceeding which was initiated during the administration of President Bush.

In early May, the Subcommittee on Oversight and Investigation commenced an inquiry into this matter, again in consultation with my dear friend, Mr. Markey, the chairman of the Telecommunications Subcommittee, and a lengthy letter was sent to the general counsel of the FCC, and without objection, that letter will be inserted into the record at this point.

In early June, the subcommittee received a voluminous response from the Commission. I refer my colleagues to the materials stacked in front of us at the witness table which constitutes the exhibits that the Commission furnished to the subcommittee.

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I ask unanimous consent that the text of the Commission's letters regarding the inquiry be made part of the record at this point, and without objection, so ordered.

[The letters follow:]

ONE HUNDRED THIRD CONGRESS

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REID P.F. STUNTZ, STAFF DIRECTOR/CHIEF COUNSEL

U.S. House of Representatives
Subcommittee on Oversight and Investigations
of the
Committee on Energy and Commerce
Washington, DC 20515-6116

May 3, 1994

Mr. William Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Kennard:

Pursuant to Rules X and XI of the Rules of the U.S. House of Representatives, the Subcommittee of Oversight and Investigations of the Committee on Energy and Commerce is investigating the Commission's so-called "Pioneer's Preference" policy, specifically with respect to the Commission's procedures and ultimate decision to award a "Pioneer Preference" to four companies earlier this year.

Four allegations concerning the Commission's decision are of particular interest to the Subcommittee: that the Commission's rules were egregiously and repeatedly violated; that the Commission's own behavior encouraged ex parte contacts and foreclosed opportunities for notice and comment; that the value of the "Pioneer Preference" awarded by the Commission is substantially in excess of the value of the contributions of the so-called "Pioneers"; and that the Commission's procedures were not sufficiently rigorous so as to justify the bestowal of an award as valuable as a "Pioneer Preference".

There may be some benefit to continuing to award "Pioneer Preferences" subsequent to the enactment of legislation authorizing the Commission to use competitive bidding procedures to license spectrum assignments. However, those awards must be based on hard scientific data, and must be granted pursuant to the rigorous enforcement of the Commission's rules so as to protect the consideration of the merits of the applicants from political or lobbying pressure. The Subcommittee is not satisfied that the Commission's consideration and procedures met this test.

Inasmuch as Chairman Hundt is recused from participating in this matter, and one of the participants (Commissioner Duggan) is no longer a member of the Commission, I am writing to ask that you assist the Subcommittee in its investigation by responding to the following questions:

1. Was the Commission's decision in the matter styled "ET Docket No. 93-266" made at an open meeting? Or was this decision made utilizing the Commission's "circulation" procedures?

2. It is my understanding that the Commission's practice is to release immediately the text of Commission decisions made using the Commission's "circulation" procedures. It is also my understanding that the "circulation" practice involves a series of sequential edits to tentative decisions by the participating

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Commissioners, and accompanying "pink sheets" to colleagues explaining the reasons for changes.

a. When was the text of the Commission's decision in the above-referenced Docket released?

b. Please describe the "circulation" process to the Subcommittee in detail.

c. In formulating your answer to question 2(a) above, did you have access to the "pink sheets"? Were you able to determine whether significant changes were made after the announcement of the decision on December 23 and prior to the release of the text of the Commission's decision?

d. Are you aware of any cases involving other Commission decisions that were made "on circulation" in which the text of the decision was not released for more than 30 days?

3. Are you able to account for the reasons for the delay in the release of this text?

4. During the period between the announcement of a Commission decision and the release of the text of that decision, it is my understanding that the subject proceeding is restricted under the Commission's rules. Are you aware of any contacts by entities designated as "pioneers" during the period beginning when the Commission's decision was announced and ending when the text of that decision was released? In your response, please include any contacts in the above-referenced proceeding and any other proceedings, including filings made with respect to experimental licenses.

5. The Subcommittee is aware of correspondence between several parties to the above-referenced proceeding and the Commission's Managing Director. Several of these letters include allegations which, if true, could constitute serious violations of Commission rules. Among the correspondence to which I refer are the following:

Letter from Michael K. Kellogg to Andrew S. Fishel (January 26, 1994).

Letter from Mark J. Tauber to Andrew S. Fishel (February 1, 1994).

Letter from Werner K. Hartenberger and Laura H. Phillips to Andrew S. Fishel (February 4, 1994).

Letter from Jonathan D. Blake, Kurt A. Wimmer to Andrew S. Fishel (February 4, 1994).

Letter from Michael K. Kellogg to Andrew S. Fishel (February 23, 1994).

Letter from Jonathan D. Blake, Kurt A. Wimmer to Andrew S. Fishel (March 8, 1994).

Letter from Michael K. Kellogg to Andrew S. Fishel (March 16, 1994).

Letter from Jonathan D. Blake, Kurt A. Wimmer to Andrew S. Fishel (March 25, 1994).

Please obtain copies of this and other relevant correspondence and submit to the Subcommittee your analysis of the allegations contained therein. Please supply any documents necessary to support your conclusions.

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6. On what date, or dates, did the Commission's "Pioneer Preference" process become a restricted proceeding? Did the Commission issue any announcement or otherwise inform the public as to the date or the nature of the restrictions that would pertain? If so, please provide copies of any such announcements to the Subcommittee.

7. Did the staff that was preparing recommendations to the Commissioners with respect to "Pioneer Preference" designations have substantive contact of any sort with applicants after the date on which the preference proceeding was considered restricted? For example, were any of the staff who participated in making recommendations to the Commission on pioneer preference entitlements also reviewing reports concerning experimental licenses filed by the applicants after the date the pioneer preference proceeding was considered restricted?

8. Please identify the dates, participants in, and specific subjects of all meetings, conversations or communications of any sort between Commission staff or Commissioners and any of the four applicants ultimately designated as "pioneers" after the dates on which the Commission considers the proceedings to have been restricted. Please include any contacts which addressed personal communications services in general; experimental licenses held by applicants (including technical trials or reports of any sort related thereto); or any contacts related to the "pioneer preference" rules as considered in Docket 93-266 or more generally. In your response, please include a listing of all contacts, including those considered to be status inquiries.

Please provide a copy of all written materials submitted to the Commissioners or staff with respect to the above issues.

9. a. Do any of the technical or other reports on the experimental licenses of the four applicants who received a "pioneer preference" award, filed on or after the dates on which the Commission considers the PCS "Pioneer Preference" proceeding to have become restricted, address or respond to arguments made by commenters concerning any of the recipient's qualifications to receive a pioneer preference?

   b. If your answer to the above question is "no", please address your understanding of the meaning of Mtel's statement in its progress report, filed June 29, 1992, that "Mtel decided to revise its planned test schedules and first evaluate its Multi-Carrier Modulation ("MCM") techniques in order to conclusively address comments made by other parties in response to Mtel's June 1, 1992, NWN Technical Feasibility Demonstration", and its submission therein of materials bolstering its claim that it could achieve the data rates for which it ultimately was awarded a preference.

   c. Were any of the reports filed in the Experimental License files by the four "Pioneer Preference" recipients served by those recipients on parties opposing their "Pioneer Preference" awards? Did the Commission's rules require service of these reports on the entities opposing the "Pioneer Preference" awards made by the Commission?

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d. Were any procedures established by the Commission to notify opponents to the awards that the reports had been received, or that the recipients had met with Commissioners or Commission staff regarding the experimental licenses, or reports associated therewith? If not, would such notice and opportunity to comment have been proper?

e. Has the Commission determined that no ex parte information received by the Commissioners or Commission staff on or after the dates on which the proceedings became restricted was considered by the staff in its recommendations that the "Pioneer Preference" recipients were so entitled? If so, what is the basis for such a determination?

f. Has the Commission determined that no ex parte information received by the Commissioners themselves, either directly or through the staff, on or after the date the proceedings became restricted, was considered in determining whether the recipients were entitled to "Pioneer Preferences"? If so, what is the basis for such a determination?

10. With respect to the four entities ultimately designated as recipients of "Pioneer Preference" awards, please respond to the following questions:

a. On what dates did Commission personnel visit the sites at which experiments were conducted to verify the results of the trials?

b. Please furnish the Subcommittee with the names and titles of all such personnel.

c. Please describe the reports that were drafted subsequent to site visits.

d. How were such reports treated by the Commission? Were they placed in the Public File? Were they released to the public so as to permit comments? Please detail any comments that were received by the Commission in response to their release to the public.

e. Did the Commission establish an internal review process for such reports? Please list the names and titles of all Commission personnel involved in such a review.

f. Did the Commission establish a "Peer Review" process for the independent review of testing results? If so, please furnish the Subcommittee with a description of such a process, including the names and credentials of any "Peer Review" panel that examined and verified test results.

11. With respect to the site visits referred to above, please furnish the Subcommittee with the following information:

a. During the conduct of the testing, how many channels were utilized for each applicant during each test?

b. What channel assignments were utilized for each test? Were these the same channel assignments, or at least in the same frequency band, as the

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assignments that had been granted for the four recipients of the "Pioneer Preference" designation? If not, how does the Commission intend to enforce its condition that "each licensee must build a system that substantially uses the design and technologies upon which its preference award is based"?

c. During the conduct of the testing, how many base stations were built for each of the four recipients? How far apart were the base stations? During the course of the site visits, how many handsets were the Commission personnel able to verify were deployed? How many hand-offs were recorded by Commission personnel?

12. a. During the course of the Committee's deliberations concerning the auctioning provisions of last year's "Omnibus Budget Reconciliation Act", there were varying estimates of the amount of revenue that would be received by the Government as the result of assigning frequencies by competitive bidding. It is my understanding that the most recent estimate by the Office of Management and Budget is $30 per "pop" (unit of population). Using this estimate, please furnish the Subcommittee with an analysis of revenue foregone directly for the four licenses that will not be issued by competitive bidding procedures if the Commission issues licenses to the four recipients of "Pioneer Preference" awards.

b. In addition, please furnish the Subcommittee with your analysis of the effect that issuing these four licenses at no cost to the licensee is likely to have on those who might be prospective bidders for one of the remaining licenses. Please make every attempt to quantify the impact of issuing these licenses without a cost on the bidding strategies of potential bidders.

Please respond to these questions no later than the close of business on Friday, May 27, 1994. If you have any questions regarding the Subcommittee's investigation, please do not hesitate to contact David Leach of the Committee staff at (202) 225-3147, or Reid P.F. Stuntz of the Subcommittee staff at (202) 225-4441. Thank you for assisting the Subcommittee in its investigation of this matter.

With every good wish.

Sincerely,

John D. Dingell
Chairman
Subcommittee on Oversight
and Investigations

cc: The Honorable Dan Schaefer, Ranking Republican Member
Subcommittee on Oversight and Investigations

The Honorable James Quello, Commissioner

The Honorable Andrew Barrett, Commissioner

The Honorable Ervin Duggan, Former Commissioner

The Honorable Reed Hundt, Chairman
Federal Communications Commission

Attached Service List

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO:

June 3, 1994

The Honorable John D. Dingell
Chairman
Subcommittee on Oversight and
Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515-6116

Re: Broadband (2 GHz) PCS Pioneer's Preferences

Dear Chairman Dingell:

This letter responds to your letter dated May 3, 1994, requesting that the Federal Communications Commission ("Commission") investigate allegations related to the grant of certain pioneer's preferences. As explained below, our investigation included an examination of the various proceedings in which the Commission awarded pioneer's preferences, an examination of the ex parte notices that were filed in the various dockets related to the PCS and pioneer's preference proceedings, and inquiries of over 120 current and former Commissioners and Commission staff. The Subcommittee's letter alleges that there were "egregious and repeated" violations of the Commission's ex parte rules in connection with the pioneer's preference awards. Our investigation uncovered no such violations by the Commissioners or the Commission staff. We also determined that the process for awarding pioneer's preferences afforded ample notice and opportunity for public comment, and in fact, ample comment was received from interested parties.

The pioneer's preference recipients are American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox"), Mobile Telecommunication Technologies Corporation ("Mtel") and Omnipoint Communications, Inc. ("Omnipoint"). APC, Cox and Omnipoint received pioneer's preferences for broadband (2 GHz) PCS, and Mtel received a pioneer's preference for narrowband (900 MHz) PCS. This letter contains our response to each of the questions posed by the Subcommittee related to the broadband PCS pioneer's preference awards. Issues related to the narrowband PCS pioneer's preferences awarded to Mtel are being addressed in a separate letter also being sent today.

The Subcommittee's inquiries involve several interrelated Commission proceedings, which are summarized briefly below as background for our responses to the Subcommittee's questions. On April 9, 1991, the Commission adopted rules to establish a pioneer's preference program designed to encourage and reward innovators of new communications services or technologies. See Report and Order in Gen. Docket No. 90-217, 6 FCC Rcd 3488 (1991),[1] recon. granted in part, 7 FCC Rcd 1808 (1992),[2] further

[1] Chairman Sikes and Commissioners Quello, Marshall, Barrett and Duggan voted in favor of the Report and Order. Commissioners Marshall and Duggan also issued separate statements.

[2] Chairman Sikes and Commissioners Quello, Marshall, Barrett and Duggan voted in favor of the Memorandum Opinion and Order.

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recon. denied, 8 FCC Rcd 1659 (1993)[3]; 47 C.F.R. §§ 1.402-1.403, § 5.207. In order to qualify for a preference under these rules, a requester must propose allocation of spectrum for a new service or substantial enhancement to an existing service by using innovative technology. To be granted, a request must be supported by a demonstration of its technical feasibility. If the requirements of the rules are met, the requester will be awarded a pioneer's preference. The application filed by the pioneer's preference recipient for a license in the geographic area of its preference is not subject to competing applications. As many requests for preferences as meet the standards set in the rules may be granted, although the Commission has indicated that it would not award preferences where other frequencies would not be available in the market for non-recipients of pioneer's preferences. Memorandum Opinion and Order in Gen. Docket No. 90-217, 8 FCC Rcd at 1659 n.4.

The Commission formally addressed the subject of allocating spectrum for PCS for the first time on June 14, 1990, when it issued a notice of inquiry in response to petitions for rulemakings which specifically requested allocation of spectrum for PCS. See Notice of Inquiry in Gen. Docket 90-314, 5 FCC Rcd 3995 (1990).[4] On October 25, 1991, the Commission issued a Policy Statement and Order in Gen. Docket 90-314, 6 FCC Rcd 6601 (1991),[5] in which it indicated that it intended to define PCS broadly, to adopt regulations to promote the rapid development of PCS, and to promote competition in PCS and in telecommunications in general.

On July 16, 1992, the Commission proposed the establishment of both narrowband and broadband PCS services and made a tentative award of a pioneer's preference to Mtel for a license for the 900 MHz narrowband service. See Notice of Proposed Rule Making and Tentative Decision in Gen. Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992).[6] On October 8, 1992, the Commission tentatively concluded that pioneer's preferences should be awarded to APC, Cox, and Omnipoint for their innovative efforts in the development of broadband PCS services. See Tentative Decision and Memorandum Opinion and Order in Gen. Docket No. 90-314, 7 FCC Rcd 7794 (1992),[7] appeal pending sub nom. Adams Telecom, Inc. v. FCC, No. 93-1103 (D.C. Cir. filed February 2, 1993).

On June 24, 1993, the Commission adopted final rules for the establishment of narrowband PCS and made final its tentative

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[3] Commissioners Quello, Barrett and Duggan voted in favor of the Memorandum Opinion and Order. Commissioner Marshall did not participate in this decision.

[4] This was a decision by the full Commission. Individual votes were not noted.

[5] Chairman Sikes ad Commissioners Quello, Barrett, Marshall and Duggan voted in favor of the Policy Statement. Commissioner Barrett issued a separate statement.

[6] Chairman Sikes and Commissioners Barrett, Duggan and Marshall voted in favor of the NPRM. Commissioner Quello concurred in a separate statement. Commissioners Barrett and Marshall also issued separate statements.

[7] Chairman Sikes and Commissioners Quello, Barrett and Marshall voted in favor of the Tentative Decision. Commissioner Duggan concurred and Commissioner Barrett issued a separate statement.

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award of a pioneer's preference to Mtel. See First Report and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993),[8] appeal pending sub nom. BellSouth Corp. v. FCC, No. 93-1518 (D.C. Cir. filed August 20, 1993). There are no claims before the Commission of any procedural impropriety regarding the grant of a pioneer's preference to Mtel.

In August, 1993, Congress enacted legislation authorizing the Commission to conduct competitive bidding for resolving mutually exclusive applications in certain services. In response, the Commission commenced a rulemaking proceeding on October 21, 1993, to consider "whether our pioneer's preference rules continue to be appropriate in an environment of competitive bidding" and, alternatively, "whether if we retain the preference rules, we should amend them to better work with our competitive bidding authority." See Notice of Proposed Rule Making in ET Docket No. 93-266, 8 FCC Rcd 7692, 7693-94 (1993) (the pioneer's preference review proceeding).[9]

In the NPRM, the Commission indicated that, as a matter of equity because final preference grants already had been made, "nothing in this review will affect" pioneer's preference decisions in narrowband PCS and the non-geostationary (NVNG) mobile satellite service below 1 GHz (so-called "Little LEOs"). Thus, the Commission determined that its authority to conduct auctions would not affect Mtel's pioneer's preference for narrowband PCS. With respect to broadband PCS and other services for which tentative pioneer's preference grants or denials had been made, the Commission requested "comment on whether any repeal or amendment of our rules should apply." Id. at 7694-95.

On December 23, 1993, the Commission decided that, as a matter of equity, the existing preference rules should continue to apply in the proceedings (such as broadband PCS) in which tentative preferences already had been granted or denied.[10] Thus, recipients of preferences for these services would not have to pay for any license they may receive as a result of a preference. See First Report and Order in ET Docket No. 93-266, 9 FCC Rcd 605 (1994).[11] However, the Commission concluded that action on the basic underlying question in that proceeding -- whether to repeal, retain, or amend the pioneer's preference rules -- should be deferred to a later Report and Order.

On December 23, 1993, the Commission took final action on the broadband PCS pioneer's preference requests by affirming its

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[8] Interim Chairman Quello and Commissioners Barrett and Duggan voted in favor of the First Report and Order. Commissioner Barrett issued a separate statement.

[9] Interim Chairman Quello and Commissioner Duggan voted in favor of the NPRM. Commissioner Barrett disapproved in part and concurred in part in a separate statement.

[10] Commissioners Quello, Barrett and Duggan voted in favor of the First Report and Order. Chairman Hundt did not participate in the decision.

[11] The Commission reiterated the decision it made in the Notice, namely that any changes in the pioneer's preference rules would not apply to narrowband PCS.

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tentative awards of pioneer's preferences for PCS broadband licenses to APC, Cox and Omnipoint. See Third Report and Order in Docket 90-314, 9 FCC Rcd 1337 (1994)[12], petitions for recon. pending, appeals pending sub nom. Pacific Bell v. FCC, No. 94-1148 (D.C. Cir., filed March 1, 1994). Chairman Hundt recused himself from both of these decisions because his former law firm represented one of the parties to the broadband pioneer's preference proceedings.

On February 3, 1994, in response to petitions for reconsideration challenging various aspects of Mtel's narrowband pioneer's preference, the Commission reaffirmed its grant of a nationwide 50 KHz pioneer's preference to Mtel. In so doing, it reaffirmed that Mtel would not be required to make any payment (other than the standard filing fees) for its license. See Memorandum Opinion and Order in Gen. Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 1309 (1994).[13]

Different ex parte rules apply to various aspects of the pioneer's preference, PCS and related proceedings. For example, the pioneer's preference review (ET Docket No. 93-266) and PCS spectrum allocation (Gen. Docket No. 90-314, ET Docket No. 92-100) rulemaking proceedings are non-restricted proceedings in which ex parte communications are permissible but must be disclosed. See 47 C.F.R. § 1.1206. Although the pioneer's preference requests were considered in the context of the PCS spectrum allocation rulemaking proceedings, they are treated separately within the rulemaking dockets as adjudicative-type proceedings rather than rulemakings. Each pioneer's preference proceeding is assigned a "PP" docket number within the rulemaking docket. These adjudicatory proceedings to determine who may receive a PCS pioneer's preference are restricted once they are formally opposed, at which time ex parte presentations are prohibited. See 47 C.F.R. § 1.1208.

Under the Commission's rules, however, status inquiries as well as communications that are "inadvertently or casually made" are not considered ex parte presentations. 47 C.F.R. § 1.1202(a). In addition, the pendency of a restricted adjudicatory proceeding does not preclude parties from making permissible ex parte presentations in related rulemaking proceedings, so long as no presentations are made regarding the restricted adjudications. See Report and Order in Gen. Docket No. 86-225, 2 FCC Rcd 3011, 3014 (1987). For example, a pioneer's preference recipient could make an ex parte presentation generally about rules that may ultimately affect its preference request so long as it does not specifically address the merits of its particular preference request. See Report and Order in Gen. Docket No. 90-217, 6 FCC Rcd at 3493, 3500 n.9.

Following are the responses to the questions posed by the Subcommittee with respect to broadband PCS pioneer's preference issues. All responses apply to events which occurred through May 13, 1994, unless otherwise indicated in our response or by the context of the question.

In responding to this and other questions in your letter, we have reviewed the ex parte notices filed in the relevant rulemaking dockets and information provided by current and former Commissioners and Commission staff involved in the relevant

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[12] Commissioners Quello, Barrett and Duggan voted in favor of the Third Report and Order. Each issued a separate statement. Chairman Hundt did not participate in the decision.

[13] Chairman Hundt and Commissioners Quello and Barrett voted in favor of the Memorandum Opinion and Order. Commissioner Barrett issued a separate statement.

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proceedings. These individuals reviewed their calendars, notes, phone logs and recollections of events during this period. Information provided by these individuals was used to cross-check items filed with the Commission and vice versa. It is important to note, however, that some individuals could not recall the details of some contacts. In addition, the Office of General Counsel has not contacted any individuals outside the Commission other than former Commissioners and their staffs who were at the Commission during or after January, 1992.[14] Consistent with discussions with your staff, we have not included pleadings and other formal filings within the scope of our investigation.

1. **Was the Commission's decision in the matter styled "ET Docket No. 93-266" made at an open meeting? Or was this decision made using the Commission's "circulation" procedures?**

The First Report and Order in ET Docket No. 93-266 (the pioneer's preference review proceeding) was adopted by circulation, using the Commission's electronic voting procedures, on December 23, 1993. The circulation process is described in more detail in response to Question 2(a), below.

2. **It is my understanding that the Commission's practice is to release immediately the text of Commission decisions made using the Commission's "circulation" procedures. It is also my understanding that the "circulation" practice involves a series of sequential edits to tentative decisions by the participating Commissioners, and accompanying "pink sheets" to colleagues explaining the reasons for changes.**

   a. **When was the text of the Commission's decision in the above-referenced Docket released?**

The text of the First Report and Order was released on January 28, 1994.

   b. **Please describe the "circulation" process to the Subcommittee in detail.**

The Commission takes action either at formal Commission meetings or by circulation. The circulation process involves "the submission of a document to each of the Commissioners for approval." 47 C.F.R. § 0.5(d). The majority of the Commission's decisions are adopted on circulation.

The circulation process is conducted through either of two methods. Most commonly, a draft decision document prepared by the Commission staff is formally distributed to the Commissioners for review, and voting is accomplished through the Commission's electronic voting system. Then, each Commissioner registers his or her vote by computer. Occasionally, when time is of the essence, a manual process is used. With the manual process, a draft decision document prepared by the relevant staff is brought to the Commissioners, either at the same time or sequentially. Each Commissioner is then asked to register his or her vote by initialing a "Request for Special Action by Circulation" form (the so-called "pink sheet").

Under both methods, the circulation process involves an informal editing process. As Commissioners review and vote an item and before the item is finalized for release, the Commissioners (and their staffs, as well as other Commission staff) may propose edits to the item. To the extent these edits

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[14] The introductory pages to Exhibit 4 identify the Commissioners and Commission staff who had contacts with the broadband PCS pioneer's preference recipients.

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are substantive, they are reviewed and approved by all of the Commissioners voting for the item before the item is finalized for release.

c. In formulating your answer to question 2(a) above, did you have access to the "pink sheets"? Were you able to determine whether significant changes were made after the announcement of the decision on December 23 and prior to the release of the text of the Commission's decision?

As noted in response to Question 2(b), most of the Commission's decisions which are made on circulation are made by computerized voting rather than via pink sheets. The decision to adopt the First Report and Order in ET Docket No. 93-266 was made by computer. The editorial changes made to the item between the December 23, 1993 adoption date and the January 28, 1994 release date did not alter the decisions. Only two arguably significant edits were made. The first was the inclusion of additional language in the background section of the item to summarize additional comments received from the public. The second was the inclusion of language in the discussion section stating more explicitly that the decision not to change the pioneer's preference rules for broadband PCS and similarly situated services meant that no payment would be required for licenses granted to pioneer's preference recipients in those services. All edits were reviewed and approved by the Commissioners before the item was released.

d. Are you aware of any cases involving other Commission decisions that were made "on circulation" in which the text of the decision was not released for more than 30 days?

Yes. For example, between January 1, 1993 and May 6, 1994, we have identified thirty-five (35) Commission decisions made on circulation that were released more than thirty days after the decision was adopted.

3. Are you able to account for the delay in the release of this text?

Yes. The decision in Docket No. 93-266 was made on Thursday, December 23, 1993. Because of the holiday season and related vacations, weather-related closings in January and the press of other Commission business, the editing and release process took longer than usual. During this period, there were five days which were holidays or days on which the Commission was closed because of inclement weather, and six liberal leave days.

4. During the period between the announcement of a decision and the release of the text of that decision, it is my understanding that the subject proceeding is restricted under the Commission's rules. Are you aware of any contacts by entities designated as "pioneers" during the period beginning when the Commission's decision was announced and ending when the text of that decision was released? In your response, please include any contacts in the above-referenced proceeding and any other proceedings, including filings made with respect to experimental licenses.

In cases where the Commission votes on an item at an open meeting, the so-called "sunshine period" prohibition in the Commission's ex parte rules prohibits most communications to the Commission about the merits of an item before its release. In contrast, when items are voted on circulation, such as the First Report and Order in ET Docket No. 93-266, the sunshine period prohibition is not triggered. Rather, circulation items are governed by the normal ex parte rules which, in the case of

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rulemakings such as ET Docket No. 93-266, permit ex parte presentations so long as they are disclosed. We have not identified any contacts by pioneer's preference recipients regarding ET Docket No. 93-266 during the period between the adoption of the First Report and Order on December 23, 1993 and the release of the order on January 28, 1994. The only contacts we have identified which occurred during this time in any other relevant proceedings were made by APC and Omnipoint in January, 1994 in Gen. Docket No. 90-314 (the broadband PCS proceeding). A list of these contacts are attached as Exhibit 1. Summaries of each of these contacts were filed with the Commission as required by the Commission's ex parte rules.

5. Please obtain copies of [correspondence cited in Question 5] and other relevant correspondence and submit to the Subcommittee your analysis of the allegations contained therein. Please supply any documents necessary to support your conclusions.

Attached as Exhibit 2 is a letter from the Commission's Managing Director, prepared in consultation with the General Counsel, concluding after extensive review that no ex parte violations occurred in connection with the allegations raised in this correspondence about the grant of pioneer's preferences to APC, Cox and Omnipoint.[15] These are the only allegations made to the Commission of improper ex parte contacts with respect to the grant of pioneer's preferences to APC, Cox and Omnipoint in the broadband PCS proceeding.[16]

Exhibit 2 also contains copies of all the correspondence requested in Question 5 of your letter. In addition, the following letters are included:

Letter from Jonathan D. Blake to Andrew S. Fishel (May 12, 1994)

Letter from Michael K. Kellogg to Andrew S. Fishel and William E. Kennard (May 17, 1994)

6. On what date, or dates, did the Commission's "Pioneer Preference" process become a restricted proceeding? Did the Commission issue any announcement or otherwise inform the public as to the date or the nature of the restrictions that would pertain? If so, please provide copies of any such announcements to the Subcommittee.

As noted previously, each pioneer's preference request is treated as an individual adjudication within a larger Commission rulemaking docket concerning the proposed new service at issue. In the case of broadband PCS services, the applicable docket was Gen. Docket No. 90-314. When a request for a preference is filed with the Commission, that request is assigned a "PP" number within the existing docket. Each application for a pioneer's preference becomes restricted under the ex parte rules on the date a filing is made formally opposing the request.

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[15] However, the Managing Director did note certain technical deficiencies in notices of permissible ex parte presentations made by these parties in the pioneer's preference review rulemaking.

[16] In addition, there has been an allegation by Qualcomm, Inc., an unsuccessful broadband PCS pioneer's preference requester, that in an experimental report Omnipoint made an impermissible ex parte presentation in connection with Qualcomm's request. That matter will be addressed by the Commission in connection with Qualcomm's pending petition for reconsideration of the denial of its preference request.

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The preference requests for each of the three broadband pioneer's preference recipients were formally opposed. The APC request became restricted on January 24, 1992, and the Cox and Omnipoint requests on June 10, 1992.

Before and after the dates on which these proceedings became restricted, the Commission issued announcements informing the public of the restricted nature of the pioneer's preference proceedings, either generally or with respect to broadband PCS. First, on May 13, 1991, the Commission released a Report and Order in Gen. Docket No. 90-217 adopting the pioneer's preference rules. 6 FCC Rcd 3488 (1991). In that Report and Order, the Commission explained that any request for a pioneer's preference would become restricted upon the filing of a formal opposition. 6 FCC Rcd 3493.

On June 15, 1992, five days after the Cox and Omnipoint preference requests became restricted, the Commission staff issued a public notice explaining that the ex parte restrictions applied to pioneer's preference requests at the time at which the requests were formally opposed. Public Notice, Ex Parte Presentations relating to requests for Pioneer's Preferences, 7 FCC Rcd 4046 (Chief Engineer 1992).

On November 6, 1992, the Commission issued its Tentative Decision and Memorandum Opinion and Order, 7 FCC Rcd 7794 (1992) in the broadband PCS proceeding (Gen. Docket No. 90-314). Therein, the Commission indicated that the broadband PCS pioneer's preference proceedings were restricted and that ex parte presentations were prohibited until the proceeding is no longer subject to administrative or judicial review. Id. at 7813, ¶ 50.

On February 12, 1993, the Commission staff issued another public notice reminding parties that the broadband PCS pioneer's preference proceedings are restricted. Public Notice, Ex Parte Presentations Relating to 2 GHz Personal Communications Services' Pioneer's Preference Requests, 8 FCC Rcd 1511 (Chief Engineer/Managing Director 1993).

Copies of the foregoing documents are attached as Exhibit 3.

7. Did the staff that was preparing recommendations to the Commissioners with respect to "Pioneer Preference" designations have substantive contact of any sort with applicants after the date on which the preference proceeding was considered restricted? For example, were any of the staff who participated in making recommendations to the Commission on pioneer preference entitlements also reviewing reports concerning experimental licenses filed by the applicants after the date the proceeding was considered restricted?

Yes, the staff that was preparing recommendations to the Commission had substantive contact with the successful broadband PCS pioneer's preference recipients after the date on which the specific pioneer's preference adjudications became restricted. See Exhibit 5, provided in response to Question 8. As noted above, contacts with respect to the various rulemaking proceedings were not prohibited under the ex parte rules. Similarly, status inquiries and casual remarks were not prohibited under the ex parte rules.

Several of the Commission staff members worked on both the various PCS and pioneer's preference-related proceedings. This is consistent with general Commission practice to assign staff to multiple projects involving similar issues or requiring similar expertise. With respect to your specific example, some of the staff who made recommendations to the Commission concerning

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preference requests also reviewed experimental license applications and reports.

8. **Please identify the dates, participants in, and specific subjects of all meetings, conversations or communications of any sort between Commission staff or Commissioners and any of the four applicants ultimately designated as "pioneers" after the dates on which the Commission considers the proceedings to have been restricted. Please include any contacts which addressed personal communications services in general; experimental licenses held by applicants (including technical trials or reports of any sort related thereto); or any contacts related to the "pioneer preference" rules as considered in Docket 93-266 or more generally. In your response, please include a listing of all contacts, including those considered to be status inquiries.**

Please provide a copy of all written materials submitted to the Commissioners or staff with respect to the above issues.

A list of all such contacts that we have identified with respect to the broadband PCS pioneer's preference recipients is attached as Exhibit 4. As noted above, contacts with respect to the various rulemaking proceedings are not prohibited under the ex parte rules if disclosed. Similarly, status inquiries and casual remarks are not prohibited under the ex parte rules. The copies that we have been able to identify of written materials submitted to the Commissioners or staff in connection with these contacts are attached as Exhibit 5. Copies of the relevant ex parte notices are attached as Exhibit 6.

9. a. **Do any of the technical or other reports on the experimental licenses of the four applicants who received a "pioneer preference" award, filed on or after the dates on which the Commission considers the PCS "Pioneer Preference" proceeding to have become restricted, address or respond to arguments made by commenters concerning any of the recipient's qualifications to receive a pioneer preference?**

Based on our review of the experimental license reports filed by the successful broadband pioneer's preference requesters, we identified one such report. On August 19, 1993, Omnipoint filed an experimental report that contained responses to comments made by Qualcomm.

b. **If your answer to the above [Question 9(a)] is "no", please address your understanding of the meaning of Mtel's statement in its progress report, filed June 29, 1992, that "Mtel decided to revise its planned test schedules and first evaluate its Multi-Carrier Modulation ("MCM") techniques in order to conclusively address comments made by other parties in response to Mtel's June 1, 1992, NWN Technical Feasibility Demonstration," and its submission therein of materials bolstering its claim that it could achieve the data rates for which it ultimately was awarded a preference.**

The answer to Question 9(a) is "No" with respect to broadband PCS. Mtel's statement is addressed in a separate letter regarding narrowband PCS.

c. **Were any of the reports filed in the Experimental License files by the four "Pioneer Preference" recipients served by those recipients on parties opposing their "Pioneer Preference" awards? Did the Commission's rules require service of these reports on the entities opposing the "Pioneer Preference" awards made by the Commission?**

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Some (but not all) of the experimental license reports by the broadband PCS pioneer's preference recipients were served. The Commission's rules do not explicitly provide for service of the experimental reports. As explained below in response to Question 9(d), the reports were available to the public.

d. Were any procedures established by the Commission to notify opponents to the awards that the reports had been received, or that the recipients had met with Commissioners or Commission staff regarding the experimental licenses, or reports associated therewith? If not, would such notice and opportunity to comment have been proper?

Yes. On May 10, 1991, the Chief of the Frequency Allocations Branch of the Office of Engineering and Technology filed a memorandum in Gen. Docket No. 90-314, indicating that PCS experimental license reports were being incorporated into the docket, and that such reports were available for public inspection and copying. Based on the recollections of the Commission staff persons involved in the experimental licensing process, numerous parties inspected and copied the documents. No procedures were established to notify the public of any meetings by pioneer's preference requesters regarding their experimental reports. Because numerous parties inspected and copied the reports, it does not appear that additional notice and comment procedures were necessary.

e. Has the Commission determined that no ex parte information received by the Commissioners or Commission staff on or after the dates on which the proceedings became restricted was considered by the staff in its recommendations that the "Pioneer Preference" recipients were so entitled? If so, what is the basis for such a determination?

As noted above, ex parte presentations in the rulemaking proceedings were not prohibited so long as they did not address the merits of the pioneer's preference requests. In addition, status requests and casual or incidental remarks were not prohibited. We have not identified any contacts that fall outside these categories of permissible communications. In this regard, the Commission's rules require that impermissible ex parte presentations in restricted proceedings be reported to the Managing Director, 47 C.F.R. § 1.1212, and no such reports have been made regarding broadband PCS pioneer's preferences other than the letters discussed in Question 5 above. As noted in response to Question 5, the Managing Director determined that no ex parte violations occurred in connection with the allegations raised in this correspondence about the grant of pioneer's preferences to APC, Cox and Omnipoint, except technical deficiencies in the notices of permissible ex parte presentations filed with the Commission.

f. Has the Commission determined that no ex parte information received by the Commissioners themselves, either directly or through the staff, on or after the date the proceedings became restricted, was considered in determining whether the recipients were entitled to "Pioneer Preferences"? If so, what is the basis for such a determination?

Based on our interviews with the Commissioners and their staffs, we have determined that after the broadband PCS pioneer's preference proceedings became restricted, none of the Commissioners received ex parte presentations which addressed the merits of the APC, Cox or Omnipoint pioneer's preference requests

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or were otherwise outside the categories of permissible communications. In addition, before receiving ex parte presentations by pioneer's preference recipients, the Commissioners or their staffs routinely reminded the recipients that discussion of the merits of contested pioneer's preference requests is prohibited. Similarly, before receiving ex parte presentations related to the PCS rulemaking issues from pioneer's preference recipients, Chairman Hundt and/or his staff advised them that he is recused from all proceedings related to the award of pioneer's preferences in the broadband PCS services and that discussions should be confined to permissible topics.

10. With respect to the four entities ultimately designated as recipients of "Pioneer Preference" awards, please respond to the following questions:

a. On what dates did Commission personnel visit the sites at which experiments were conducted to verify the results of the trials?

Commission staff did not visit any test sites to verify broadband PCS trial results. A staff person from the Commission's Office of Engineering and Technology (OET) visited APC's test site to view a demonstration of APC's CT-2 (second generation cordless telephone) technology in the 900 MHz band, but not for the purpose of verifying test results. APC was not awarded a preference for this technology; its preference was granted in the 2 GHz band. We are unable to determine the exact date of the visit.

b. Please furnish the Subcommittee with the names and titles of all such personnel.

Thomas Mooring, an Electronics Engineer in OET, made the visit described above.

c. Please describe the reports that were drafted subsequent to site visits.

Not applicable.

d. How were such reports treated by the Commission? Were they placed in the Public File? Were they released to the public so as to permit comments? Please detail any comments that were received by the Commission in response to their release to the public.

Not applicable.

e. Did the Commission establish an internal review process for such reports? Please list the names and titles of all Commission personnel involved in such a review.

Not applicable.

f. Did the Commission establish a "Peer Review" process for the independent review of testing results? If so, please furnish the Subcommittee with a description of such a process, including the names and credentials of any "Peer Review" panel that examined and verified test results.

No.

11. With respect to the site visits referred to above, please furnish the Subcommittee with the following information:

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a. During the conduct of the testing, how many channels were utilized for each applicant during each test?

Not applicable.

b. What channel assignments were utilized for each test? Were these the same channel assignments, or at least in the same frequency band, as the assignments that had been granted for the four recipients of the "Pioneer Preference" designation? If not, how does the Commission intend to enforce its condition that "each licensee must build a system that substantially uses the design and technologies upon which its preference award is based"?

No such testing occurred. As in all cases in which it imposes conditions on licenses, the Commission will have available the full range of sanctions provided in the Communications Act to discipline a broadband pioneer's preference recipient if it violates a condition of its license. For example, the Commission could fine the licensee, issue a cease and desist order, revoke its license or decline to renew its license. The Commission has not indicated specifically which of these enforcement mechanisms would be invoked in the event that Cox, APC or Omnipoint were to violate a license condition.

c. During the conduct of the testing, how many base stations were built for each of the four applicants? How far apart were the base stations? During the course of the site visits, how many handsets were the Commission personnel able to verify were deployed? How many hand-offs were recorded by Commission personnel?

Not applicable.

12. **a. During the course of the Committee's deliberations concerning the auctioning provisions of last year's "Omnibus Budget Reconciliation Act," there were varying estimates of the amount of revenue that would be received by the Government as the result of assigning frequencies by competitive bidding. It is my understanding that the most recent estimate by the Office of Management and Budget is $30 per "pop" (unit of population). Using this estimate, please furnish the Subcommittee with an analysis of revenue foregone directly for the four licenses that will not be issued by competitive bidding procedures if the Commission issues licenses to the four recipients of "Pioneer Preference" awards.**

We have not independently estimated the auction revenue foregone from the three broadband PCS pioneer's preference awards. Developing an accurate estimate of foregone revenue is difficult. There are no established numerical values for the nationwide market for narrowband PCS, for the spectrum being used for PCS or for the PCS technology itself, which is new.

We are not aware of any OMB estimates of $30 per unit of population, or "pop." However, the House Budget Committee estimated in 1993 that total broadband PCS revenues would be approximately $10 billion. Dividing $10 billion by the U.S. population of approximately 250 million results in an average estimated value of $40 per pop for all 120 MHz of spectrum allocated to broadband PCS. Thus, the 30 MHz of PCS spectrum awarded to each of the broadband PCS pioneer's preference

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recipients would represent approximately $10 per pop. At $10 per pop, with the combined population for the three broadband PCS markets of 53.3 million, the auction revenue foregone for the three 30 MHz broadband licenses would be $533 million.

b. In addition, please furnish the Subcommittee with your analysis of the effect that issuing these four licenses at no cost to the licensee is likely to have on those who might be prospective bidders for one of the remaining licenses. Please make every attempt to quantify the impact of issuing these licenses without a cost on the bidding strategies of potential bidders.

The net effect of awarding licenses under the pioneer's preference rules on the value of the remaining PCS licenses cannot be quantified easily. It could result in an increase or a decrease in auction revenues derived from the remaining licenses, depending on the circumstances. The Commission's staff believes that issuing these licenses prior to auctioning the remaining licenses could affect the strategies of potential bidders and the ultimate assignment of licenses. The effect on bidding for the remaining licenses is likely to depend on whether those licenses are complements or substitutes for the licenses awarded under the pioneer's preference rules. Once the pioneer's preference licenses have been issued, bidders (other than the pioneer awarded a license) interested in licenses that are close substitutes for pioneer's preference licenses (e.g., licenses in the same geographic area but on different channels within the same band) would likely be willing to pay more for these remaining licenses. This is because there is one less close substitute available for auctioning. On the other hand, bidders (other than the pioneer awarded a license) interested in complementary licenses (e.g., licenses on the same frequency channel in adjacent geographic areas) would likely be willing to pay less for such remaining licenses than if all the complementary licenses were up for auction at the same time.

As noted above, our review of the PCS and pioneer's preference proceedings, the relevant ex parte notices, and information provided by current and former Commissioners and Commission staff uncovered no misconduct by the Commission in these proceedings. I trust that the foregoing is fully responsive to your inquiries and addresses your concern about possible improprieties by the Commission related to the grant of pioneer's preferences to APC, Cox and Omnipoint. Should you require any additional information in this regard, please contact me.

Sincerely,

William E. Kennard
General Counsel

cc (w/o attachments): The Honorable Dan Schaefer, Ranking Republican Member
Subcommittee on Oversight and Investigations

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Mr. DINGELL. On June 28, together with our colleague and friend, the Honorable Carlos Moorhead, the Honorable Martin Sabo and our good friend, Mr. Ed Markey, I introduced H.R. 4700, a copy of which will be inserted in the record at this point.

That bill would have required preference winners to pay for the benefits which they were to be receiving.

In late July, the Commission requested that the record on this proceeding be remanded to the Commission by the court in order to permit the Commission to revise the decision which it had made earlier to give the licenses away for free.

In early August, the Commission did, in fact, revise its decision, along the lines of the requirements of H.R. 4700. Throughout the summer, it was no secret around this town that the administration was considering including a compromise version of H.R. 4700 in the GATT funding package.

Members of this committee staff, of the staff of the subcommittee, and the staff of the minority, working together with the administration, and the Majority and the minority staffs of the Senate, worked to arrive at a compromise. Again, a widely known set of events which were reported in the press.

It was our hope that they could draft language which would be able to gain the support in the Congress, including those of us who had worked for months in order to assure that the pioneers would pay a fair price for their licenses.

On September 12, I circulated a memorandum to all of the members of the committee stating that it was the administration's intent to include these provisions in the GATT funding bill, and I ask unanimous consent that it be inserted in the record here.

[The memorandum referred to follows:]

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ONE HUNDRED THIRD CONGRESS

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U.S. House of Representatives
Committee on Energy and Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

September 12, 1994

M E M O R A N D U M

TO: Members, Committee on Energy and Commerce

FROM: John D. Dingell, Chairman

SUBJECT: GATT Implementation

As you may know, in late June I introduced H.R. 4700, along with our colleague, Carlos Moorhead. This legislation would require recipients of the Federal Communications Commission's so-called "Pioneer Preference" awards to pay an amount equal to 90% of the value of comparable licenses, rather than receive these valuable licenses for free.

Since that time, the Committee staff, together with the Subcommittee and minority staffs, have been working with the Administration to develop a compromise proposal that would be acceptable to all. They have reached an agreement that, in my view, fairly balances the need to compensate the public for the use of scarce spectrum resources with the need for consistency and equity for the so-called "pioneers".

The attached letter was delivered to the Committee during the August District Work Period. Based on this letter, it appears that the compromise proposal developed by the staff will be included in the GATT financing package that the Administration plans to submit.

I wanted to take this opportunity to alert you to this latest development so that you will be adequately informed in the event we are asked to consider the GATT legislation in Committee before the 103rd Congress adjourns. If you have any questions regarding the substance of this proposal, please don't hesitate to contact me or David Leach of the Committee staff.

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THE DEPUTY SECRETARY OF COMMERCE
Washington, D.C. 20230

AUG 29 1994

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The Honorable John D. Dingell
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Dingell:

Over the past several weeks the Administration has worked with Congressional staff to develop legislation that will reform the Federal Communication Commission's (FCC) Pioneers' Preference Program. My staff informs me that this issue has been discussed with House and Senate staff and that consultations have been held concerning specific legislative language. This legislation will provide significant new revenues to the Treasury.

I am writing to let you know that it is our intention to submit a pioneers' preference reform bill as part of the General Agreement on Tariffs and Trade financing package. As currently drafted, the bill will require FCC pioneers to pay 85% of the market rate for their licenses, with a guaranteed minimum payment to the government of $400 million (total for all licenses). The market rate will be determined using an average of the 20 largest metropolitan markets outside the pioneer license areas. The bill will require payment of the full amount over five years, with only interest in years one and two, and with a payment plan for years three, four, and five set by the FCC in a forthcoming rulemaking. With the single exception noted above, these provisions would go into effect without any further FCC action. These draft financial parameters were produced in consultation with Congressional staff and the pioneer-awardees, who will, under this new law, be paying the government for their FCC licenses. We would, of course, be pleased to have further discussions with you on this proposal.

Thank you for your consideration of this matter. I look forward to talking with you in the near future.

Sincerely,

David J. Barram

Identical Letters Sent to Honorable Ernest F. Hollings, Honorable Edward J. Markey, Honorable John C. Danforth, Honorable Carlos J. Moorhead, and Honorable Jack Fields

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Mr. DINGELL. A copy of a letter that I had received from the Commerce Department was attached. And I have already asked unanimous consent that the text of these materials be included at this point in the record.

Given this history, I was very much surprised at recent protestations that the inclusion of these provisions was news. It should not have been. I am even more surprised at some of the charges that have been made by unknowing, ignorant, irresponsible and perhaps vicious people that in some way this was a corrupt effort on the part of the administration, the committee, or any other person to engage in some efforts to give some very special preference to the pioneer preference recipients.

Now, it is at the request of the leadership that we are convening this hearing, and it is partly in response to these protestations that we are convening the hearing also. Given the shortness of time, I will urge my colleagues and our witnesses to be brief.

This ends the opening statement of the chairman, and I now recognize the distinguished gentleman from Colorado, Mr. Schaefer, for an opening statement, and then I will recognize my dear friend, the chairman of the subcommittee, for another opening statement.

Mr. SCHAEFER. Thank you, Mr. Chairman.

As the chairman has so eloquently explained, interests that seek competitive advantage in the exciting new PCS market have turned the pioneer preference issue completely on its head. One of the pioneers is Omnipoint, a small entrepreneurial company based in my State of Colorado.

Now, Omnipoint has already invested millions of dollars and countless hours to develop the only American non-cellular PCS technology. Then, as required under the pioneer program, they made this technology public.

Thanks to the pioneers' preference program, PCS service and technology have developed much more quickly than did cellular. In fact, the pioneers' efforts have probably increased the value of the PCS licenses and therefore the amount of money the government will realize through the upcoming spectrum auction.

I can assure my colleagues that the PCS pioneers are not getting any kind of a deal in this bill. Omnipoint, for one, is willing to pay for their license, despite being repeatedly assured by the FCC that they would get it for free. This is just to end the litigation and get on with the deploying of this new technology that will create jobs, advance competition, and benefit the consumers in this country.

And I would yield back, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

The gentleman from Massachusetts, Mr. Markey, chairman of the subcommittee.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Today's joint hearing on Title VIII of GATT implementing legislation is designed to give members a chance to explore again an issue that has been the subject of two other hearings in the House and was before the committee, this committee, just last week.

It was raised with Chairman Hundt in testimony before the Appropriations Committee on the House side in April. It was the focus of an oversight subcommittee letter widely reported on in May from this committee. It was the subject of a hearing before the Budget

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Committee last week, and now our two committees will again look at this matter.

I appreciate the cooperation of the members in permitting us to hold this hearing on such short notice. But Chairman Dingell and I thought it was important to have this hearing as soon as possible.

Title VIII contains an amendment to the Communications Act of 1934 that requires the Commission to recover for the public a portion of the value of public spectrum that has been awarded by the Commission to licensees granted a pioneer's preference. This title is based on H.R. 4700, introduced by Chairman Dingell, the ranking Republican member, Mr. Moorhead, Mr. Sabo and myself.

The pioneer's preference was begun in the late 1980's under a Republican chairman of the Federal Communications Commission. Under the program, certain persons are determined by the Commission to have made significant contributions to the development of a new telecommunications service or technology, and those persons are assured of obtaining a Commission license.

The Republican-led FCC developed the pioneer preference program in the late 1980's as a means to reward those who invest in technology but who might lose out under the licensing procedures in place at that time, namely, a lottery system that returned nothing of value to the Federal Government.

The Commission reasoned that because the lottery system made no distinction between the serious technology innovator and the casual speculator who plunked down 50 bucks for a Xeroxed copy of an application, it gave no incentive to persons or companies to invest in new communications technologies.

In August of 1993, long after the pioneer preference program had been under way, Congress changed dramatically the Commission's licensing process. The Licensing Reform Act of 1993 approved by this committee as part of the Omnibus Budget Reconciliation Act of 1993 largely abolished lotteries and instead put in place a system of competitive bidding in services where there are mutually exclusive applications.

Earlier this year, the FCC began to use auctions as a means of assigning licenses, and the first auction for narrow-band PCS generated over $600 million. Later in the year, the Commission will auction broadband PCS.

In light of these events, the committee, led by Chairman Dingell, several months ago began to examine whether pioneer preference winners should get their spectrum without having to pay for it, as was the original intention back in the Bush era.

Under the Commission's pioneer preference rules, the spectrum being awarded to the pioneers would not be subject to auction, since by Commission rule, the applications were not mutually exclusive. Consequently, the Commission sought to develop legislation that would ensure that holders of a pioneer's preference pay an equitable amount for use of their spectrum and that such payment not be mooted by litigation.

Title VIII accomplishes that goal by amending section 309(j) of the Communications Act of 1934, to require pioneer preference holders to pay a sum equal to, not less than 85 percent on a per population basis of the highest bid for a license that is most reasonably comparable in terms of band width, area designation,

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usage restrictions and other characteristics. The legislation provides that in the context of broadband PCS, the 20 largest markets in which no one has obtained a pioneer's preference would be the most reasonably comparable.

The legislation also provides that the sum owed to the Federal Government by the broadband PCS pioneers may be paid over a 5-year period.

Title VIII also ensures that the Federal Government obtains at least $400 million, and with the required interest payments, this means pioneers will pay over $500 million.

Most importantly, this legislation makes certain that the pioneers will have to pay for their spectrum.

Make no mistake, the Commission—that is the Federal Communications Commission—is at great risk in losing the case where it imposed a fee on the pioneers. The FCC is on thin ice when it seeks to impose in the absence of congressional authorization a fee of hundreds of millions of dollars on its licenses.

If you take the FCC's reasoning to its logical conclusion, then the Commission needs no congressional authorization to impose hundreds of millions of spectrum dollar fees on broadcasters or other license holders.

Consequently, the choice before the committee is whether to take 85 percent of a sure thing or roll the dice on 90 percent on nothing, with many observers believing nothing will be what the Federal Government and the Treasury receives.

I think this legislation is necessary to give certainty for taxpayers. It is a good proposal, and I hope it is embraced by the Congress as part of the overall GATT package.

I yield back the balance of my time.

Mr. DINGELL. The Chair thanks the gentleman.

The gentleman from Texas, Mr. Fields.

Mr. FIELDS. Mr. Chairman, I would like to make an opening statement.

Mr. DINGELL. The gentleman is recognized for that purpose.

Mr. FIELDS. Mr. Chairman, I would like to start by saying publicly what I said privately earlier today and that is how much I appreciate you responding to members and calling this hearing, particularly after some advertisements appeared in The Washington Post and The New York Times. This gives us an opportunity to set the record straight.

And, Mr. Chairman, you stated the facts very eloquently, and that is that Congress in Title VIII of the GATT legislation intended to ensure that a giveaway of licenses did not occur and that the pioneer licensee paid a significant portion of the market value of a PCS license.

And already we have had the history reviewed several times, but it is important for everyone to remember that the pioneer preference policy was established nearly 4 years ago by the FCC. The policy offers the guarantee of a FCC license to parties who successfully pioneer new communication services and technologies.

When Congress passed the Budget Reconciliation Act last year authorizing the use of auctions for PCS spectrum, something that many of us had believed in for many years, Congress at that point

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remained neutral on the issue of whether the FCC's pioneer preference policy should be applied for the licensing of PCS services.

Last December, the FCC awarded a pioneer preference to three PCS applicants, and that was out of more than 100 who had applied for that preference.

In so doing, the FCC guaranteed these companies a license in three of the top markets. The FCC decided that the applicants should be awarded those licenses at absolutely no cost.

In response to concern that valuable spectrum was being given away, you, Mr. Chairman, and our ranking member, Mr. Moorhead, introduced a bill, H.R. 4700 which would have required the pioneers to pay 90 percent of the value of the license in their market.

Subsequent to the introduction of that legislation, the FCC reversed its decision and required the pioneers to pay a comparable amount. However, the FCC lacks the authority to tell a licensee to pay the government in return for a license. The FCC decision would likely be overturned by the courts, and thus it was important that statutory authority be given.

And after lengthy negotiations with the administration, the Senate, a compromise was agreed to which would require the pioneers to pay 85 percent of the average market value of the top 20 markets. The provision, contrary to the advertisement in The Washington Post, does not provide a giveaway to the pioneers; rather, requires that the pioneers pay at least $534 million, figures given to us by OMB, to the Federal Treasury for the license that was awarded to them.

Without that provision, it is likely that after the FCC's decision is overturned, the licensees would pay nothing, and this provision in GATT corrects that inequity.

But again, I want to emphasize to you, Mr. Chairman, how much I appreciate in such a short time frame you responding to the concerns and questions that some of our members had, particularly in light of the advertisement that appeared yesterday.

Mr. DINGELL. Well, would the gentleman yield just briefly?

Mr. FIELDS. Be glad to yield.

Mr. DINGELL. Because I think there is something I should say here. I want to make it very clear that the entire conduct of this matter has been done up to this point in a thoroughly and carefully crafted bipartisan fashion and that it has been accomplished with the full cooperation of all of the relevant members of the committee, the subcommittees involved.

And I want to commend the gentleman from Texas, as well as the gentleman from Colorado and the senior minority member of this committee, Mr. Moorhead, for the very decent, cooperative way in which they have worked with the Chair to address the problem that we have confronted right from the first day of this order. So I want to express my appreciation to the gentleman from Texas as well as to the other Members on both sides of the aisle, Republicans and Democrats alike, as to how this matter has been dealt with to this point. I thank the gentleman.

The Chair recognizes now the gentleman from Oregon, Mr. Wyden.

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Mr. WYDEN. Thank you, Mr. Chairman. And I am going to be very brief.

Let me first commend you and Chairman Markey, because I think you have gone about this in a very open way that has involved all the Members.

The two points I would like to make is, first, it seems to me that without the Dingell-Markey legislation, the main thing that the taxpayers of this country would have gotten are some huge legal bills, because as I understand it, it was a sure bet that the pioneers would have challenged an FCC decision. Certainly this would have been a lawyer's full employment program, would have gone on and on and on, and your legislation with Mr. Markey has ensured that the taxpayers will get hundreds of millions of dollars rather than just running some sort of legal roulette that would have stuck the taxpayers with some huge legal bills.

The second point that I would make, Mr. Chairman, is that it seems to me what we are seeing, much like we saw in the last days of the NAFTA debate, are some far-out scare tactics trying to inflame the people of our country into thinking that something is being railroaded through; this is an effort to muddy the waters.

I think Congress has a chance to pass a jobs producer, cut tariffs and help thousands and thousands of our businesses, while at the same time, because of this provision, making sure that the taxpayers' interests are protected. I hope our colleagues will see that in the course of this debate and yield back.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes now the distinguished gentleman from South Carolina, Mr. McMillan.

Mr. MCMILLAN. Make that North Carolina, Mr. Chairman.

Mr. DINGELL. I am sure South Carolina would be delighted to have him if they could get him. I will go further to say that——

Mr. MCMILLAN. My wife feels that way. She is a South Carolinian.

Mr. DINGELL. I will go further and say that we would like to keep the gentleman on the committee and his retirement from the Congress is a source of considerable regret.

Mr. MCMILLAN. That would be very unusual if we could arrange it.

I won't say much, except to thank you for holding this special hearing today. I will have to confess that having sat on this committee during the markup of the bill, as well as on the Budget Committee when I didn't make that session because of a conflict, I hadn't really focused on this thing sufficiently enough. So when the criticism emerged yesterday, I was not able to address the issue, and that is my fault.

That is not a criticism of the committee, but I do think it needs airing. So I am delighted we have this opportunity to do it today, and I think once done, a lot of the questions and criticisms would be answered.

And I thank the Chair and yield back the balance of my time.

Mr. DINGELL. The Chair thanks my good friend.

The Chair recognizes now the distinguished gentleman from Virginia, Mr. Bliley.

Mr. BLILEY. Thank you, Mr. Chairman.

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I don't have a statement. I just came to learn. And I will yield back the balance of my time.

Mr. DINGELL. The Chair recognizes the distinguished gentleman from Ohio, Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

Never in my wildest dreams would I have thought a few years ago when I was toiling in the vineyards trying to convince the Congress and a Republican administration that the spectrum auction was the best way to go in distributing scarce resources, in allowing the taxpayer to benefit, that we would be here today discussing this particular issue.

So I want to make it clear, Mr. Chairman, that from the get-go, that this is an argument, if you will, it is a hearing, if you will, about more for the taxpayer, not less, and it may be an argument about how that is distributed and how it is determined, but the fact is that because of the success, the huge success of the first spectrum auction that we had earlier this summer, that we can be here today and talk about not zeroes, but numbers in front of a lot of zeroes that have been beneficial and will continue to be beneficial not only for the driving of the technology in this very quickly changing world of telecommunications, but as importantly, as equally importantly, getting money to the taxpayers who actually own that spectrum anyway.

And this was, of course, the first—after that success we had this summer, the first chance that we had to see how this pioneer's preference would work.

I want to commend the chairman of the full committee, the gentleman from Michigan, Carlos Moorhead and Ed Markey, for seeing what could potentially happen with a pioneer's preference that was given without cost, stepping into the breach and making some bold decisions that have benefited the taxpayer and I think the telecommunications community immensely. And so we are here today to talk about that process and how that will work.

And really what we have to do, we have to learn today, particularly from our distinguished panel, is the structure of the original deal as it was structured in the Moorhead-Dingell bill, how the deal was modified by the GATT approach, what have the pioneers invested, and specifically, are Pacific Telesis' accusations supportable or are they unfounded as to the lost revenue through the pioneer's grant.

I think it is an opportunity for this committee to set the record straight and to get it out of the very controversial context of the GATT debate and where it belongs, and that is in the context of what we were trying to do initially with the entire concept of a spectrum auction.

To that extent, Mr. Chairman, I commend you for this very important hearing and giving us an opportunity to get all the facts on the table.

I welcome our distinguished witnesses today, and I yield back the balance of my time.

Mr. DINGELL. The Chair thanks my good friend from Ohio.

The gentleman from Ohio, Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman.

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I have no questions, but just as an opponent of GATT and as someone who is concerned about trade policy in this country overall, I want to applaud the work of the committee and applaud the chairman for what seems to be an ability to make sure that the legal bills that we might be saddled with will not happen and that we in fact have gotten something out of the auction and the spectrum, and I applaud Chairman Markey and Chairman Dingell's efforts on behalf of taxpayers.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair wants to express the appreciation of the committee to our witnesses who have appeared here under difficult conditions and on very short notice.

The Chair will recognize our panel, first panel, Mr. Irving of NTSIA.

Ms. Rivlin, your good work is known to this committee over many years, and you, Mr. Sallet, we appreciate your kindness in being here with us from the Department of Commerce. So you may recognize yourself in such order as you deem appropriate and then the Chair will recognize members for questions.

STATEMENTS OF HON. ALICE RIVLIN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; LARRY IRVING, ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION, DEPARTMENT OF COMMERCE, ACCOMPANIED BY JONATHAN SALLET, ASSISTANT TO THE SECRETARY AND DIRECTOR OF THE OFFICE OF POLICY AND STRATEGIC PLANNING

Ms. RIVLIN. I think I will lead off and then turn things over to the Department of Commerce.

I am pleased to be here even on short notice, Mr. Chairman, and to have the opportunity to testify on the pioneer preference provision of the GATT implementing legislation.

The pioneer preference provision in GATT requires that firms who are given spectrum licenses by the FCC as a reward for technological innovation compensate the public fairly for those licenses.

The Federal Communications Commission developed a program in 1990 to reward wireless telecommunications technology innovators with free spectrum assignments. This program was developed in the era when spectrum was allocated by random lotteries to ensure that breakthrough technologies could actually get on the air.

In October 1992, the FCC designated three companies as technology pioneers: American Personal Communications, Cox Enterprises, Inc., and Omnipoint Communications, Inc. With this designation came the expectation of a free license for a block of broadband spectrum.

In December 1993, the FCC designated extremely lucrative areas for the pioneers: Washington-Baltimore; Los Angeles, San Diego; and New York, New Jersey.

In 1993, the FCC was given authority to auction spectrum, thus allowing technology pioneers to simply buy their spectrum assignments like everyone else. In spite of this change, the FCC made no changes in the policy to grant pioneer designations.

Following widespread criticism, the FCC wrote an order dated August 9, 1994, that requires parent pioneers to pay 90 percent of

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market value for their licenses calculated on a 10-city average of license sales.

The legislative proposal in GATT would make the pioneers pay 85 percent of the winning bids in the 20 largest U.S. metropolitan areas, excluding the pioneers' markets.

This is a fair and balanced solution that rewards pioneers for their innovations while properly compensating the public for private use of a public resource.

Let me turn to the scoring of this activity because that is what OMB serves to do.

Because of the interest payments and other factors, OMB would score the draft bill higher than the FCC order. OMB would score the FCC order at $1.22 billion, all in 1995, while interest payments drive the OMB scoring over 5 years for the GATT bill to $1.498 billion, an increase of $278 million.

The CBO has scored the draft bill at less than that, at $534 million. CBO has not and typically would not score the FCC order because it is not a legislative action. OMB and CBO staff discussions suggest that CBO would probably score the FCC order at an even lower receipt value if CBO were to score administrative actions by agencies.

The reason for this lower scoring is that CBO is relying very much on the minimum guaranteed payment by the pioneers of $400 million contained in the legislation but not the FCC order.

Now, one might wonder why there are such big differences. The OMB scores the pioneers' preference draft bill at $1.498 billion compared to the approximately $534 million by the CBO, a difference of nearly a billion dollars.

The reason for this difference is that the CBO bases its scoring solely on the existence of a guaranteed minimum revenue floor in the legislation, while OMB bases its scoring on recent market price sales data, what would we reasonably get for the auction.

The legislative proposal in GATT makes the issuance of licenses to the broadband pioneers final and not subject to further judicial review. This is needed in order to assure that the pioneers, who are recognized innovators, actually get their license in advance of all the non-pioneers who will be purchasing spectrum at the FCC auctions. Without this provision, the pioneers could be tied up in litigation and unable to build their systems months or even years after everyone else.

A vital point is that the Communications Act does not currently give the FCC clear authority to compel the pioneers to pay anything for the licenses they were once promised for free. The FCC's order on this matter is already subject to legal challenges, and it is quite possible that it could be overturned in court.

My colleagues from the Department of Commerce will elaborate on this point, but the bottom line is if this were overturned by the courts, the pioneers would get the licenses for free and the government, the public, would see nothing of it.

This concludes my testimony and I would be happy to answer questions, but I think we probably should hear from the Commerce Department first.

Mr. DINGELL. Thank you, Ms. Rivlin.

Mr. Irving.

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STATEMENT OF LARRY IRVING

Mr. IRVING. Thank you, Mr. Chairman.

Mr. DINGELL. Welcome back to the committee. We are glad to see you here.

Mr. IRVING. Thank you.

I am joined today by Jonathan Sallet, the Senior Adviser to the Secretary of Commerce for Policy. I will deliver an opening statement but both Mr. Sallet and I would be delighted to answer any questions.

Mr. Chairman, I am pleased to be able to appear this afternoon along with the OMB Acting Director, Alice Rivlin, in order to discuss the important policy goals that are furthered by the inclusion of the so-called pioneers' preference provision in the GATT implementing legislation.

The basic goals that underlay the policy can be simply stated: First, the administration believes very strongly that public resources should generate public funds. That is why we proposed, and Congress enacted, landmark changes in last year's budget legislation, establishing for the first time that radio spectrum would be auctioned with the revenues going to the Federal Treasury instead of being given away.

Current market estimates are that the PCS auction, which will begin in December, will raise between $10 and $15 billion.

Second, this administration believes that technological innovation is critical to our national success. Consider for a moment PCS, which offers the opportunity to create new digital telephony networks across this Nation, in every community of this Nation. Innovation that demonstrates the viability of new services will not only help to bring new competition and lower prices for all Americans, but it also will serve as a driver for the creation of new markets which spectrum users are expected to bid billions of dollars.

Earlier this year, Mr. Chairman, Vice President Gore, taking note of both of these goals, announced that the administration favors the future use of pioneers' preference but not if pioneers are going to get spectrum for free. He said the administration would favor only the use of a pioneer preference program that gives a discount of 20 percent or less, enough to award innovation but capturing enough revenue to ensure that our first principle also is met.

Of course, these are not just administration goals, Mr. Chairman. Your introduction of H.R. 4700, along with Congressman Sabo, Congressman Moorhead and Chairman Markey, seeks the same ends through the same basic means. The pioneer preference provision in the GATT legislation meets both of the administration's goals, and let me explain why.

First, as you noted, Mr. Chairman, and as Mr. Fields also noted, if this provision does not become law, there is a very real possibility that the pioneers will get these licenses for free. And as you know, the FCC first issued an order stating that the preference should be awarded free of charge. Then it reversed course saying that the pioneers should pay.

The pioneers now charge that the FCC lacks the ability and authority to change its mind, and lacks the authority to impose the payment requirement. Of course, the FCC disagrees. But in our judgment, Mr. Chairman, it is an unacceptable risk to leave this

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issue to the courts to take the chance of a huge windfall for the pioneers. We must ensure that the pioneers pay.

Second, again as you noted, Mr. Chairman, and Congressman Schaefer and Congressman Markey also noted, the pioneers' preference provision serves the purpose of rewarding innovation. Unlike previous methods of allocation, these pioneers didn't have their names picked out of a hat, nor did they get spectrum just because of their previous market position. Rather, the Commission found that all three have made significant advancements that will help bring the PCS market into being and help, of course, to raise more revenue from the auction.

Third, Mr. Chairman, the pioneers' preference will require payment of substantial sums by the pioneers. By OMB's estimates, the pioneers will pay about $1.5 billion to the Federal Treasury over the next 5 years.

For these reasons, Mr. Chairman, the administration believes an inclusion of the pioneers' preference provision in GATT is absolutely critical. It reflects our policies and the policies of this committee and yours, Chairman Markey. Indeed, we are very pleased to have been able to work with your staff and with the staffs of Congressman Moorhead and Congressman Markey during the creation of this provision.

This provision should be enacted.

Thank you for your leadership, Mr. Chairman, and I would of course, along with Mr. Sallet, be happy to answer any questions that any members of this committee might have.

Mr. DINGELL. Thank you very much.

Mr. Sallet, did you have any comments you would like to make at this time?

Mr. SALLET. No. I would just like to express my support for Assistant Secretary Irving's excellent statement.

Mr. DINGELL. Members of the panel, the Chair wants to thank you for your kindness and your valuable testimony.

The Chair will commence under the rules recognizing first the distinguished co-chairman of this event today under the rules for the usual period, and so the gentleman from Massachusetts is recognized for 5 minutes.

Mr. MARKEY. I thank the chairman very much.

Ms. Rivlin, you make the contention that your proposal, the proposal that we are making here today, will in fact generate more money for the Treasury than the FCC proposal will if it is ultimately successfully litigated, and that the argument that they are at 90 percent and that this legislation at 85 is a red herring.

Could you please explain that so that all can understand the reasoning behind your argument?

Ms. RIVLIN. Yes. I think it is fairly simple. The FCC would require the pioneers to put all the money up front. The proposal before us would spread the payments over 5 years, but they would have to pay interest on it. And with the interest, the government would end up with more money.

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Mr. MARKEY. So the proposal here is preferable to the FCC procedure, which would gain 90 percent but would also be subject to litigation?

Ms. RIVLIN. That is right. And the litigation is probably the big point.

Mr. MARKEY. Yes.

Ms. RIVLIN. The dollars may differ, but the real point is this proposal is a sure thing and the other is not.

Mr. MARKEY. OK. Now, let me focus upon another issue that is raised because it is printed too often and is very deceptive. That is, that this legislation generates a floor guarantee of $400 million for the government in addition to another $100 million or so guaranteed revenues. But that is not the ceiling. As you pointed out, CBO estimates a much higher level, but that is strictly an estimate. We don't build in an estimate into our legislation, but we don't in any way inhibit our ability to reach a higher level.

As a result, is it not likely that this legislation very well could produce a billion dollars or more for the Treasury, but that you are only restricted by your ability to project. And as a result, you are just limiting it to what is guaranteed by the legislation.

Ms. RIVLIN. Well, the guarantee would be around $500 billion, and that in fact is what the CBO is saying because that is the way they score things.

We are actually estimating the $1.5 billion because we are looking at the recent experience with auctioning, and as you will remember, the estimates made by both us and CBO were very low. As the auctions developed, they brought in more money than anybody expected, and we are not being wildly optimistic here, but based on the recent experience, we think that this will be a very substantial——

Mr. MARKEY. As a rule of thumb, should the Federal Government operate under the premise that it is going after certain guaranteed dollars or speculative dollars in trying to reduce the deficit?

Ms. RIVLIN. I don't know that there is a rule of thumb about it, but common sense, and especially in this case, would, I think, lead you to believe that a certain amount rather than the risk of nothing would be prudent.

Mr. MARKEY. Thank you.

Mr. Irving, aren't we today operating under that time-honored tradition that the companies that have in the telecommunications industry try to block those that have not and could challenge them in any one of the fields that they may happen to be in?

This committee over the years has seen AT&T try to block MCI and Sprint and others getting into that business. Then the cellular industry blocking Nextel and Fleet Call, getting into that business. Now it is the RBOC's and the cellular industry blocking PCS competition, especially those pioneers that are ahead of the curve and more ready to get into the marketplace.

Could you give us a little bit of history on this subject so that we can see that it is not just about money, this debate that we have here today, and that when a single company starts to take out full-page ads in newspapers, it is not because of their concern about the Federal deficit as much as it is about their competitive posture with other companies in the same industry.

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Mr. IRVING. I think it is fair that any of us who have been watching the telecommunications marketplace, it is fair to say that you do see the incumbents often trying to inhibit their would-be competitors.

I think it is particularly ironic in the case of Pacific Telesis taking out the ad in yesterday's newspaper because many of us know that Pacific Telesis received 25 megahertz of unfettered spectrum for free from this government. They made billions of dollars off of that free giveaway, and then they sold it for something between $11 and $12 billion to another company last year.

Mr. MARKEY. I am sorry. Did you say billion dollars?

Mr. IRVING. Between $11 and $12 billion.

Mr. MARKEY. The company that put the ad in the newspapers made $11- to $12 billion on the free spectrum which the government gave to them?

Mr. IRVING. And they have made no suggestion, as one of my colleagues has noted, no suggestion that they would take some of the revenues of that $12 billion and help us pay for GATT.

Mr. MARKEY. Now, can I ask one more question? We gave that spectrum, that is, the government, to that company back in 1984 or so.

Mr. IRVING. Yes, sir.

Mr. MARKEY. And we gave it to them when they were a united company with ratepayers and shareholders. Who received the benefit of the sale of that spectrum that derived $11 to $12 billion, the ratepayers or the shareholders of that company?

Mr. IRVING. To the best of my knowledge, the shareholders received the full benefit of that $12 billion sale with little, if any, benefit going to the ratepayers, those who actually owned the spectrum and those who would receive the benefits of this provision in the GATT bill.

Mr. MARKEY. And they paid absolutely nothing for it?

Mr. IRVING. Paid zero, Mr. Chairman.

Mr. MARKEY. And these pioneers, only three of them, are going to have to pay 85 percent?

Mr. IRVING. They will pay something that we estimate in the administration will be above $1 billion and they will help us pay for GATT.

Mr. MARKEY. Thank you very much, Mr. Irving.

I yield back the balance of my time.

Mr. DINGELL. The Chair thanks the gentleman.

The Chair recognizes the gentleman from Texas, Mr. Fields.

Mr. FIELDS. Thank you, Mr. Chairman.

I will ask a question I think I know the answer to. Commerce and OMB were not involved in the selection of the pioneers.

Mr. SALLET. That is correct.

Mr. FIELDS. At what point did you become engaged in the process?

Mr. SALLET. Well, Mr. Fields, as the considerations were drawn up to find financing for the GATT proposal, obviously the administration looked at sources for that funding in order to offset the tariff reductions that are also in GATT.

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This issue came to our attention, of course, through the chronology that the chairman has outlined, including the introduction of the bipartisan legislation in June. And so over the summer, we had discussions about how to work with both the administration's policies as Assistant Secretary Irving has laid them out, but also, frankly, to help pay for the passage of GATT through this provision.

Mr. FIELDS. Were you engaged directly in the negotiation with the three companies who were awarded the pioneer license?

Mr. SALLET. The administration talked to the three companies that were awarded the pioneers' licenses during the course of its consideration of whether to go forward with the pioneers' preference provision.

Mr. FIELDS. Was OMB directly engaged in the negotiation?

Ms. RIVLIN. I was not Director at that time so I am going to let——

Mr. SALLET. It is my understanding that OMB was involved in the conversations which included conversations with the three pioneers.

Mr. FIELDS. Ms. Rivlin, could you go back? I know you spoke to us just a moment ago in response to Chairman Markey, but give us the basic elements of the negotiation with the three companies.

Ms. RIVLIN. Of the negotiation with the three companies?

Mr. FIELDS. Yes, ma'am.

Ms. RIVLIN. I don't think it was a negotiation. It was a discussion of what the administration was considering. I was not personally a party to that negotiation.

Mr. SALLET. The negotiation, I think it is fair to say, if I might add, Mr. Fields, was what was referred to, I believe, in the chairman's opening statement when he talked about the fact that a compromise had been reached. The negotiations, such as they were, were in essence between the administration and Members of Congress about what provision would best serve a number of different goals. The pioneers were talked to during that process, but the negotiation and the final decision of whether to include the provision was made in consultation on a bipartisan basis with Members of Congress.

Mr. FIELDS. Let me rephrase it. Could you explain the reasoning behind modifying what was originally suggested in the Dingell-Moorhead proposal and what we finally see in GATT?

Mr. SALLET. Mr. Fields, this was a compromise, and I think I can point to three factors that helped shape the compromise.

The first was questions of equity. As some of the opening statements have already reflected, there was a feeling that pioneers had been promised by the government that they would get spectrum for free, and that although one might question that judgment, one recognized the fact that there were strong equitable considerations from companies who tell us they have invested millions of dollars and then say at a certain point they were told the spectrum would get to them for free.

Second, in a competing——

Mr. FIELDS. On that point, do you have any idea what the three companies invested?

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Mr. SALLET. I don't have a precise figure, Mr. Fields. As I said, we have been told it is millions, but I will not put to rest on a specific number.

The second interest to be decided and discussed in this move towards a compromise was of course the need to get payment from the pioneers, to ensure the payment would be gotten and, as has already been said, that could only be done through legislation because of the unacceptable risk that the FCC order would be overturned.

And the third was the desire, as articulated in the Vice President's statement over the summer, to continue to reward innovation in the marketplaces, innovation which, after all, would help spur the use of the spectrum and then therefore help raise the amount of money that the Federal Government would receive from the upcoming PCS auctions.

So looking at these three factors, the compromise that was reached on a bipartisan basis is what is incorporated in Title VIII.

Mr. FIELDS. If you don't know what the investment was, do you know what the innovative technology was with the basis?

Mr. SALLET. Yes, sir. I would like to quote in this regard from the FCC order which spells out the innovations in a most direct fashion. The FCC order says about APC that it warrants the pioneer's preference for its development and demonstration of technologies that facilitate spectrum sharing by PCS and microwave users at two gigahertz.

Now, if I might just add, Mr. Fields, that is an important question because the new spectrum doesn't necessarily come without other users. So the ability to add a new service into some spectrum to which there are already current users residing is an important technical issue about the future of PCS.

Second, the FCC says, Cox deserves the pioneer's preference for its development and demonstration of PCS/cable plant interface technology and equipment that results in a spectrum-efficient application for PCS services. And as we understand the FCC order, this relates a little bit perhaps to the question that Chairman Markey asked. The effect of this was to bring into the potential PCS market people who had different plant, cable plant, other than the traditional telephone technology.

And then third, the FCC says, Omnipoint merits a preference for its development of two gigahertz equipment that utilizes advanced techniques that will facilitate the continued development and implementation of PCS services and technologies.

In this regard, I would like to note Mr. Schaefer's statement, which is consistent with my understanding. It is not yet certain what will be the precise PCS technology used in the United States. We have not set a uniform standard. This is unlike the Europeans, which have set a uniform standard.

Omnipoint is one of the 3, 4, 5 technologies that may emerge as the standard in the United States. This has enormous effects, not only for the growth of the PCS market in the United States, but as global standards are moved to by countries around the world, for the market around the world and conceivably for U.S. competitiveness in those markets.

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Mr. FIELDS. Mr. Chairman, I know my time has expired. I may have additional questions, if there is an opportunity to ask a second round of questions.

Mr. DINGELL. The Chair would advise the gentleman that we will have as many rounds as are necessary to complete the business of the committee, considering the fact we do have some time constraints at the other end.

The time of the gentleman has expired.

The gentleman from North Carolina, who we wish would stay with us.

Mr. MCMILLAN. I thank the gentleman from Michigan.

There are a couple of things that I think caused some confusion. There are three things that I would like to clarify once again. One of the arguments was that in 90 percent of the top 10 markets, under the FCC formula, and then the 85 percent of the top 20 markets, it is unclear as to whether the average would be determined by a per capita formula, or whether it was simply a flat average of the markets that would not be on a per capita basis. If there is not a per capita provision in here, then it perhaps has a rather significant distortion. Could you answer that question?

Mr. SALLET. It is our understanding, Congressman McMillan, that this would be applied on a per capita basis.

Mr. MCMILLAN. Well, is it more than an understanding? This is pretty precise stuff.

Mr. SALLET. Yes. This is what Title VIII provides.

Mr. MCMILLAN. So in a vacuum, if I can recap here then, we auction off the spectrum. Then we take the top 20 bids, excluding the three named markets of Baltimore-Washington, Los Angeles, San Diego, New York, New Jersey. We then derive a per capita average.

We take that per capita average and apply it to those markets, whatever it is. If the average is one dollar per capita, then we take one dollar per capita and apply it to the Washington-Baltimore market and that is the price that they have to pay; 85 percent of that is the price they have to pay.

Mr. SALLET. Yes, sir. That is how the provision would work.

Mr. MCMILLAN. Because I think that answers one enormous question that I have heard raised by critics of the approach, and I think that needs to be laid out clearly.

If we could just get a very simple ranking and not get into the confusion of OMB versus CBO, we will have to use CBO's scoring, right? I mean, that will be in the report language.

Ms. RIVLIN. Yes.

Mr. MCMILLAN. And so while the other we might use rhetorically, I think it would be nice to get a simple table that would show essentially six figures: What it would have been if we had done nothing under the pre-FCC rule, and I think that would be zero in the case of OMB and zero in the case of CBO. On that you would agree?

Mr. SALLET. Yes.

Ms. RIVLIN. Yes.

Mr. MCMILLAN. Then under the 90 percent, let's get a figure from OMB and CBO on a comparative basis; and then under the 80 percent—or as included in GATT—what the 90 percent and the 85 percent would be. Could we do that and——

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Mr. SALLET. Yes, sir.

Mr. MCMILLAN. Circulate that and I won't——

Ms. RIVLIN. We can do that with the possible exception of the CBO scoring on the FCC because they don't——

Mr. MCMILLAN. On the pre-FCC?

Ms. RIVLIN. No, on the 90 percent.

Mr. MCMILLAN. OK. Well, that is OK. I think this will give us a general idea.

I would suggest we do that rather quickly because I think we are going to debate this bill maybe at 7 o'clock, and that clearly ought to be laid out in the debate so that it is fully understood.

And the last thing I would observe is that it seems to me that the definitions on which the pioneer status was determined may be a little bit up in the air, and maybe that remains so. It is basically hardware, correct?

Mr. SALLET. Well, not entirely, sir.

Mr. MCMILLAN. It could be software as opposed to——

Mr. SALLET. Software, yes.

Mr. MCMILLAN. Let me ask this question. Since we don't know what that value is, yet you say future PCS applications will be based on that technology, correct?

Mr. SALLET. Well, it could be. One of the pioneers——

Mr. MCMILLAN. Couldn't be, doesn't have to.

Mr. SALLET. That is correct.

Mr. MCMILLAN. Somebody else could come along with technology that is better that would supersede it.

Mr. SALLET. It is certainly possible.

Mr. MCMILLAN. However, in the absence of that, if they have developed this, aren't they going to get a rather enormous return on their investment?

We don't know what their investment is, but the presumption is that if they are on the cutting edge, there is going to be a rather significant return to those pioneer companies by virtue of what they have developed.

Mr. IRVING. I guess I should try to take that question. There is a possibility of some spin-off benefits to them with pioneering technologies, but there is a larger benefit to every person who might use this spectrum and to the entire Nation for developing these wireless technologies. But for the efforts of the pioneers, it is doubtful that anybody would be willing to pay the types of sums we are talking about for the spectrum.

We are looking at possibly $10 to $15 billion for the Federal Treasury across the PCS licensees. So part of what the pioneer preference policies is intended to reward is the fact that because of the efforts of these pioneers, they have helped create an industry that is going to create $10 to $15 billion for the Treasury and untold tens of billions of dollars of economic activity——

Mr. MCMILLAN. I am not questioning that. I think that is fine. I support the auction method. I am simply asking the question: are we ignoring the fact that those who develop the technology, by marketing that technology to others who would have applied it in other market areas, are going to get a rather substantial return anyway for having developed the technology?

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Mr. IRVING. We are not ignoring it. That is one of the reasons why the Vice President in his speech earlier this year at the CWA said that they shouldn't get it for free, they should get some discount because of the benefit that they are giving the rest of the Nation and other industry people, but they shouldn't get it for free.

Yes, they get a benefit. We have tried to balance the benefit that they have given us versus the benefit they are going to have from a sure license, by making a significant payment of 85 percent of what we think the market value is. So it is a balancing act.

Mr. MCMILLAN. OK. I guess I am of the—still raising the question that if I have developed a technology and I am going to get a rather high return on the sale of that technology to others.

Mr. IRVING. That is unclear, sir.

Mr. MCMILLAN. Well, they took that risk when they developed it, right?

Mr. IRVING. They took the risk when they developed it and we are rewarding them not—the pioneers' preference has less to do with what may happen with the hardware and software and other licensing agreements, more to do with what they did in terms of helping develop the use of the spectrum.

Mr. MCMILLAN. I understand.

My time has expired and I thank you.

Mr. DINGELL. The Chair thanks the gentleman.

The gentleman from Ohio, Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

You know, I have to say, I am a strong supporter of GATT. I may be one of the few Republicans that will vote for the rule and if it passes, vote for GATT, and I would do it today. Whether we get that opportunity or not is another question.

But I am sorry that this whole question of the spectrum auction and thereby the pioneer preference has gotten involved in this entire issue. It is a side issue, in my estimation, towards the overall question of GATT and it didn't have to happen had the administration taken a dynamic paradigm approach to the GATT. In other words, to recognize that GATT is not a revenue loser; it is a revenue gainer, big time, and that instead of this green-eye-shade concept where you have got to kind of pick here and pick there and find $100 million here and $200 million there, that we just recognize what everybody and any economist worth his or her salt knows, and that is when you expand trade, you create economic opportunity and you create more wealth and you create, therefore, more revenues for the treasury. And while I may have only taken a few economics courses in school, I would certainly argue with any economist who would take a different approach.

But here we are now in a situation where we are trying to put this into the context of GATT, and that is frankly very frustrating to me because I just think that the issue deserves better. But having said that, we are where we are, and I guess we are going to have to live with that decision.

Now, let me ask Mr. Irving, have you seen the article or the paid advertisement in The Washington Post put in by Pacific Telesis?

Mr. IRVING. The one that was in yesterday's paper, yes, sir.

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Mr. OXLEY. I think today's as well. What is your opinion of this ad? Is it factual? If it is not factual, where do you differ with the charges made in this particular full-page advertisement?

Mr. IRVING. Well, we disagree—I think it is less than fully factual. We disagree, we do not believe that this is a billion-dollar giveaway. We think that is an absolute falsehood. We do not believe that anybody is receiving a price break under the formulation of the legislation. We don't think that the two companies will pay significantly less than the license's true value.

It is unclear that the FCC's pricing formula could withstand litigation, so that is at least potentially untrue. They state that they are willing to pay the taxpayers the full price set by the FCC. Well, they are willing to pay the full price set when they got their cellular licenses, which is nothing, and I can understand why they would be willing to pay that full price. I don't understand what they do.

It is a combination of misleading statements and untrue statements in our opinion. We are not giving anyone a price break. It is not a giveaway, and for someone to state that they are willing to pay the full price of something when a few years ago they received a similar something for nothing leads one to think there is a certain amount of irony in this ad. So for a lot of reasons, we think that the ad is misleading at best and in some areas untruthful.

Mr. SALLET. We do agree, however, with the opening words, GATT is good trade policy.

Mr. OXLEY. I think we are all agreed on that, hopefully.

Ms. Rivlin, did you have any comments?

Ms. RIVLIN. Well, I might defend the green eye-shades a bit. We fully agree with the notion that GATT is very good for the economy and that we will, through bigger exports over the years, get major benefits, but the rules under which the scoring are done are to protect the integrity of the budget, and once one started down the route of scoring expected effects on the economy of anything, we do a lot of good things that are good for the economy, and those indirect effects are not normally scored.

So we are abiding by the scoring conventions. But even so, we believe that GATT is paid for and here we are talking about a very solid item that will flow into the Federal Treasury to offset any loss from GATT revenues, from tariff revenues.

Mr. OXLEY. Well, I appreciate your response.

Mr. Chairman, I would just hope that we don't spend this money too often that we are going to get from the auction. We, as you well know, we approached that in the reconciliation package. We have looked at it now in GATT. We may look at it somewhere down—it may be in another reconciliation package for all I know.

That was certainly not my intent when I was pushing for this years ago to go with an auction, but I just think we have to be very careful about that. And having said that, I just can't say enough about your leadership, Chairman Dingell's leadership and Carlos Moorhead's leadership in really fixing the real problem that existed, and that was that it was patently obvious that at some point somebody is going to get something for nothing and we moved very expeditiously in this committee to head that off and we deserve a

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great deal of credit for that as a committee, and you certainly deserve a great deal of credit for taking the bull by the horns and solving that problem.

And with that, I yield back the balance of my time.

Mr. MARKEY [presiding]. I thank the gentleman very much.

The Chair recognizes the gentleman from California, Mr. Moorhead.

Mr. MOORHEAD. Well, thank you, Mr. Chairman.

You know, I guess there are several things that are floating around and causing a lot of problems because people don't understand what really is going on, and I think that causes difficulty. When Mr. Dingell and I introduced legislation calling for the pioneers to pay 90 percent of the spectrum value in their markets, it was because we were afraid people were getting something for nothing and the public ought to have the benefit of a public item that they owned that they were giving away. They ought to get some money from it for the American people.

One of the principal reasons why the legislation calls for 85 percent of the average of the top 20 markets, excluding the three pioneer markets, was there was some rather vigorous lobbying by the administration.

Now, I know they must have had a reason for it. Do you know what the reason was that they were lobbying to change that figure from 90 to 85?

Mr. SALLET. Mr. Moorhead, I believe as I stated before, there were conversations that went on on a bipartisan basis with both chambers, including minority staff on this committee, about the precise details of a pioneers' preference provision.

As I have noted before, the three factors which were thought about during our consideration of the issues were equity, the need for payment, and the need to reward innovation.

The 85 percent was a figure that was arrived at, as was noted in the opening statements, as a compromise in order to reach these different goals and, of course, to secure financing for the GATT agreement.

Mr. MOORHEAD. Well, what is the difference between 90 percent of the spectrum value in their markets and 85 percent of the average of the top 20 markets, excluding the three pioneer markets? That is something that doesn't mean much to anyone that just reads it cold.

Mr. SALLET. And that is why we think it is so important to note, as the Acting OMB Director did in her opening statement, that in fact OMB's scoring shows that this preference included in this legislation actually yields over 5 years more in revenues to the Federal Government than would application of the FCC order on its own terms.

In other words, OMB scoring shows more revenue coming in over a 5-year period. At a minimum it demonstrates, we believe, that there is no million or billion dollar giveaway that can be charged against this provision.

Mr. MOORHEAD. Could you explain, or Ms. Rivlin can explain to us, so everybody understands what it does when you take a certain percent of the top 20 markets as opposed to 90 percent of the spectrum value in their own market?

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Ms. RIVLIN. Go ahead, Jonathan, you are doing fine.

Mr. SALLET. Well, as we say, the OMB scoring shows that the provisions of the bill raise more revenue under the OMB proposal versus the FCC order. This difference is partly based on the fact that we are talking about the very largest—in either case, the very largest markets in the United States, and also we are talking about major trading areas that include fairly large areas beyond the precise boundaries of an urban area. So for these reasons, we believe that the OMB analysis demonstrates the point that I have already stated.

Mr. MOORHEAD. What you are really saying then is that 85 percent of the average of the top 20 markets brings in more money than 90 percent of the spectrum value in their own market?

Mr. SALLET. Over the 5-year period, including the interest payments that would be paid as a part of the administration's provision, yes.

Mr. MOORHEAD. Well, what—if you took the interest out, because money is worth—is valuable wherever it is, so the interest really can't count there.

Mr. SALLET. Well, the total value, of course, would include the interest, so we think that is the fair way to look at it, what would be the revenue actually received by the Federal Treasury, because these are the revenues that would be available for use by the Federal Treasury.

Mr. MOORHEAD. Well, I am not trying to be difficult, but if the Federal Treasury had the money in it today, they would save interest on bonds and other things and borrowings that they make, and if they get it 5 years from now, they are going to get the interest of course from the people that buy the spectrum, but they are not going to get the reduction of the bonds. I am just trying to find out hard value, and I don't know the answer, but I am trying to get that information from you.

Ms. RIVLIN. Well, I think there are a——

Mr. SALLET. Your question raises a number of points, one of which, which I would like to address, is the nature of the formula, and that is, our use of more cities, the multi-city formula we think is a fairer approximation of what will be, in fact, the value received. That is in part the basis for the difference between the OMB scoring of this provision and the FCC order.

Mr. MOORHEAD. Could I ask—I have one more question.

Mr. MARKEY. Without objection, the gentleman is granted an additional minute.

Mr. MOORHEAD. Cox Cable asked for a preference in San Diego. Why were they subsequently given all of Southern California?

Mr. SALLET. That was a decision made by the FCC in its initial order, and was not a question that is revisited or changed in the provision that is included in the GATT agreement.

Mr. MOORHEAD. I suspect that is one of the reasons why Pacific Telesis is upset, because that is their general market.

Mr. SALLET. Well, Pacific Telesis, as I understand it, made a business decision. Pacific Telesis had, as Assistant Secretary Irving noted, been given cellular licenses for free that it decided within the last year to spin off at a value of—I am told various figures—$10 to $12 billion.

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Now, the business decision that Pacific Telesis made may require it, from its own corporate point of view, to win in the spectrum auctions that are taking place in December and thereon. In other words, Pacific Telesis may well have made a conscious business decision that it feels requires it to win and pay a high price for spectrum in the PCS auction in Southern California, but that was Pacific Telesis's business decision. It doesn't go in our sense, in our belief, to the merits of the pioneers' preference provision in which we have simply carried forward the geographic areas as established by the FCC order.

Mr. MOORHEAD. Do you have any idea—I don't know the answer to this either so I am just trying to find out. Do you have any idea why the Commission expanded their request from the San Diego area to include virtually all of Southern California?

Mr. SALLET. I don't, sir, and I understand that the FCC will have representatives on a subsequent panel. I believe the question would be better referred to those representatives.

Mr. MOORHEAD. I think that is one of the reasons why there is a lot of dissatisfaction in various places about this whole thing is because they don't know why that happened.

Mr. SALLET. Of course, if I might, sir, just note on the equity argument that I noted before, the FCC did make that order and did make it for free, and the pioneers went forward for some months with the belief that they would have both that geographic area and would pay nothing for it.

Mr. MOORHEAD. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired.

Just for the record, under the FCC's rules and regulations, it allowed for any pioneer applicant to designate the area that they wanted to apply for, and it was that area upon which they made the decision. It was as the application had been filed.

Let me turn and recognize the gentleman from Illinois, Mr. Hastert.

Mr. HASTERT. I thank the chairman.

I want to associate myself with the questions of the gentleman from North Carolina, Mr. Alex McMillan. I think if those answers come forward and come forward on an expedited basis, then maybe we could get to the bottom of a lot of these issues.

I think the bottom line is our constituents, the American people, and the Congress have been misled by recent news reports and ads. We have to move on GATT in short order here—make a decision one way or the other on it—and we want to make sure that everybody is being treated fairly.

To trace through this process, the pioneers were first told that they could have this spectrum at no cost. The rules have been changed and the FCC said, "We are going to make you pay a percentage of the cost." I think this was probably a prudent thing to do and Congress generally agreed to make them pay.

There is one thing I want to explore and make sure that I understand. The areas, the greater New York, New Jersey area which is part of the spectrum that was given to one group and the Southern California, Los Angeles, San Diego area given to the other, those areas are probably in excess of 15 million people, I would guess. I am just guessing.

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Ms. RIVLIN. Big markets.

Mr. HASTERT. If you are equating the cost of somebody in Boston or that spectrum in Boston and Chicago and Phoenix, Arizona, you take those, average those costs out of what you receive for that spectrum, and let's say that is X amount of dollars, all right? You take that X amount of dollars for those spectrums. You take 85 percent of that, break it down on a per capita basis at 85 percent. Then in actually selling to—or conveying this spectrum to the pioneers, you are multiplying that by the spectrum. So actually the cost of the spectrum in Southern California or the East Coast spectrum could be in excess of 4 or 5 or 6 times what the cost for a spectrum is in other geographical areas; is that correct?

Mr. IRVING. I was following you until the end, Congressman.

Mr. HASTERT. Well, if there are—let's say 1 million people in Phoenix and 2 million people in Chicago, and when you put this on a per capita basis, the way I understood your explanation——

Mr. IRVING. No. I think it is a little bit different. If you take any three cities and—Cleveland, Detroit, and Tulsa, I don't know if it is in the top 20, you take those and you divide what the full dollar value is by the population in those areas, you then get a per capita figure. Say it is $2. You would then multiply that $2 times the population of the New York area or the Baltimore-Washington area or the L.A. area and then you would multiply that figure by 0.85.

Mr. HASTERT. So the gross paid for spectrum—I mean, you are not talking about the value of the spectrum. You are talking about the value of the population that is served by that spectrum.

Mr. IRVING. Yes.

Mr. HASTERT. So the gross amount paid by the pioneers, in these two cases could be 4 or 5 or 6 times the cost of the spectrum paid for any other area.

Mr. IRVING. Yes. It is very likely that if you take markets 15, 16, 18, 22, that the person who gets New York or Baltimore or L.A. will pay significantly higher in terms of the gross amount. But the per capita amount will be based upon the average.

Ms. RIVLIN. And that was just an attempt to——

Mr. HASTERT. I am trying to clarify it so everybody understands that this may be a pretty expensive piece of property that is being conveyed.

Mr. SALLET. It is worth noting, if I might, that as we have noted, the OMB estimate is that these pioneers' three markets will pay approximately $1.5 billion. There are estimates of what the total PCS auction will be for A and B blocks across the Nation that put it at something on the order of $12 billion, which suggests that these pioneers are paying a very healthy percentage of the revenues that will be gathered in total from PCS——

Mr. HASTERT. I agree with you. There is no question this will bring in a lot of money to the Treasury. So I think we should expedite answers to the questions that our gentleman friend from North Carolina, Mr. McMillan, asked and try to get those hard numbers out there.

There is one point I would dispute. If you buy a car and the cost of that car is $30,000 or $20,000, that is the cost of the car. The interest you pay for that car over the 5 years is really the cost of holding that money for 5 years. So if you want to add it in, that

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is fine. But I am not sure if that is exactly what we would want to do.

Ms. RIVLIN. Oh, it is a normal scoring practice and you do have to differentiate. I mean, it is a difference whether the money is paid up front or it is paid over a period of time, and interest is paid on it and the government gets more back.

Mr. HASTERT. Thank you very much.

Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired.

The Chair will recognize himself again for another round of questions if the other members don't mind, and then we will move on to the next panel, unless some of the other members have a question or two.

I would like to ask about the potential for anomalies in the bidding for licenses in markets where preferences were awarded. Has the scarcity value of the remaining licenses been enhanced as a result of the granting of a pioneer preference?

Mr. Sallet.

Mr. SALLET. Mr. Chairman, that is certainly the conventional wisdom, that in a market in which the pioneers' preference has been awarded, the remaining license would likely be very valuable because it is the only broadband license available through this method.

Mr. MARKEY. So by decreasing the supply by 50 percent, you clearly enhance the value of the remaining.

Mr. SALLET. That is our view, yes, sir.

Mr. MARKEY. Thank you. Is it possible to quantify the amount by which the value of the remaining license has been enhanced?

Mr. SALLET. It is certainly before the fact, at the time this legislation has to be enacted, we know of no way that that could be done.

Mr. MARKEY. Has the award of a pioneer preference resulted in a competitive advantage for the pioneers inasmuch as their discount will give them a cost advantage over other licensees who must acquire licenses through competitive bidding?

Mr. SALLET. Certainly not. First of all, it won't just because of the way the provision works, requiring them to pay 85 percent, but second, Mr. Chairman, because the market here is not just those people who are going to buy the PCS blocks. It includes incumbent cellular providers, many of whom, as you have noted, Mr. Chairman, have paid nothing for that spectrum.

Mr. MARKEY. Thank you. If a competitor has a cost advantage, is it logical to assume that bidders could bid less for licenses in pioneer markets than they will in nonpioneer markets?

Mr. SALLET. I suppose it is possible, Mr. Chairman, but we rather believe that the scarcity argument will control.

Mr. MARKEY. OK. Let me ask a couple of other questions.

Isn't it right that the bill as introduced and that is now under consideration makes only two changes? The first is that it takes the original language which just referred to most reasonably comparable markets and defined it so that there is certainty with regard to what the Congress intends in terms of an establishment of price.

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Mr. SALLET. You are talking about in comparison with H.R. 4700?

Mr. MARKEY. In comparison with the GATT legislation that we are considering right now, yes.

Mr. SALLET. Yes, that is correct, Mr. Chairman.

Mr. MARKEY. And the other change was to move from 90 percent to 85 percent, but with the intention of insuring that we have certainty——

Mr. SALLET. Yes, sir.

Mr. MARKEY. [continuing] in passage of this legislation?

Mr. SALLET. That is correct.

Mr. MARKEY. Thank you. Well, let me make one other final comment before yielding back to the chairman.

This legislation that we are considering was introduced by this committee, by Mr. Dingell, by Mr. Moorhead, by Mr. Sabo, by myself, before the FCC ever had a 90 percent proposal. In fact, the FCC is responding to our proposal several months later after this committee had already begun the process and introduced the legislation that corrected the problem that existed in these pioneers escaping without paying anything; is that not correct?

Mr. SALLET. Yes, sir.

Mr. MARKEY. Well, let me address then, in conclusion here of the first panel, the taxpayers' concerns about this provision, which I think are central. Much of what has appeared in the press has been generated by those who believe that the government is giving a windfall to three communications companies. Actually, it is the reverse. The windfall is to the government, which under this legislation is able to settle an uncertain legal wrangle on favorable terms.

The taxpayer is guaranteed at least $500 million and perhaps much more—$1 billion, $1.5 billion or more. Without this legislation, the American taxpayer risks losing it all to those three telecommunications companies.

Under the old system, the pioneers were guaranteed 100 percent of the value of their spectrum in return for the unique technological advances they had made compared to other lottery winners. Under the proposed change, they get only 15 percent.

Under the old system, the pioneers have a claim against the government in court which they have threatened to make, in fact, to the great direct harm to the taxpayers of this country. Under the proposed change in this GATT legislation, the court case is essentially moot.

Any settlement which gives the taxpayers 85 cents on the dollar in return for killing a lawsuit which threatens to leave the taxpayer with zero cents on the dollar sounds like a solid settlement. In return, or in contrast, there is a very real probability that the taxpayer will wind up with nothing.

This is really an argument between one company taking out full-page ads to gain a competitive advantage against others in the same industry at the expense of the taxpayers if this legislation dies.

And this is not about GATT. We are now being covered by political reporters, not telecommunication reporters. We now have peo-

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ple sitting in this audience that are visiting us once and we will never see again.

This is about GATT, not telecommunications policy. It is not about our legislation. It is not about the Oxley auction; it is not about the pioneer's preference. It is not about the Dingell-Moorhead-Sabo-Markey communications legislation of 1994. It is about a small number of people and companies trying to gain a very short-term tactical advantage in a debate over GATT and using this one provision as a means of trying to derail a larger issue.

Mr. OXLEY. Would the chairman yield?

Mr. MARKEY. I would be glad to.

Mr. OXLEY. Let me just associate myself with your remarks. We have been on this committee for a long time together and you have been chairman. This is maybe your finest hour. I truly mean that. You have encapsulated the issue as well as I have ever heard you do. You hit the nail right on the head. You defended the honor and integrity of this committee, and I want you to know how proud I am of you for saying that.

Mr. MARKEY. Thank you. And I yield back to the chairman.

Mr. DINGELL [presiding]. The Chair wants to commend both the gentleman from Texas and the gentleman from Massachusetts. They have been a great team working on telecommunications and securities matters, and they have certainly done a fine job in moving forward in the legislative efforts that we were engaged in prior to this stage. I want them to know of my appreciation and respect.

Now, ladies and gentlemen on the panel, I would like to ask about our track record in predicting the behavior of bidders at auctions. The first auction was held this past summer and resulted in bids totalling more than $650 million. Would you inform us the amount that the OMB and CBO estimated would be raised at the narrow-band PCS auction where the auction statute was scored?

Ms. RIVLIN. It was much less. We thought it was so small, we didn't score it.

Mr. DINGELL. I want to get that clear because there are some here that won't understand it. It was so small that you didn't score it. You didn't expect to bring in any money at all that would appear on the right side of the decimal—rather, on the left side of the decimal point in the estimates of revenue to the government?

Ms. RIVLIN. That is right, Mr. Chairman.

Mr. DINGELL. Now, given the disparity between estimates and the auction results, is it reasonable to conclude that everyone's projections are speculative?

Ms. RIVLIN. Yes. I think it is reasonable to conclude that, although we are gaining some experience now as these auctions take place.

Mr. DINGELL. So we won't know the real answer until the auctions have been held?

Ms. RIVLIN. Right.

Mr. DINGELL. And I guess anybody that takes out a full-page ad can be said that he doesn't know what he is talking about; isn't that right?

Ms. RIVLIN. Certainly don't know the exact numbers that will come out of any of these auctions.

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Mr. DINGELL. We are going to have them both before the committee and let them tell us why they are spending all this money to put it in the newspapers.

Now, there is one firm number in the $534 million, isn't there? That is the principal plus interest which is contained in the legislation.

Ms. RIVLIN. Right.

Mr. DINGELL. So we are absolutely guaranteed of that as a minimum, and as mentioned earlier, there is a possibility of as much as $1 billion or $1.5 billion?

Ms. RIVLIN. That is right.

Mr. DINGELL. Does this look like a giveaway to you of public spectrum or something that belongs to the taxpayers to some kind of special interests and some kind of corrupt deal?

Ms. RIVLIN. It certainly does not to me, Mr. Chairman. It looks like a fair deal for the taxpayer.

Mr. DINGELL. Well, that was my impression. Now, we are going to have some people running around here who are going to tell us it is a corrupt deal, and I am looking forward to hearing from them because I am going to enjoy that testimony mightily, and I hope they do, too.

Are there further questions of the panel?

Mr. FIELDS. Just one question, Mr. Chairman.

Mr. DINGELL. The gentleman from Texas.

Mr. FIELDS. And also I want to begin, like my friend from Ohio, by complimenting Chairman Markey for the statement that he made just a moment ago and also associate myself with the content of that statement.

The only disagreement I would have with my friend from Ohio is I always think you are eloquent and always present yourself well. But, Mr. Sallet, let me ask you a question because if we go forward with a vote tonight, some of us are going to have to address our conference and talk about this particular provision, and I preface my question by saying that this committee and our Telecommunication and Finance Subcommittee has a reputation of working in a bipartisan fashion. It does not mean that we always agree, but we are always afforded the courtesy of being engaged and participating in the process, and I would have to say that on this issue, I think we agree.

But the question we are going to get at our conference—and I want to give you an opportunity to address it because when I asked the question just a moment ago, perhaps I didn't ask it as clearly as I should—we are going to be asked the public policy rationale for what some people are going to interpret as a 15 percent discount. Some people are going to say that that is not competitive, not fair to others. And in light of that, the administration originally supported a 20 percent discount, Chairman Dingell and others came in with a 10 percent discount.

What would be your response to those who say, What is the public policy argument rationale other than the argument of just equity?

Mr. SALLET. The argument is what was stated earlier this year by the Vice President and the argument that we have tried to present today. Innovation is a critical part of U.S. competitiveness.

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Leading the world in telecommunications markets is a critical part of U.S. competitiveness. Expanding the use of new technologies to parts of the radio spectrum that previously might have been thought to have had no value is, we believe, a critical part of U.S. competitiveness.

The pioneers' preference provision provides an incentive for innovators to help create markets, not just for their own private gain, but create markets that will help the Nation as a whole move forward through the use of advanced information technologies and, we believe, sir, have an impact, a positive impact on U.S. competitiveness around the world.

Mr. FIELDS. And I can appreciate your response. If we don't have the vote today, tonight, or perhaps as early as tomorrow, and certainly not trying to be difficult, but I would appreciate that there are other factors that went into that decision, things that we could argue, that we could point to in a specific way and say these were the reasons. And I also appreciate a moment ago your recitation of the FCC's argument on why these three particular companies.

Mr. Chairman, with that, I yield back.

Mr. MARKEY [presiding]. The gentleman's time has expired.

Are other members seeking recognition at this time?

Then, with the thanks of the committee, we will allow the first panel to leave. You have been very helpful to us in clarifying the issues at hand and we will be working with you over the next day or so.

Our next witness is Mr. William Kennard, who is the General Counsel of the Federal Communications Commission.

Mr. Kennard, please come forward and sit before the subcommittee.

Let the record be very clear for Mr. Kennard and the other members of the subcommittee at this time. There is litigation pending and Mr. Kennard necessarily has to be circumspect in his answers to members of the committee. I think that members of the committee should be respectful of the legal posture that the FCC finds itself in as it sits before this committee testifying at this time. With that said, whenever you are ready, please begin.

STATEMENT OF WILLIAM KENNARD, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. KENNARD. Thank you, Mr. Chairman. I am pleased to be here to address this committee on this very important issue for the Federal Communications Commission and our country.

I had prepared some opening remarks to give a brief procedural history of the pioneer preference policies and how we got to this point, but after the very excellent summaries by you, Mr. Chairman, and Chairman Dingell and Mr. Fields I will dispense with that but be happy to return to any questions if you have specific questions about the procedural history.

I did want to address the issue of litigation and litigation risks because that was raised a number of times in the earlier questioning.

The Commission's August 9 order adopting the 90 percent payment requirement or formula for pioneer preference is being appealed in the United States Circuit Court of Appeals for the Dis-

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trict of Columbia circuit. The FCC will vigorously defend that order, as we do all our orders.

We were faced, however, earlier this year with a decision of whether we were going to press forward and try to defend in the court a decision to give away the pioneer preference awards completely for free or to reconsider that determination. The Commission made the determination that we would feel a lot more comfortable defending a decision requiring 90 percent payment than trying to defend the earlier order which would allow the pioneers to get the licenses completely for free.

Litigation is about risk. There are always risks involved in litigation. We feel that the August 9 decision gives us a better case to defend.

However, I am personally—in particular since I will have to write the brief defending the August 9 order—very sympathetic to the comments of Congressman Wyden when he talked about the tremendous drain of private resources in defending our litigating this case. I think he referred to the litigation as the lawyers' employment act.

I look at it somewhat differently because, as this committee knows well, the FCC is a very active agency now; and, as the exchange between Chairman Markey and Larry Irving indicated earlier, we are inundated with litigation today as incumbents fight to protect their competitive turf against new entrants, as there is restructuring of a lot of the basic regulatory landscape in this industry.

If the legislation that the administration discussed today passes, it will eliminate the requirement for FCC to defend its August 9 order. It will bring certainty to a very complex and difficult problem that faces us.

I wanted to make clear that the FCC will vigorously defend its August 9 order, but if this problem can be solved legislatively we would certainly welcome that, and I personally would welcome that.

I would be happy to take questions from the committee.

Mr. MARKEY. Thank you, Mr. Kennard.

The Chair will recognize himself for a brief round of questions.

The allegation was made earlier that Cox applied for San Diego, but the Commission gave them all of southern California. Could you comment on that allegation and, in particular, whether the Commission's rules permit the applicant to specify which licenses they are applying for?

Mr. KENNARD. The Commission determined that it would license based on 30 megahertz major trading areas. So when Cox applied for a license to serve southern California that application was fit within the Commission's overall licensing scheme which called for 30 megahertz MTA licenses. That is the reason why Cox was granted the pioneer preference for 30 megahertz MTA.

Mr. MARKEY. How long has the FCC been reviewing pioneer preferences? When did that start?

Mr. KENNARD. The notice of proposed rulemaking to consider whether the Commission should grant pioneer perferences began in April of 1990. The Commission made its first tentative award of pioneer preferences to the three broad band pioneer preference ap-

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plicants in November 1992. That was a tentative decision which was appealed and subject to a fairly complex procedural history.

Mr. MARKEY. So the initial designation was made in November of 1992, which was 9 months before we passed the legislation that was referred to by Mr. Oxley that constructed the new process for auctioning off the spectrum?

Mr. KENNARD. That is correct.

Mr. MARKEY. So, essentially, the FCC was caught in transition with a proceeding that had already begun and was in progress for 3 years, since 1990, and we are left here now with the responsibility of trying to deal with that process and to deal fairly with those who were participating in it.

I don't have any other questions.

Let me ask one more while the other members are kibitzing over there. I don't expect you to undercut your position, Mr. Kennard, but, essentially, you have said that your legal hand would be much stronger with this legislation; is that correct?

Mr. KENNARD. Well, it is a question, Mr. Chairman, of eliminating the litigation altogether. The legislation would, in effect, moot the litigation that is now pending.

Mr. MARKEY. Thank you.

Let me turn and recognize the gentleman from Texas, Mr. Fields, for a round of questions.

Mr. FIELDS. Mr. Kennard, let me again ask a question that I am going to be asked when I go back to the Republican conference, to give you an opportunity to respond to that question. The question is going to be, what distinguished the three companies who were given the pioneer status from the 97 or so who were not chosen?

Mr. KENNARD. Well, the Commission had a team of engineers who reviewed all of the pioneer preference requests and determined that the three pioneers had proposed technology that was not only innovative but was also—could have significant implications for the development of the PCS industry.

Mr. Sallet said APC received the award for making advances on a very vexing problem of how to relocate incumbent microwave uses in the 2 gigahertz band and came up with a fairly unique and innovative plan.

Cox developed a plan that would expedite the ability of cable television licensees or system owners to use PCS in their operations.

OmniPoint developed and deployed the first small, hand-held phone, using what we call spread spectrum technology, which is a very innovative use of that technology in the 2 gigahertz band.

Mr. FIELDS. The allegations—I want to put it in that context because I want to emphasize that this subcommittee—our full committee has operated in a very bipartisan fashion. Communication policy is not liberal, conservative, Democrat or Republican. I think that goes to the remarks made by Chairman Markey a moment ago.

But some people made the allegation that these awards were based on politics or someone having a better representative or someone representing their interests perhaps in a better way than someone else. How would you respond to that allegation?

Mr. KENNARD. Well, the process that the Commission went through was a very rigorous one. We, in response to an inquiry by

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Chairman Dingell, made a very extensive review of the entire process by which the Commission awarded pioneer preference, the results of which you see to my left here.

We determined that the process was a very open one. Not only did it involve a fairly rigorous review of the technology but members of the public and interested parties had ample opportunity to comment on the pioneer preference proposals.

Mr. FIELDS. The third question I was going to ask is because it was my understanding that there was some oversight of the full committee on the awarding of the PCS pioneer preference licenses?

Mr. KENNARD. That is correct.

Mr. FIELDS. Based on your experience with the narrow band auctions that we just completed, how does a pioneer preference discount compare with a straight auction?

Mr. KENNARD. Well, in a separate auction all of the applicants must come to the auction and everyone has uncertainty as to whether they will be awarded a license.

In the pioneer preference scheme, you have a pioneer preference scheme that is overlaid over the auction process whereas some applicants come to the auction having to bid, and the only certainty that they will have is whether they can come up with the highest bid. Whereas the pioneers know they will end up with a license if they pay the requisite price.

Mr. FIELDS. Is it your professional assessment that if we do not act in some capacity that a court challenge would likely be successful and, consequently, there is a need for legislative activity?

Mr. KENNARD. Congressman, I learned long ago not to try to predict the outcome of the DC circuit or any court.

I will say, as I said earlier, that all litigation involves risks, and the legislation before you would effectively eliminate those risks because the issue would be resolved legislatively without need for further litigation.

Mr. FIELDS. Just in closing, Mr. Chairman, Chairman Markey earlier made the point that this is an issue that really has nothing to do with GATT. It is important for our members to understand that this is a stand-alone issue that should be evaluated on its merits, and I appreciate the chairman making that particular point.

Mr. Chairman, I yield back.

Mr. DINGELL [presiding]. The time of the gentleman has expired.

The gentleman from Ohio, Mr. Oxley.

Mr. OXLEY. I have no questions at this time. Thank you, Mr. Chairman.

Mr. DINGELL. I want to thank you for being here with us on this very much short notice.

The Chair is a little bit tardy in this, but because of the fact that there is litigation pending on this matter and because of the fact that there is also a pending proceeding before the FCC with regard to the pricing of these matters, I would like to make it clear that it is not the intention of this committee to intrude into either the litigation which is involved or into the proceedings, the administrative proceedings at the FCC. I hope that the record indicates that and that you will carry that thought away with you.

Mr. KENNARD. I certainly will. Thank you.

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Mr. DINGELL. The Chair happens to be very sensitive to the Pillsbury rule, as do my wise colleagues.

The Chair would like to recount a bit of history which has been set forth in the opening statements of Mr. Markey, myself, Mr. Fields and others and also in the statements of the prior panel. The history of this is, basically, that a previous administration had begun to try to deal with the question of affording a decent standard of preference to those who went out and invested money and did innovative things to bring on line new technologies in the field of telecommunications; is that right?

Mr. KENNARD. That is correct.

Mr. DINGELL. The purpose of that was to assure that in essentially comparative proceedings that a person who invested large sums of money, brought on new technology in the area of telecommunications, would receive the benefits of having done this rather than seeing someone else come in and overlay another bid or to enter into a competitive proceeding in order to derive the benefit that had been achieved by the person who had made these investments to bring on line important new technologies which at that time were of critical interest to the United States. Isn't that so?

Mr. KENNARD. That is correct, Mr. Chairman.

Mr. DINGELL. So under that particular policy the Commission—and under legislation supporting that opportunity—the Commission then proceeded to move towards what became then known as the idea of the pioneer preferences. Is that right?

Mr. KENNARD. That is correct.

Mr. DINGELL. Then when the Congress changed the law with regard to how spectrum was allocated to require that it then be sold under very careful qualifications to assure that the public interest was protected the issue then rose as to whether or not these preferences should be sold, is that right?

Mr. KENNARD. That is correct, Mr. Chairman. The Commission did a lot of rethinking about the pioneer preference policy once the Congress passed the auction law.

Mr. DINGELL. Now, so the Commission then as a part of a proceeding awarded these under the prior law; is that right?

Mr. KENNARD. That is correct.

Mr. DINGELL. But at some point reasonably contemporaneous with this event the Congress had changed the law so that now spectrum was to be essentially auctioned off under carefully defined tests in the public interest; is that right?

Mr. KENNARD. That is correct. The tentative awards of the pioneer preference licenses were made in November, 1992. The auction law, that is the Budget Act authorizing the Commission to conduct auctions, was passed in August of 1993. And in the fall of 1993, the FCC commenced proceedings to reevaluate pioneer preference in light of the auction statute.

Mr. DINGELL. Now, the Commission had awarded—now the Commission's next step was, after a review of the matters that were related to this, to come to the conclusion that the Commission should issue an order requiring the pioneer preference recipients to pay 90 percent?

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Mr. KENNARD. Yes. That was in response to the Commission's request that the DC Circuit remand the appeal of the earlier pioneer preference award back to the Commission so that the Commission could reconsider its decision to give away the licenses for free.

Mr. DINGELL. Then began a protracted period of discussions up here on the Hill, is that right, over the manner in which this should be handled, somewhat centering around legislation introduced by the present occupant of the Chair, my good friend from Massachusetts, Mr. Markey, the ranking minority member of this committee, Mr. Moorhead, and others, including Mr. Sabo, the chairman of the Budget Committee, is that right?

Mr. KENNARD. Mr. Chairman, I should make clear that the FCC was not a party to those negotiations or discussions.

Mr. DINGELL. You are getting one question ahead of me, but answer the question. I want that on the record, too.

Mr. KENNARD. So do I. The FCC did not participate in drafting the legislation or was not a party to any of these negotiations or discussions.

Mr. DINGELL. You did observe—you, as counsel to the agency, did observe the discussions. The discussions involved a wide range of choices. The suggestions of this committee had been basically that the amount should originally be 90 percent. The administration had suggested 80 percent. Members of the other body had suggested that the cost be zero to the awardee of the pioneer preference, is that right?

Mr. KENNARD. I don't have any knowledge of that, Mr. Chairman.

Mr. DINGELL. So you have no knowledge of that.

Mr. KENNARD. I am afraid not.

Mr. DINGELL. Maybe it would be important for me to simply raise this question.

In your view, was there any pressure asserted on the Commission on these matters that was in any way improper by any of the parties, the applicants or anyone else?

Mr. KENNARD. No, Mr. Chairman. As you well know, we conducted a very thorough investigation into those types of questions, and we concluded that there was not improper ex parte pressures or contacts of that nature at all.

Mr. DINGELL. Now, the law under which the Commission then came to the conclusion that you would charge the recipients of the pioneer preference licenses was what section of the Communications Act?

Mr. KENNARD. That was an amendment to 309(j), I believe.

Mr. DINGELL. Does that afford specific authority to the Commission to charge for pioneer preference licenses or to place charges? Or is it sort of a general authorization to the Commission to take actions with regard to managing the telecommunications spectrum?

Mr. KENNARD. Mr. Chairman, in our August 9 order, the Commission based its authority to charge its pioneers the 90 percent formula on section 4(i) of the Communications Act, which we refer to as the necessary and proper clause of the act which allows us to implement policy that furthers the overall purposes of the act.

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Mr. DINGELL. It does not afford the Commission, however, specific authority to charge for the granting of these particular licenses?

Mr. KENNARD. No. It is non-explicit authority. It is derived from 4(i), which is a general empowering clause.

Mr. DINGELL. It is that which has raised the question which has been discussed in this committee with regard to whether or not the charges being placed by the Commission would, in fact, be sustainable under law, is that correct?

Mr. KENNARD. That is correct.

If I might add one statement, Mr. Chairman. I want to be perfectly clear on the involvement of the Commission in discussions about the legislation, the GATT legislation. We served a role, as we typically do in these matters, as the expert administrative agency, and I am informed that at a staff level there were some discussions, and we did provide some technical assistance in the drafting of the particular provisions, but we were not involved——

Mr. DINGELL. On substance.

Mr. KENNARD. That is right. We were not involved on the substance.

Mr. DINGELL. It is, I believe, long settled that it is proper for the Commission, which is the Federal custodian of the spectrum and which is in charge of telecommunications matters that are of great importance to the government, should provide technical assistance to other agencies, both to the Congress and to the executive branch. Is that not so?

Mr. KENNARD. That is our role, Mr. Chairman.

Mr. DINGELL. As a matter of fact, it is one with which I strongly agree.

Well, sir, we want to express our thanks to you for your assistance to the committee and for your appearance today on very short notice.

The gentleman is recognized again.

Mr. FIELDS. You did an eloquent job talking about the technologies of the various companies. Do you happen to know what the capital contribution or the amount expended by these particular companies were as part of your pioneer preference decision?

Mr. KENNARD. I don't believe that is in our record.

Mr. FIELDS. Thank you, Mr. Chairman.

Mr. DINGELL. The Chair thanks the gentleman.

Any further questions of our witness?

Thank you, sir.

The Chair announces that our next witness is Mr. Douglas C. Smith, president, OmniPoint Corporation, 1200 North Veitch Street, Arlington, Virginia.

Mr. Smith, we are happy to welcome you for such statement as you choose to give. Do you have anyone you desire to have at the witness table with you?

Mr. SMITH. No, thank you, Mr. Chairman.

Mr. DINGELL. Please identify yourself for the record.

Mr. SMITH. I don't have a prepared statement. I was called in on very short notice, and I would like to make one correction.

Mr. DINGELL. If you get in that Chair we will let you say whatever you might.

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STATEMENT OF DOUGLAS G. SMITH, PRESIDENT, OMNIPOINT CORPORATION

Mr. SMITH. Although the address is my apartment in the Washington area, our firm is based in Colorado Springs, Colorado—and the only reason that I was able to testify on such short notice is that this process has been going on for so long, for so many years, that I had to take an apartment here in Washington in order to be able to spend time with my family. Because I have been called in on repeated occasions to have to contribute to the almost endless motions against the pioneers on all kinds of issues.

This panel needs to understand that this has been going on since 1989, that the decisions were made almost 2 years ago in October.

OmniPoint is a small, high-technology, entrepreneurial, start-up company. All of the original employees and myself who started the company are still running the company. We went 2½ years without pay in the first 2½ years of our company's existence.

The reason why we support this GATT legislation is because it ends this process that has been going on. It ends the controversy that goes on. Despite the fact that we were promised if selected the guarantee of a license without any payment, we recognize that the circumstances have changed. And the advantage of this legislation is that it stops the delay that the opponents of this would like to have continue and tie us up in the courts for years.

We as a small company cannot survive years of litigation. We want to get on with the business of building the PCS business and building our company and providing service to consumers.

I thank you for the opportunity to testify here. I don't have a prepared statement, but I will be happy to answer any questions, including some that were raised earlier on a number of points. Since I have been at this now for an extraordinary period of time I can probably shed some light on some of the questions that were asked earlier.

Mr. DINGELL. The Chair thanks you for those comments.

The Chair is going to request staff to inform us what the votes are to be, and then we will proceed to try and recognize members for questions for approximately 10 minutes. Then we will all go to the Floor and vote and get back here as fast as our bandy legs will take us.

The gentleman from Colorado.

Mr. SCHAEFER. Thank you, Mr. Chairman.

Doug, we appreciate you taking time to come in during the day. I know this kind of testimony is a little bit foreign to you, so just relax. We are pretty good fellows here.

Can you describe to the committee the money that you have spent and the man-hours you have put in in order to develop your PCSs and the technology to get this company running?

Mr. SMITH. Yes. Probably the largest investment was what people call sweat equity. We have 100 employees and almost all took substantial pay cuts, even when we finally could afford to pay salaries, to come to work for us.

In addition to that, because in 1991 the pioneer preference program promised that, if successful, you would be awarded a license, we were able to raise capital on that basis. We have spent to date

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approximately $30 million. That for a small company is an enormous amount of money.

One of the issues that people have to put into context is we had to take these risks back in the past. We had to ask our investors to risk their money at a instant in time when there was no assurance there would be any PCS allocation, let alone we would get a license. There is a thing called risk return trade-off. The only source of capital we can do to go out and raise money, we have to sell stock to raise money, and we have to ask investors to risk their money.

The parties who are now trying to argue over small percentage differences in various formulas, they are trying to say aren't you getting this enormous return for even $30 million? A, we don't know. Any number today is a speculative number about the auctions, but no one can go back in time and take the risk away from us. They can't remove that. We have already done that.

If someone came out to Colorado on the promise that if they could find a use for land there that no one else could that they could use that land to test their idea and it turned out that the idea was successful after years of struggle and everybody else wanted to do that and came back in and said now that we know it is right we would like to take it all away from you, that is the problem. This legislation is a complex area filled with complexities. The advantage of this legislation is that it simplifies and gets on with the business.

Mr. SCHAEFER. Could you have developed this PCS technology without the pioneer program?

Mr. SMITH. We would not have undertaken this program.

In 1991—in May, 1991, when the program was official at the FCC, the general consensus was that PCS was not going to be happening, that you had all kinds of arguments against it. People said it was unnecessary. The cellular could do everything. People said the spectrum at 1.9 gigahertz was unusable. People said the technology spread spectrum could not be shrunk and put into a handset, which we had to prove.

There were a lot of naysayers at that time, and the actual pioneer preference is legally listed as a guarantee of a license not subject to competing applications. Had that not been there we would not have been able to raise the tens of millions that we did in order to go after this technology.

Mr. SCHAEFER. Could you briefly describe this technology?

Mr. SMITH. It is hard to do briefly. We essentially developed the first hand-held pocket spread spectrum phones the PCS frequency of at 1.9 gigahertz. There are a lot of things derivative of having accomplished that, a lot of benefits, technology. It has tremendous potential to reduce the cost to the consumer of wireless services. It offers a lot more flexibility in how you use the spectrum. So there were a number of benefits.

We were tested during the process by 30 companies. No company who tested our technology petitioned against us for a pioneer preference. We had 20 companies support us during the process. The purpose of the license is to be a test bed for technologies like ours and others. There is no guarantee what technology is going to win.

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Mr. DINGELL. If the gentleman will yield, a question that is very important. Say somebody came along and was going to take this away from you. What would you think of that? They say, we are going to bid more money, and we are going to take your license away from you. Would you say that is fair or unfair? Would you say it is in the public interest? What would you say?

Mr. SMITH. We think it would be terribly unfair.

Mr. DINGELL. Why would you say it would be unfair? A guy comes in and says you are not entitled to it. I will give you a better deal, and I will give you the same technology. Why would you say that would be unfair?

Mr. SMITH. Companies have said exactly those words. We have been petitioned against on the grounds that we are a small company, how could we pay as much as a large company and we shouldn't get it because we are small. People have filed those comments. Fortunately, they don't have our technology. We are the ones that developed it.

Mr. DINGELL. They have done nothing, developed no technology, just saying we are going to pay more and develop the technology and take it away from you. Would you regard this as fair?

Mr. SMITH. Obviously not.

Mr. DINGELL. If they were trying to do that you would get a court order, wouldn't you?

Mr. SMITH. Unfortunately, we have had to go to court already over this issue. We never had a lawyer or a lobbyist prior to winning the pioneer preference. All our filings were done by our engineers, and we had no contact with the Commissioners prior to the tentative award. Since then, we have had a lot of lawyers helping us fight through this.

Mr. DINGELL. If somebody tried to take this away you would go to court, wouldn't you?

Mr. SMITH. We would.

Mr. DINGELL. What would you tell the court when they tried to take this away from you?

Mr. SMITH. Well, the ground rules were the same for everyone. We operated under those.

Mr. DINGELL. You played under the rules that were established?

Mr. SMITH. Absolutely.

Mr. DINGELL. Without any special preference?

Mr. SMITH. Only the one that was awarded finally——

Mr. DINGELL. Anybody else could have gotten a pioneer preference for the same kind of work, could they not?

Mr. SMITH. There were 100 other parties who also asked the FCC for recognition of their work. It is not just PCS that has pioneers. There are pioneers in other dockets.

VITA is a nonprofit organization. Volunteers In Technical Assistance was awarded the first pioncer preference for their low earth orbit satellite technology. If someone said to them, you as a nonprofit organization have to come up with whatever someone else wants to bid for the spectrum that you have innovated, they would be out of business.

There is another company. Suite 12 pioneered a wireless cable. Pioneer preference is not specific to just this docket.

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Mr. DINGELL. It has been said to the committee this is some kind of a secret, a sweetheart deal. Is there a secret or special preference that you got that any other American couldn't have gotten with the same effort?

Mr. SMITH. Not only was it not secret, but there were thousands of pages filed by at least 100 companies who analyzed each others' technologies. There was a tremendous amount of peer review.

On this topic I first found out about the fact that we were going to be charged by the GATT legislation by reading it in the newspaper. In fact people keep attacking—The Washington Post, they reported on July 16 it would be part of the GATT legislation.

There was nothing secret about this. Anyone who wanted to could have read—industry newsletters have been writing about this for some time, and I had nothing to do with the formula of 90 percent, 80 percent or 85 percent.

Mr. DINGELL. So you don't think this was some kind of sneaky secret, underhanded, dishonest, special interest preference and dirty dealing on behalf of your company against everybody else; is that right?

Mr. SMITH. Mr. Chairman, I find it inconceivable, and I have to say your reputation is so well-known for being—not only squeaky clean but as extracting as much out of people as you can, I find it inconceivable that people think you were taken.

Mr. DINGELL. Well, I want to thank you for that. I really didn't want you to say that, although it is kind of nice to hear.

There have been a lot of people running around charging that this was some kind of sneaky special interest preferential deal, and I wanted to hear what you said. You don't look to me like you are some kind of sneaky, underhanded, influence peddling scoundrel.

Frankly, I think it is pretty hard for me to say that because you worked hard, developed your technology, filed your application and won your case fair and honest that you ought to have it taken away from you by somebody who may happen to have the desire to get your technology and your business and your niche in the spectrum. What do you think of that?

Mr. SMITH. I appreciate that very much. I agree. I reiterate that one of the major advantages of this legislation is that it ends litigation.

By the way, it takes away our right to litigate the charging, and it takes away the other side's right.

The point is, we don't want delay. We want to get going. The other side wants to tie this up in the courts for as long as they can to delay it.

Mr. DINGELL. I apologize to my friend from Colorado, and I will yield back what little of his time is left.

Mr. SCHAEFER. You got at the very questions that I was going to be asking anyway, and I yield back.

Mr. DINGELL. The Chair notes that there is a vote on the Floor. We are liable to be there for a while so we are going to recess and get back as fast as we can.

Are there further questions of the witness?

Sir, we want to thank you for being with us. We are sorry about whatever distress this proceeding has caused you. We appreciate your coming on such short notice.

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We will return as quickly as possible to hear other witnesses on the list. Mr. Stowe and Mr. Choate also desire to be heard, and we will look forward to their testimony.

The committee will stand in recess until we get done voting.

[Brief recess.]

Mr. DINGELL. The committee will come to order.

The Chair advises the next witness is Mr. Ronald Stowe, vice president, Washington operations, Pacific Telesis Group, 1275 Pennsylvania Avenue, Northwest, Washington, DC 20004.

Mr. Stowe, we are pleased to welcome you to the committee. You are recognized for such statement as you choose to give today.

STATEMENT OF RONALD STOWE, VICE PRESIDENT, WASHINGTON OPERATIONS, PACIFIC TELESIS GROUP

Mr. STOWE. Thank you, Mr. Chairman. I appreciate very much the attempt to clarify and explain and elucidate the position that Pacific Telesis and the issue that Pacific Telesis has tried to raise.

The issue that we have tried to raise is very limited and very specific, and that issue is that in the decision of how much the auction price for the pioneer preference, how much the discount should be charged, that the administration has put forward a number which we believe—a formula which we believe equals 27 percent of the fair market value of the license that the pioneer preference recipients will receive.

Our position had been to support both earlier the formula in H.R. 4700 or the formula then arrived at by the FCC, which is approximately 90 percent of the fair market value either of a comparable license or of a combination of the top 10 markets.

I would like to take the opportunity to say—to address two issues. One is, before I get to the numbers that we heard—we heard a lot of numbers this afternoon, and I think it is important to clarify some of those.

Before we get to that, it is very important for me and on behalf of Pacific Telesis to state that we have since the issue came up supported the adoption of GATT. We adopted a public position earlier supportive of GATT as good for the United States economy and for employment in the United States. We continue to have that position in terms of the international agreement negotiated under GATT.

The objection that we have raised does not deal with the content of GATT, and we have not participated in and we have taken steps to disassociate ourselves from those who would use what we believe is a very legitimate issue that we have raised about the numbers and calculation, to use that point in a partisan or a demagogic way to argue about the adoption of GATT.

We do not want the Congress to adopt the formula that is in the legislation at the present time. That is not the same as challenging the validity and the merit in the United States of GATT.

I realize that this has in the past 2 days become highly politicized and highly emotional. We have not, again, participated in any of that, but we do defend both before and after this hearing the explanations that we heard from the administration witnesses. We do continue to believe that the calculations we put forward and the conclusions that we reached about the discrepancy between what

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will be raised and what the administration has proposed will be raised are still valid.

I must go back and say that if we believed that the licenses were going to be offered at 90 percent or at 85 percent or anywhere in that area of the fair market value, we wouldn't be here today. We wouldn't have raised the issue.

Our concern is that they are really going to be raised at 30 cents on the dollar, not at 70, 80 or 90 cents on the dollar, and that has a substantial impact on both the spectrum auction itself and, obviously, on the amount of dollars that are going to be raised.

It is extremely unfortunate in our view that this has taken on the connotation, as was raised by the chairman earlier, of insinuations by some people of improper conduct. Pacific Telesis stands by the text and the numbers of the position it went public with, and I think—I hope you will agree nothing in any of those statements contains any of the suggested innuendos.

I would also like to address a number of questions that came up in the earlier discussion. For example, are we talking about a—in the case of the last witness, taking away spectrum granted or a license granted? Absolutely not. Pacific Telesis bid on the pioneer preference grant, was not given a pioneer preference grant, and now is bidding on the second license in that area. We are absolutely not interested in taking away the license that was granted to OmniPoint or anybody else.

The question is, again, what the formula for compensation is. Is there going to be a 10 percent discount or is there going to be a 70 percent discount and what are the consequences of that decision.

The question has arisen about the earlier grant of cellular spectrum. Pacific Telesis was indeed one of the many recipients of a cellular license. At that time, in order to encourage the development of the cellular industry, the government decided to grant the cellular licenses without charge.

It granted all the cellular licenses without charge. It also, by coincidence, granted The Washington Post a cellular license without charge at the same time it granted Pacific Telesis and the other recipients. The Washington Post subsequently sold its license at a substantial profit, and the fact that Pacific Telesis sold off its cellular properties last year really has nothing to do with this debate. And if it does, then the fact that The Washington Post did the same thing is equally valid, and I would hope that we wouldn't get distracted by that.

In terms of the accuracy of the numbers, we have had a tremendous—made a tremendous effort since we learned about the proposal within the administration to come up with a—what we calculate at approximately a 27 percent valuation or, in other words, about a 70 percent discount based on the administration's numbers that were sent to the Hill that under this formula from the administration we said that formula would raise about $564 million. Mrs. Rivlin said that the CBO said that it would raise $548 million. Our numbers are not far off from what she said.

The conclusion, however, then did not go on and apply apple to apples. Our calculations were under the formula that the administration has put forward they would raise approximately $564 mil-

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lion. Under the FCC order of last August there would be $1.038 billion raised.

And under a proposal that we actually put forward to the administration in an effort to make a compromise on this weeks ago of a 70 percent proposal, not 90 percent, not 85 percent, but a 70 percent proposal, you would raise $1,439,000,000.

That was a good-faith effort by Pacific Telesis to bridge the gap between continuing a major incentive for pioneer preference and yet not create such tremendous market distortions that we believe would result from the 70 percent discount.

Now, we heard so many numbers today, and I must confess I am not an economist. I will try my best to try to evaluate those.

What I can assure you of is that Pacific Telesis came forward in a good-faith effort with the administration to try to get a compromise which was not going to distort the market and was not going to leave—again on behalf of companies like The Washington Post and Cox Communications, which are not in fact pitiful, fledgling giants—not leave nearly a billion dollars on the table.

It would in our view seriously distort the market. It would be unnecessary in terms of public exposure. And our point in running the advertisement was to try to get the administration's attention after having, quite frankly, been told essentially to go away for week after week after week, saying we don't want to hear about this. Our intention was in no way to raise questions about ethics, about propriety, whether in the administration or certainly not in the Congress.

We weren't focusing, frankly, on the development of legislation in the conference. We were focusing specifically on the numbers coming out of the administration, which we thought were just dead wrong. I regret to say that nothing that we heard today in terms of the numbers contradicted that. In fact, it reinforced at least the underlying assumptions.

Now, we are—certainly we feel immersed at the present time in a situation, a political situation that goes far beyond the dispute over numbers. I hope that you will understand I have tried to be as specific and as open about our process and our thinking as I can, that we have put forward in good faith an argument that where we felt, frankly, that the administration for whatever reason was using a wrong set of numbers, with significant adverse consequences for the American public. And it was again very interesting to hear Mrs. Rivlin confirm basically what our calculations were.

There are a lot of issues here, but, again, what we wanted to focus on was the difference between 30 percent and 90 percent, between anywhere between $.5 billion and $2 billion. There is a major difference here.

And let me come back again to my opening point. We regret that this has become a tool of people who for completely irrelevant reasons want to become—want to really demagogue on the question of GATT. That is why we started off saying that in terms of our position that GATT was good policy.

I regret that this is in the legislation. In fact, the final thing I would say in the opening statement is if the Congress had adopted the FCC formula in GATT, had scored the money in the FCC for-

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mula in GATT, the taxpayers would be better off to the tune of at least $.5 billion.

So we are not objecting to the pioneer preference. We are not objecting to the scoring. We are not objecting to moving ahead with GATT. We are very much objecting to the very substantial differential in the two formulas.

Thank you.

Mr. DINGELL. Thank you, Mr. Stowe.

The Chair is going to recognize the distinguished gentleman from Massachusetts, the chairman of the subcommittee and cochair of today's proceedings.

Mr. MARKEY. Thank you very much, Mr. Chairman.

Mr. Stowe, are you familiar with the California PUC decision reached by the administrative law judge that held that cellular assets of PACTEL could not be converted from use by the integrated telephone company to a spun-off company without compensation to the ratepayers?

Mr. STOWE. Yes.

Mr. MARKEY. I know that your company's successful lobbying of the California PUC managed to reverse the administrative law judges's decision and you succeeded in paying a paltry sum of around $10 million. Do you remember what the sum was?

Mr. STOWE. I would suggest that anybody who manipulates the California PUC——

Mr. MARKEY. I didn't ask that. You lobbied to change the decision so that only $10 million was in fact paid is that correct?

Mr. STOWE. That is what the Commission and the Commissioners voted on.

Mr. MARKEY. Well, that is a shockingly low amount to be paid to the ratepayers for an asset that was given by the Federal Government to a telephone company, only $10 million. That sum pales in comparison to the $9 billion that the cellular spun-off company generated.

You are sitting here today very concerned about taxpayers, who are essentially the ratepayers, all telephone ratepayers are taxpayers as well. It is the same universe of people, same pockets. Yet your company is arguing that all of the benefits from the gift that the Federal Government gave to PACTEL should go into the hands of the shareholders, not to the ratepayers.

Now you are sitting here after your company has taken that position with crocodile tears, concerned now, helping our subcommittee to maximize revenues coming out of a much smaller competitor, entering the marketplace much later than the gift which the Congress gave to Pacific Telesis. And, without question, that does raise arched eyebrows as to what the real motives are.

We don't think it is the taxpayer/ratepayer for sure. We think it is the competitive position of your company trying to gain a narrow edge in the marketplace.

This is similar to a subcommittee hearing held in July on electric utilities converting spectrum given to them for internal use because they were electric utilities. We gave it to the electric utilities to manage their electric grid operation. Fine. They now want to move it over to commercial use so that they can make more money for their shareholders.

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Now, I think it is wrong for companies to think that the spectrum belongs to them. We did not give this spectrum to either the telephone companies or to the electric utilities so they could use it for purposes other than that which was intended, which is to benefit ratepayers, to give them new services, unless there was full compensation given over to the ratepayers and then it is fine, move it over into a separate subsidiary.

For what it is worth, I think the California PUC decision was an $8 billion sweetheart deal for PACTEL that hurt tremendously the California ratepayer, but I leave that issue for another day.

The point I want to make is that the spectrum is something that belongs to the public, and the legislation that we are considering today would recover in a guaranteed manner the money that the taxpayers deserve and would not receive otherwise or be subject to litigation in an uncertain climate. And we believe that it is going to ultimately wind up over a billion dollars.

This action on your part calls into question whether or not the taxpayers will receive that money. And it is very disturbing to me—and I know that you know how long and hard we have worked on this legislation—a last-minute attack to be made on something that is clearly in PACTEL's narrow economic interest in trying to knock a challenger in their own region off balance even as we have staked them to a 10-year lead with a free, much larger and valuable piece of spectrum. And for very short term, in my opinion, and narrow selfish corporate interests PacTel called into question all the activity of this subcommittee.

I want to tell you, Mr. Stowe, I don't think it was appropriate, and I think that the hearing that we have had today is unnecessary except for the full page ads that you put in the newspaper inaccurately characterizing what this subcommittee, both subcommittees, have done over the course of the last year to rectify what we believe to be a problem with the pioneer's preference.

You can respond.

Mr. STOWE. On your first point about the value of the licenses, the PUC in California took an intensive audit of what the investments were in the cellular business and decided that the share owners of Pacific Telesis had, in fact, invested the difference, the $8 billion in investment facilities of people—of market development, and they came up with an approximation. Obviously the $10 million is an approximation.

Mr. MARKEY. So the spectrum is only worth $10 million. Is that your point?

Mr. STOWE. It was their decision to value the license part——

Mr. MARKEY. Fine. So do you agree with that decision that it is only worth $10 million?

Mr. STOWE. We accepted what they said.

Mr. MARKEY. You accepted that decision?

Mr. STOWE. Sure.

Mr. MARKEY. But of course you think that all the spectrum that is now being auctioned off is worth perhaps 100 or 1,000 times greater than that amount?

Mr. STOWE. We, like every other cellular recipient, got the cellular licenses with the understanding that we were going to develop the cellular business.

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I think it is worth just 30 seconds on looking at the historical development here. Back in the days before there were any wireless services, the government decided in order to get the cellular service developed, that they would give the spectrum out. They would give two licenses. It is now clear that those licenses are valuable.

So at this stage of the evolution, the government has decided appropriately, and we supported this, that they should auction it and get revenues.

Mr. MARKEY. I assume, Mr. Stowe, that your appeal to the administrative law judge's ruling was that the very large amount that he or she had believed was due to the ratepayers, $9 billion or so——

Mr. STOWE. Not the ratepayers, the shareowners. Actually it turns out, I believe, that the Pacific Telesis cellular group contributed funds to help keep the ratepayers' rates low, not the other way around.

Mr. MARKEY. But the administrative law judge did believe that the ratepayers should be compensated before the transfer of the spectrum did take place; is that not correct?

Mr. STOWE. Yes.

Mr. MARKEY. Yes. And the $10 million is now the price, having been appealed by PacTel; is that correct? As you sit here today, is that not the situation in terms of the ratepayers of California?

Mr. STOWE. The ratepayers were given the $10 million plus a tremendous amount of compensation over the period of time that we developed the cellular license. I might add that the Washington Post made no contribution at all to anybody when they sold their cellular license. I really don't think that that is the key issue. I mean, we can talk about it. It was fully adjudicated, for sure.

Mr. MARKEY. My time has expired, but I would like to continue to return to this subject later.

Mr. DINGELL. The Chair will recognize the gentleman again on the second round. The Chair is going to recognize the distinguished gentleman from Colorado.

Mr. SCHAEFER. Thank you, Mr. Chairman.

Mr. Stowe, didn't PacTel go on record at the FCC in support of the pioneers' program itself, including the guaranteed free PCS license and the formula?

Mr. STOWE. Pacific Telesis has absolutely supported the pioneer preference program, and when it—when it was understood that there would be no charge, we supported that. When it was then changed that there would be a charge for the spectrum, we supported that.

Mr. SCHAEFER. And you filed, as I understand, numerous papers with the FCC in support of this from 1990 until 1993 when finally you found out you would not receive the pioneers' preference; is that correct?

Mr. STOWE. We have always supported the pioneer preference program, including now. There was no change. When we were not awarded a license, there was not a change in our support for the pioneer preference program.

Mr. SCHAEFER. But you did apply for a pioneer preference?

Mr. STOWE. Yes, absolutely.

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Mr. SCHAEFER. OK. And as I understand it, the FCC determined, and you can refute this if you like, but the FCC determined that the—PacTel, the company, had not made a sufficient contribution to the development of PCS technology and that was the reason that they denied your application.

Mr. STOWE. No. I think they decided that the three awardees had made the most outstanding contributions. I don't think that they decided anybody else did not make a contribution.

Mr. SCHAEFER. Had not made sufficient contribution?

Mr. STOWE. They chose the three best.

Mr. SCHAEFER. OK. Have you appealed in the courts the decision of the FCC to deny PacTel's application for pioneer preference?

Mr. STOWE. Yes.

Mr. SCHAEFER. Now, there are two things here. I want to make sure I have got this straight. First of all, you have appealed the FCC's decision on the grant of preferences to these three companies, but you did not appeal the FCC's denial for the application for your preference.

Mr. STOWE. We challenged the process that the FCC followed. We didn't challenge on the point—we didn't challenge Cox or The Washington Post. We challenged the procedure that the FCC followed.

We are not challenging the fact that they chose three people and they didn't choose us. I mean, it was a matter of—one of the things that we challenged was, in the process, in the procedure, we asked them to please clarify how they made the decision, what the technological advances were that they decided were better than others.

It is a matter of record, and it was a matter of—in one respect, of the context. None of that—I am happy to answer your questions the best I can, but none of that has to do with the present question that we have raised about the amount of the formula, because all of—we are talking about, assuming that those three awards stand, then are they going to get a 90 percent or a 30 percent——

Mr. SCHAEFER. I fully understand the difference of what you are arguing about, and I think the whole situation on the money will be coming up pretty shortly, but I guess my concern in getting to this point is the fact that you just did not agree with the decision that the FCC made on granting these three companies this preference.

Mr. STOWE. We did not agree with the FCC's procedure. We do agree with the most important issue of all, which is the August 1994 decision by the FCC about how to proceed with the auction, including with these pioneer preference awards. We challenged the procedure at the FCC.

Mr. SCHAEFER. Do you feel that PacTel had made significant contribution to PCSs?

Mr. STOWE. We think we put forward a very good proposal. We are not saying the award should go to us and not to them, absolutely not.

Mr. SCHAEFER. Mr. Chairman, I would yield back right now.

Mr. DINGELL. The Chair thanks the gentleman. The Chair recognizes now the gentleman from Texas, Mr. Fields.

Mr. FIELDS. Thank you, Mr. Chairman.

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Mr. Stowe, something you said earlier doesn't ring true with me, and I want to give you an opportunity to respond to it, and that was your statement, if I understood your statement, that the amount generated at this 85 percent level, after you averaged those other 20 areas, would only amount to 27 percent of the fair market value of the licenses.

What do you base that on?

Mr. STOWE. Well, there is an assumption in the administration's proposal that all the licenses are of equal value, that people in Raleigh, Durham, or Jacksonville will pay the same per capita as people in New York or Chicago or Los Angeles will.

In fact, that is just not—it is not true, both on our experience and it is not true intuitively, we believe. I mean, people will pay more—look at what has happened in cable. Cable prices are different all over the country depending on the local market, and people will pay more based on how much they will use their PCS, how much they will use their cellular phone, how much they use and how much they pay for cable.

The assumption that 85 percent is 85 percent of the same thing that 90 percent is is wrong unless you assume that all of the licenses are equal in value. And if you believe, and we have been unable to convince people in the administration of this, that the subscriber will pay—will end up paying the same thing in New York as they do in a small town in Ohio or in a more rural or less densely settled area, I think that is just wrong, and our numbers are correct if you have an assumption based on what has happened in cellular and cable that the value of what they call a pop, the value of per population served differs.

Now, our calculations are, in fact, that in New York, the value of the license is up close to $50 per subscriber and the value in——

Mr. FIELDS. Mr. Stowe, let me ask you, is that the reason you have a $20 market average?

Mr. STOWE. If they were all the same, then you wouldn't need an average at all.

Mr. FIELDS. Let me tell you, because—and I am going to give you an opportunity to respond to allegations. I have asked basically the same question of each panel. Earlier panels, I asked about the allegation that there was some kind of sweetheart deal or that there was some kind of undue influence or special privilege or whatever.

You know, sitting here, kind of going off on the question that Chairman Markey asked a moment ago concerning crocodile tears, some people might allege that you are up here because you are a sore loser.

Mr. STOWE. We are not after the license that we didn't get. We are bidding on the other license. I don't really understand the accusation or the question about being a sore loser. We are not challenging the license we didn't get. We are going after the second one.

Mr. FIELDS. I am not accusing you of being a sore loser, but I am telling you that—and I can't speak for the Democratic Conference, but this issue has raised itself in a major way in the Republican Conference and that is one of the things that is being said, you know, people wondering why at this particular moment, as we are debating an issue that in all honesty has nothing what-

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soever to do with GATT other than it is being used to fund GATT, that you chose this particular moment to make this particular point in a highly-publicized and politicized forum.

Mr. STOWE. Because we just found out about it a couple weeks ago. We have been working very, very hard to try to work with the administration to get the numbers recalculated, the formula changed before it was sent up to the Hill, and so it isn't a matter of raising this.

Now, it is raised now because it was the last chance——

Mr. FIELDS. Mr. Stowe, clarify for me what you just found out a couple weeks ago.

Mr. STOWE. That the administration was considering sending to the Hill a formula that would charge competitors about 30 percent of the market value rather than some—rather than what the FCC decided just this last August, which was 90 percent, either of an average or of the comparable license. And I——

Mr. FIELDS. Let me run through some figures because some of us are going to disagree with your 47 or your 30 percent of fair market value, and you tell me where these numbers are wrong.

And these are numbers that we had to pull out to some degree by our staff, but we also have used some figures that have been used by the OMB, CBO, Ross Perot, you know, and try to be fair. Here are the numbers that we see, that we are basically talking about 55 million people in the three license areas that are up for discussion. Ross Perot, CBO, OMB all calculate that we are talking about a $25—or $24 per capita value, which—on the 20 markets.

Now, that raises about $1.32 billion. If you discount the 85 percent, the pioneer preference discount, that leaves you $1.12 billion. So if you want to use those numbers, then we are talking about a discount of $200 million.

Now, earlier we had testimony from OmniPoint that they have spent about $30 million. We are assuming—we don't know this—that APC and Cox probably spent, each of them, $40 million. Now, that comes to about $100 million in round terms.

Now, the question is, is it worth that $100 million that may not be coming and no one knows whether that additional $100 would or would not come, but is it worth it for bringing forward the technology that has poured over $600 million into the Treasury just on the narrow band auctions?

So the point I am making is, when you look at these figures, I have a hard time understanding the 27 or 30 percent fair market value that you talked about.

Mr. STOWE. I would—I would be pleased to try and give you a detailed assessment of those numbers. I hear in there a couple of things that would be hard to substantiate, and believe me, believe me, I am not interested in——

Mr. FIELDS. Mr. Stowe, hold it a second. With the chairman's indulgence, tell me. Tell me where you disagree.

Mr. STOWE. OK. First of all, you say, would $100 million—wouldn't $100 million be worth—or getting $100 million, isn't that worth all these other benefits.

The FCC proposed a formula to take 10 percent off the fair market cost of these licenses. The CBO said the licenses were together worth about $1.3 billion. That would be $130 million right there

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from the most conservative, the most expensive formula that has been put forward.

So you would get $130 billion—$130 million simply by going with the original FCC formula. If you then discounted it down to 85 percent of the same thing, then you would obviously get in the neighborhood of $200 million. If you took our formula at 70 percent of an additional incentive for the pioneer preference, you would obviously get well over $200 million.

The point that we were trying to make is that these companies, like The Post and like Cox, will certainly go ahead with this if they have to pay something that approximates—whether it is 70 or 80 or 90, we don't care about that. We do care when it gets down into the 20 to 30 percent range and that is all the money they are going to put forward.

There is no need to do that and if—frankly, if OmniPoint—it is obviously very difficult for a company like Pacific Telesis, which is a large telephone company, to sit here and appear to be postured against a company like OmniPoint. Well, my answer to that is that we are not. We have got no complaint with OmniPoint. If OmniPoint needs more assistance or more help because it is a start-up fledgling company, then ways ought to be found to do that.

What we are talking about is when you have got, in our particular case, talking about our parochial interest, you have got Cox Enterprises coming in and getting an award for all of Southern California, San Diego, Los Angeles, Orange County, clear over to Las Vegas, and they are going to get it at 30 cents on the dollar. That doesn't seem right.

Mr. FIELDS. Mr. Stowe, if I accepted your statement that it was 30 cents on the dollar, I might be able to agree with you, but in the fact situation that I laid out, I didn't see where you really disagreed with the numbers we brought forward because you talked about $1.3 billion.

I was talking about $1.3 billion. We were talking about a differential of $200 million, but then when you begin to look at the investment of these companies, that $200 million shrinks, and of course the figures we are talking about could change based on the value of these licenses, and there was testimony earlier that with the licenses that remain, the numbers could go up dramatically, we could be talking about quite a bit more money for the Federal Government——

Mr. STOWE. Right.

Mr. FIELDS. [continuing] generated by this particular process.

Mr. STOWE. Right. But if that happens, all the numbers will float together. I mean, you are absolutely right that it could be a lot more money. It could be an anomaly and it could be less. I don't believe it will. I believe those are very important licenses. They could, in fact, float up, but they will all float together.

So—but let me come back to the point I believe that you are asking about, and that is, if we have licenses valued at $1.3 billion and the legislation says you are going to have a minimum of $400 million, there is a tremendous—that is the discrepancy, and even if you added the cost, the $30 million or $40 million or $50 million of investment that the pioneer preference has made, the awardees made, so you take it—take the $400 million and adjust it by $100

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million each way. The difference is still with the $1.3 billion. There is a huge gap in there. It is not a $200 million gap.

Let me try one other thing. I think the $200 million dealt with paying it over a 5-year period, and again, if you calculate it in the same basis——

Mr. FIELDS. Thank you, Mr. Chairman.

Mr. DINGELL. The Chair is going to recognize himself just briefly to try and get this record corrected here.

Now, as I understand it, sir, the Pacific Bell bases its numerical comparison on the assumption that the FCC formula is simply that the pioneers paid 90 percent of the auction price of the block B license in their service area; is that right?

Mr. STOWE. Or of a combination of the top 10 licenses. I believe they would have a choice.

Mr. DINGELL. Well, I am not going to agree with the second point, but that comes in later.

Now, however, in fact, the FCC order provides that the pioneers will pay the lesser of these things. One, 90 percent of the average per pop auction price of the top 10 MTAs; is that right?

Mr. STOWE. Yes, I believe so.

Mr. DINGELL. Or two, 90 percent of the auction price of B band in the pioneer service area; is that right?

Mr. STOWE. I believe so.

Mr. DINGELL. Now, how does that rhyme with what you have just been telling us?

Mr. STOWE. Well——

Mr. DINGELL. It adds a whole series of new dimensions which are quite different than that which you have been telling us.

Mr. STOWE. My understanding of the FCC formula is exactly that you just outlined. Ninety percent of the average of the top ten or 90 percent of the other—of the B band license. That is the point. I have been handed a note that says the straight 90 percent formula is—was the 4700, H.R. 4700 formula, not the FCC formula.

Mr. DINGELL. Are you referring to the FCC formula or to the legislation's formula?

Mr. STOWE. I am sorry?

Mr. DINGELL. Are you referring to the formula in the legislation or the FCC? You are using the FCC's formula as a base. You set forth that the FCC's formula is correct, and it is a good formula to which you would not object.

Mr. STOWE. Yes.

Mr. DINGELL. But you have been setting forth that the FCC's formula in fact does one thing when in fact it does something quite different.

Mr. STOWE. My assumption is that the FCC formula is as you just outlined it, if I said something inconsistent with that——

Mr. DINGELL. You appear to have been having a quite different appreciation of that. However, we will let the record speak for itself on that matter.

The Chair is going to recognize now the gentleman from Ohio, Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

Mr. Stowe, I—first of all, let me say I hold no brief for the Washington Post. I think that is probably self-evident, but you indicated

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in your opening statement that the—you were sorry that the issue had become, I think I quote you correctly, highly politicized and that Pacific Telesis had not participated in that.

Is that a fair rendition of your remarks?

Mr. STOWE. Yes. What I was referring to was the—what I think of as the demagogic use of this argument in the GATT debate in the last couple of days on a number of talk shows and things like that.

Mr. OXLEY. And you had become aware of the situation as it related to GATT, you say, about 2 weeks ago?

Mr. STOWE. It was probably a little bit before that,, but it was certainly within the last month.

Mr. OXLEY. And when was the first ad taken out in The Washington Post?

Mr. STOWE. There has only been one, thank heavens.

Mr. OXLEY. That was today?

Mr. STOWE. Yes. Yesterday.

Mr. OXLEY. Yesterday?

Mr. DINGELL. The date is October 4. Tuesday, October 4. Now, when it was taken out is another question.

Mr. OXLEY. And the day—so in other words, the ad appeared——

Mr. DINGELL. I read it with interest.

Mr. OXLEY. The ad appeared the day before—the ad appeared the day before the vote on the GATT, the day that we were supposed to vote on GATT?

Mr. STOWE. The ad appeared when we finally gave up getting anybody in the administration to listen.

Mr. OXLEY. Did you counsel with anybody on the Hill about that particular problem?

Mr. STOWE. We asked on—a number of people whether they thought there was any chance of getting this thing changed.

Mr. OXLEY. Who did you ask?

Mr. STOWE. I wasn't—we were not—we made our own decision. This is not anybody else's responsibility.

Obviously what has happened here, which was totally unintended, was that members of the committee have taken this as an attack on the committee's work, which was absolutely not what we—what was intended or what was expected.

What was intended was that we had hoped and we really believed and continue to believe that the administration proposal to you and the numbers were wrong.

Mr. OXLEY. Did you give prior notice to anybody on the committee, either members or staff, that this ad would be forthcoming?

Mr. STOWE. Well, we—as a courtesy, we notified people the night before.

Mr. OXLEY. The night before?

Mr. STOWE. Yes.

Mr. OXLEY. Who are those people?

Mr. STOWE. Well, I don't really know. My staff does that.

Mr. OXLEY. What——

Mr. STOWE. It was not our intention to have this surprise anyone. I mean, we, in fact—we informed the administration, we informed the people at the Commission and——

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Mr. OXLEY. Let me ask you this: Was the intention of the ad to inject this issue into the GATT debate?

Mr. STOWE. The intention of the ad was to make sure that if changes were going to be made in the GATT legislation or the formula, that this is one of the issues that would be considered, and we were criticized——

Mr. OXLEY. Were you aware we were on a fast-track procedure?

Mr. STOWE. We were criticized, we were criticized repeatedly, and I think unjustifiably for coming in late in the process. We came in as soon as we were informed about the provision that was in the GATT.

I said yesterday that we—if the GATT proposal were sent back and changes were made, we would like this to be one of the changes. We very specifically were not asking that the GATT proposal be sent back because of this issue.

Mr. OXLEY. Well, were you aware at that point that it was impossible to send the GATT provision back under fast track and that the clock had already started to run on the proposal?

Mr. STOWE. Well, it is my understanding that if they decided to make modifications and resubmit it, that that would not be impossible to do.

Mr. OXLEY. Well, that is not my understanding under the provisions of GATT, and counsel tells me that I am correct.

Mr. STOWE. But if you are asking did we do this as a futile gesture, absolutely not. We did it with the—with the intention that if the debate were continued and other changes were made, we did not want to be accused later of not having raised the issue until it was all over.

Mr. OXLEY. Further reiterating my lack of enthusiasm for defending The Washington Post, let me——

Mr. STOWE. We were just asking people not to feel sorry for them.

Mr. OXLEY. I understand and it is difficult to feel sorry for The Washington Post under any circumstance, but let me also indicate that in the ad—by the way, whose decision was that to run the ad?

Mr. STOWE. Well, it was a corporate decision. I mean, it wasn't taken at random by any one particular person. We talked about it at considerable length.

Mr. OXLEY. Well, given the fact that this was run, a full page ad a day before the debate on GATT, given the fact that you have indicated that you were concerned that this issue had become highly politicized, let me quote from the ad that appeared in The Washington Post. "The Washington Post and two other corporations have slipped in a $1 billion loophole and the Post forgot to mention its own special interest."

You talk about a deeply discounted license, $1 billion giveaway. Now, those are pretty highly charged quotes and terms that sound a lot like a political ad to me. Am I misreading that ad?

Mr. STOWE. The Washington Post ran two editorials in which they talked about moving quickly on the GATT without taking more time to review it because it was—there were no other issues of interest or importance or special interest items. Two different editorials in recent weeks.

Mr. DINGELL. Would the gentleman yield?

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Mr. OXLEY. Be glad to yield to the chairman.

Mr. DINGELL. This is a most interesting discussion. We never heard a word of complaint from PacTel until somebody else got the license. You thought it was a grand process until that point. Then all of a sudden somebody else gets a license and you folks become very exorcized.

How do you explain that to me? You thought it was a wonderful process until somebody else got it. Then all of a sudden you began to generate these enormous sources of distress about it.

Was it that somebody else got it or was it that the price was unfair? You had never complained about the pricing structure before. You just all of a sudden found that the pricing structure was bad after somebody else got it. Explain that to me.

Mr. STOWE. Someone else getting it had nothing to do with it. We would have never raised this issue if Cox Enterprises got the Southern Los Angeles license at 100 percent, at 90 percent, at 85 percent, or, as we tried to negotiate, at 70 percent.

Mr. DINGELL. You would most assuredly not have raised it had you gotten it.

Mr. STOWE. Of course not. As they haven't.

Mr. DINGELL. All of a sudden you find this enormous sense of righteousness generated about the public purse and an unfair, as you call it, special interest loophole. In fact, a $1 billion loophole, and you then talk about, it is deeply discounted; it is buried in GATT, and you say we are willing to pay the taxpayers' full price set by the FCC, but you never generated this willingness until Cox got it.

Mr. STOWE. We were willing to pay whatever we can bid on the other license. We expect to pay the—if it is $1.3 billion, we will pay the $1.3 billion. We are not asking them to pay $1.3 billion. It is the difference between 90 percent and 30 percent, which is a huge difference.

Mr. DINGELL. I have been sitting here patiently waiting for you to explain how it was that you were totally undistressed until PacTel lost it and Cox got it.

Mr. STOWE. Only when it was 30 percent. It didn't—the loss of the pioneer preference or the award to someone else was absolutely not the occasion for us raising this issue, and neither was the discount to 90 percent or 85 percent. It was when the formula went down to 30 percent that we became concerned.

Mr. DINGELL. Are you telling me you are not litigating this matter in court at this time?

Mr. STOWE. No. I am telling you we never would have raised this issue.

Mr. DINGELL. You can litigate it in court. Now, are you litigating the price in court, or are you litigating the fact that Cox got it?

Mr. STOWE. We are litigating the procedure followed by the FCC and we never, ever would have raised this issue in this context——

Mr. DINGELL. The issue about which you are complaining though is the procedure which placed this license in the hands of Cox, rather than in the hands of PacTel.

Mr. STOWE. But who got it was not the issue. The process followed certainly was the issue. We don't expect to have the pioneer preference.

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Mr. DINGELL. If you at PacTel had got it, would you be in court protesting?

Mr. STOWE. Of course not.

Mr. DINGELL. Of course not. Of course not. I thank the gentleman for yielding.

Mr. OXLEY. Thank you, Mr. Chairman.

Let me continue. You had indicated that you weren't interested in the licenses from the gentleman from Colorado, the entrepreneur who testified earlier, or any other license; is that correct?

Mr. STOWE. I am sorry.

Mr. OXLEY. You weren't interested in getting those licenses?

Mr. STOWE. No, no. We are not trying to take away licenses, absolutely not. We are bidding on—there are two licenses in each market. Pioneer preference was given already and we are bidding on the other one. We are not bidding, we are not trying to take away the pioneer preference award.

Mr. OXLEY. And that is what you meant in your ad when you say, we are willing to pay the taxpayers the full price set by the FCC?

Mr. STOWE. That is right. For the second license, we expect to pay the full auction price, even though the pioneer preference awardee will get their license at a substantial discount. All we are saying is, keep this in the 80, 90 percent range instead of the 20, 30 percent range. That is the whole issue.

Mr. OXLEY. You might want to check with your PR people because I think this paragraph is particularly misleading. It doesn't talk about two licenses. It doesn't indicate to the public that there are two licenses. It simply says, the FCC already adopted a fair pricing formula for these licenses, period. We are willing to pay the taxpayers the full price set by the FCC.

Now, the average person reads that and they think that you essentially are going to be the good guys, come in here, bail out the taxpayers and take that license away from those scumbags at The Washington Post.

Mr. STOWE. No. I understand your point and I apologize for the lack of clarity in that. That was absolutely not intended. I know that when that came by, the admonition was it had too many words already and it had to be cut down, and unfortunately in the editing—I understand the point you are making and it was absolutely not what the factual situation is or what we intended.

Mr. OXLEY. What do you think this dust up on the GATT regarding Telco will have—what effect will that have on our negotiators in the GATT proceedings on the telecommunications issues?

Mr. STOWE. My guess is it won't have any effect.

Mr. OXLEY. I hope you are right.

I yield back. Thank you, Mr. Chairman.

Mr. DINGELL. The time of the gentleman has expired.

This ad is a matter of interest to me. You say that it is not directed at charging any wrongdoing anywhere here. Or are you charging wrongdoing here?

Mr. STOWE. We were not charging wrongdoing. We were charging that there was——

Mr. DINGELL. You are kind of sidling up to the reader and saying, do you know that the corporations have slipped in a $1 billion

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loophole, and then in the next paragraph you say, deeply discounted licenses for new wireless services as a result of language buried in GATT.

That doesn't reflect very well on those of us who have worked in this now, does it? Are you charging us with some kind of wrongdoing, Mr. Stowe?

Mr. STOWE. Obviously not. It is a—if I could say in the words of one of the earlier witnesses, both I personally and Pacific Telesis have been working with you and this committee for a lot of years, and I would hope it is quite clear, based on our historical record, that there is absolutely no question and there has never been any question in our view about the integrity of this committee and obviously the chairman. That was not the intention and that was not——

Mr. DINGELL. This ad seems to be rather unfortunate in its tone insofar as those of us who have worked on this particular matter. I want you to know that I take offense at it. I think every member of this committee, we have worked very hard on this matter, takes offense. It is the kind of ad that a really smart company doesn't put in, especially when it is not founded on good hard fact involving misbehavior.

Now, your—let's talk about the number. CBO's number is based on—of $548 million is based on $400 million plus interest, right?

Mr. STOWE. If you say so. I don't know. I heard you say $548.

Mr. DINGELL. That was the testimony we received earlier, and the—that is based on a hard statutory number which was inserted into the language of GATT first by this committee and then by those who did the drafting of the legislation; is that right? Isn't that right? That is the statutory minimum that can be paid, $400 million plus interest.

Mr. STOWE. Right, $400 million floor plus interest.

Mr. DINGELL. Now, all other numbers you heard testified to are entirely speculative, is that not so? You heard Alice Rivlin, you heard the Chief Counsel of the FCC. You heard others. You heard the folks from the——

Mr. STOWE. Well, in an auction, obviously there is uncertainty, but——

Mr. DINGELL. So those numbers are speculative?

Mr. STOWE. But people are making estimates of what they think.

Mr. DINGELL. CBO and OMB scored zero on the narrow band auction which netted out $678 billion; is that right?

Mr. STOWE. As I understand it, yes.

Mr. DINGELL. This is going to be an auction here, isn't it?

Mr. STOWE. Yes.

Mr. DINGELL. And the price that they are going to get, the government is going to get on this is going to be bought under an auction, isn't it?

Mr. STOWE. Yes.

Mr. DINGELL. Now, your numbers are based, as I understand it, on the buying power index by Rand McNally; is that right?

Mr. STOWE. In part, yes.

Mr. DINGELL. Now, this buying power index, is it adjusted for population?

Mr. STOWE. I don't know. As I said earlier——

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Mr. DINGELL. I will tell you that it is not. Do you disagree with that?

Mr. STOWE. I don't know.

Mr. DINGELL. Now, when it is adjusted for population, the difference between the FCC numbers and the GATT formula comes down to 6 percent; is that right?

Mr. STOWE. You have the advantage of——

Mr. DINGELL. You allege that it is 600 percent, but when you adjust this for population, I will make the allegation that the difference between the FCC formula and the GATT formula is 6 percent. Now, is that correct or not correct?

Mr. STOWE. Well, our estimate is that——

Mr. DINGELL. No, no. I am just asking you the question.

Mr. STOWE. Well, I am sorry. I don't have an independent basis for saying. I mean——

Mr. DINGELL. Would that be useful if you had that number before you had talked about a $1 billion giveaway, a price break, and you say—you then go on and you say that the FCC already adopted a fair pricing formula for these licenses.

Now, the FCC formula and your formula, according to my calculations, differ in the amount of 6 percent, not 600 percent, and yet in your editorial at PacTel, Mr. Stowe, you say again, $1 billion loophole, deeply discounted license, price—no, $1 billion price break, significantly less than the licenses' true value, and then you talk about subsidizing The Washington Post.

I am not here to hold brief for The Washington Post, but 6 percent doesn't make good copy. Six hundred percent does, but don't you think you have some modest responsibility to come up with correct numbers?

Mr. STOWE. Yes. Well, I believe our numbers are correct.

Mr. DINGELL. And here you are saying 600 percent. The numbers we get and the difference between the FCC's numbers and yours is 6 percent. That is almost within the level of background noise, isn't it, Mr. Stowe?

Mr. STOWE. Mr. Chairman, I am afraid I can't agree that the 6 percent is based on—is consistent with any of the calculations we have made, and we have not tried to do anything except to get a very realistic assessment of what was going to happen in the marketplace.

I am at a disadvantage because I don't know how to disprove the particular calculation that you gave or that you gave from OMB. I do know that when we base the numbers on the Rand McNally buying power index——

Mr. DINGELL. Are you telling me then that you cannot justify your own numbers?

Mr. STOWE. No. We can justify our own numbers.

Mr. DINGELL. You were not aware, for example, that they were not adjusted for population.

Mr. STOWE. Well, I understand that when you adjust them for——

Mr. DINGELL. And doesn't that change things?

Mr. STOWE. No. Understand—just a minute——

Mr. DINGELL. Let's talk about it. We charge one price in Nevada, which has a relatively limited population. We charge another price

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in Manhattan, which has a different population. Would you say that adjusting those numbers for population would have a significant impact on price and on value?

Mr. STOWE. Of course, and in fact——

Mr. DINGELL. Of course, but you have used—you have used numbers which are not adjusted for population, and yet you come in here treating this entire matter as if in some evil fashion this number was deliberately cooked to constitute an enormous, unjustifiable, unconscionable, and, according to what I read here, nearly criminal giveaway and you have created a vast storm throughout the country.

Talk show hosts are raising cain. Ross Perot is communicating with us how he is going to give us $1 billion or something like that and all manner of good-hearted citizens and scoundrels are now complaining that in some fashion this matter has been improperly handled by the Congress, the administration and everybody else. Your numbers are off by a factor of 100.

Mr. STOWE. Mr. Chairman, I would like to clarify. I do not believe that that is the case, that the Rand McNally——

Mr. DINGELL. Do you know, Mr. Stowe? Do you know? You do not believe. Now, let us go through——

Mr. STOWE. That is because I didn't calculate the numbers.

Mr. DINGELL. I believe in the Holy Trinity. I have never met them, but when I get—I have never seen them, but when I get a page full of numbers, I know. You are telling me to believe.

Let's assume you are addressing this from a theological basis and I am addressing it on the basis of hard numbers. Which is the basis on which public policy questions should be decided?

Mr. STOWE. If you would permit me just a second, because I think that the numbers really are intact, and the reason that I am saying that I don't know for sure is that I personally was not in charge of calculating the numbers. On the other hand, the people who did it are certainly every bit as expert as those you heard earlier this afternoon.

Mr. DINGELL. They perhaps are expert, but they have not communicated this expertise to you, have they?

Mr. STOWE. No.

Mr. DINGELL. Nor is it manifest in this. Nor is it manifest, if in fact there is a difference between 6 percent, which is the FCC's figures, and yours, which are 600 percent, you, I believe, should be awarded the telephone number of the FCC so that you may then go up and criticize their numbers as opposed to attacking the numbers of the committee or the numbers of the administration.

Mr. STOWE. We believe that the numbers the administration put forward are dead wrong.

Mr. DINGELL. Believe. Believe. Believe. We do not know.

Mr. STOWE. Well, it is a spectrum auction.

Mr. DINGELL. When you are able to tell me you know and when you are able to sit there in that witness stand and tell me that these numbers are incorrect, then I will accept your testimony. As of this particular minute, we will treat you with the same credibility we would treat an itinerant preacher.

Mr. FIELDS. Mr. Chairman.

Mr. DINGELL. The Chair's time has expired.

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Mr. FIELDS. Will the gentleman yield for just one quick question?

Mr. DINGELL. Of course. I would be happy to yield.

Mr. FIELDS. As a follow-up, because I was listening to the chairman's eloquence and this line of questions, and if the chairman would indulge me for just a moment, I want to come back because this statement that you made early on that still sticks with me is that we are only looking at a 30 cent return on the dollar, and you have lost me, because the fair market value, as I understand this particular process, would be the per capita average over a 20 market area, and so I want to know where you get that 30 percent.

Mr. STOWE. If you take the top 20 markets, our estimate is that they range in per capita value from about $50 down to about $7. There is a huge difference in the fair market value of those licenses.

Mr. FIELDS. I don't want to take the chairman's time. This goes back to what I was saying earlier though. Mr. Perot, CBO, OMB all say that is about $24 per capita over the average.

Mr. STOWE. But then you are taking out—first of all, I don't subscribe to whatever Mr. Perot may have said. I have no idea what he based his calculations on.

The second thing is, they are taking out New York, Washington, and Los Angeles. If there is no difference, why are they taking it out? If there were no difference, it wouldn't matter. They could take just the top 10 or the top 20 or the top 500, it wouldn't matter.

There is a difference and that is why the first—the top three most populated, most active markets are being eliminated from the calculation. It is not an accurate assumption that everything is worth $24.

Mr. FIELDS. Mr. Chairman, I want to thank you for yielding.

Mr. DINGELL. The Chair thanks my friend. The Chair will start the second round. Then we are going to go—after we complete the second round, we will go to the next panel. The gentleman from Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman, very much. That ad cost about $100,000 in The Washington Post.

Mr. STOWE. I don't think so. Even they don't get that much.

Mr. MARKEY. How much did it cost? We will make it $50,000. Who paid for it, the ratepayers or the shareholder?

Mr. STOWE. Obviously the shareholders. The ratepayers don't pay for anything in Washington.

Mr. MARKEY. None of this is obvious to us, by the way. That is why we are asking the questions, OK? We are trying our best to find out what exactly is going on.

So my problem is that you and your company are in violation of the first law of holes, which is when you end up in one, stop digging. So I want to continue then to probe further down this hypocrisy coefficient which is at record high levels in the committee today.

Your position, for example, on how much people should pay for spectrum differs greatly depending upon which side of the question you are on. Are you a pioneer? Are you a telephone company? When the cellular spectrum was given for free in 1984, there was no question that you should pay. We knew that you shouldn't pay

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then. That was clear, and when that cellular spectrum was converted from ratepayers to shareholders, you did not think that the ratepayers should be compensated.

And while I am at it, 1 year ago, you urged, Pacific Telesis urged this committee to preempt California from regulating cellular. Then after Air Touch was spun off from Pacific Telesis, you did a 180. You just turned right around and argued that California should not be preempted from regulating cellular.

And when you applied for a pioneer's preference, you thought the spectrum should be gotten for free. When you lost, those who received it should have to pay the full amount, no ifs, ands, or buts.

And now when someone else may get spectrum and pay 85 percent, you don't think that is right and you shed your crocodile tears down there for the taxpayers of our country.

You have done—your company has done more flip-flops than a pancake, but do not expect this subcommittee to follow you. We have had a consistent philosophy as to what we have been interested in seeing achieved, and it does not switch on and off with the various corporate perspectives that may be of that moment that you, as a good lawyer, you as a good corporate representative, feel compelled to make, but do not make those charges of us, as you flip-flop back and forth on each of these questions, as your economic interest happens to be on one side or another of those questions.

All you are doing is really raising questions here at the last hour that unjustifiably question the solid process which this committee engaged in.

Now, I know that your company's interest is not at this particular point in time in concert with the subcommittee, the full committee's agenda, but I just want to say to you, Mr. Stowe, that we are aware, very well aware of why you take these positions, and we are very well aware of what the whole history of this spectrum allocation issue is in this country with your company and with all others, and we think that it is absolutely inappropriate for you at this late moment to be questioning a process which we in good faith and with hard work put together to construct something that would be fair for all participants.

I don't have any other comments, Mr. Chairman.

Mr. DINGELL. The Chair notes that we have a vote. Mr. Stowe, you and I have been friends for some while. I am sorry that we had to bring you in before the committee to discuss this matter this way.

But, like Mr. Markey, I was much offended by the tenor of the ad which you so graciously placed in The Washington Post at such great expense. I believe that it reflected upon the integrity of the committee, integrity of the subcommittee, integrity of the staff, integrity of the administration, integrity of the chairman of the subcommittee, integrity of the chairman of the subcommittee and each of the individual members of the subcommittee.

It is a very unfortunate thing that was done. It has not helped you nor has it helped PacTel. It is not the way these things should be done in this town. It has long-term bad effects, and I very much regret that you have done it. I think that you will have occasion in the future to very much regret the consequences of this.

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The Chair is going to excuse you at this time. We are going to go over and vote. We will return as soon as we have completed the vote and we will proceed then towards the next panel. The committee will stand adjourned until the members have returned from their vote.

[Brief recess.]

Mr. DINGELL. The subcommittee will come to order.

The next panel is a panel composed of Mr. Choate, Mr. Fein and Ms. Claybrook. The committee welcomes them. We will start with you first, Mr. Choate and then Mr. Fein and then Ms. Claybrook.

STATEMENTS OF PAT CHOATE, ON BEHALF OF ROSS PEROT; BRUCE FEIN, ATTORNEY AT LAW; AND JILL CLAYBROOK, PRESIDENT, PUBLIC CITIZEN

Mr. CHOATE. Thank you. I appreciate the opportunity to testify this afternoon. In fairness to the committee, I want to note that I do oppose GATT. The issue that I come——

Mr. DINGELL. Mr. Choate, the committee will inform you that this hearing is not for or against GATT. It is convened at the request of the leadership to hear testimony on Title VIII, which relates to the telecommunications provisions and the pioneer preference provisions of that particular statute. We will be happy to receive your testimony, but since the hour is late it will be difficult for us to hear you on other matters.

Mr. CHOATE. I bring a letter that has been given you from Mr. Ross Perot. He regrets that due to the lateness of the hour that he could not appear himself before the committee.

The question is on section 801 that is contained in the GATT bill. His contention is that it is impossible and it is largely conjecture to determine what would be the value of these three preferenced licenses.

It is true that OMB and the Congressional Budget Office have made estimates as we have heard this afternoon that the value of those licenses and the fees that will be collected range from $548 million to $568 million. We have also heard substantially higher values, but, again, those are conjectures and we will hear other offers that are conjectures.

The offer that he brings to the committee is that the only real way to find the true value of these airways and these licenses is to offer them in public auction and at fair market value. But to assure that the public will not suffer a dime's loss, he is willing to give a guarantee that if an auction, a fair market value auction, is conducted, that he will put up either of these amounts; or if there is a substantial higher amount, he will put that up as a floor price so that the American public can, if there is $1 billion extra or $2 billion extra or $3 billion extra, that the public can get that money. He will do so as a public service and will do so at no fee.

Moreover, he is prepared and willing to testify before this committee or meet with such officials and give such guarantees as would bring that into being. That is the message I convey this afternoon, Mr. Chairman.

Mr. DINGELL. Mr. Fein.

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STATEMENT OF BRUCE FEIN

Mr. FEIN. Mr. Chairman and members of the committee, I am grateful for the opportunity to present views on section 801, the pioneer preference provision of the GATT legislation.

I think that in context 801 does provide an unjustified monetary benefit to the three pioneer preference licensees who initially received awards for use of spectrum without any fee and have provisionally been ordered by the FCC if their bid were sustained, to pay something like 90 percent of fair market value, although I understand there is imprecision in identifying fair market value.

The FCC itself in its August order indicated it could be either the competitive bid received in a market for Los Angeles, New York or Washington, DC, the markets where the three pioneer preference licenses exist, or an average of the competitive bids of the top 10 markets.

It seems to me that this Congress and the American people have come to recognize that the public spectrum really does belong to them, and that all those who use the public spectrum generally should pay at a competitive price. Indeed, I believe that in 1993 Congress enacted a statute that at least prospectively applied those rules and indeed those rules will apply in the awards of all licenses for personal communication services.

Indeed, it is in expectation of that that this committee had drafted legislation that relies upon competitive awards in the top 20 markets for establishing the 85 percent fee level that the pioneer preference licenses would pay. It seems to me that in equity it is not required to provide such an enormous discount, whether it is hundreds of millions or billions.

The Congress frequently finds that an initial standard that is enacted for public interest reasons has proved erroneous, has proved to be a loophole and retroactively seeks to correct it. It does that frequently in the tax law.

For instance, just last year the United States Supreme Court upheld a congressional retroactive statute regarding State taxation that required that a State that in good faith had purchased stock in a company and sold it to an ESOP, an employee stock ownership plan, and received a special deduction under the then existing law, could retroactively be required to pay tens of millions of dollars and that did not violate the Constitution.

This Congress in the most recent tax bill has provided some provisions retroactively. There is some unfairness in that, and in order to ensure, I think, equity to the three preference licensees, it would be obligatory to give them back the money they expended on developing the technology—Congressman Fields mentioned figures of $30 and $40 million—that should go back with a fair amount of payment of interest of use of that money that could have been devoted to other purposes, but after that return, what we call restitution, then they should come into the market and bid like everyone else does, like the people they will be competing against. That is the way the American people know this was a fair deal for everyone.

I don't believe there are any constitutional infirmities in such retroactivity. There were statements made that, gee, this particular formula worked out and section 801 was in part a good deal be-

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cause there had been some suggestion by the three pioneer preference licensees they would sue the FCC, claiming the 90 percent figure was retroactively applied and was a taking of their property without due process, because the initial award was for free.

I don't think that constitutional claim has any solid foundation based upon the most recent Supreme Court decision just this last June.

Also, it needs to be noted that it is not correct that these licensees, if section 801 was enacted, would be prohibited from challenging the constitutionality of the 85 percent rule after they were initially promised zero as a fee for coming in under a constitutional claim. That statute cannot forbid those companies from claiming they still are being unconstitutionally deprived of the use of the spectrum for free as the FCC initially awarded. That is not part of the bargain that would amount to anything.

One of the reasons why in my judgment there has been some skepticism cast upon section 801 doesn't necessarily go to the substantive provisions. Persons I think in good faith can disagree over the relative merits that have encouraged these three to take risks and develop some special technology. That is why provisions like this ordinarily come to the Congress as regular legislation subject to debate and amendment, and it is of such importance that it is ordinarily debated on its own merits.

Section 801, however, comes in on the tail of what the chairman recognizes is a big dog, GATT. That is basically what the vote is going to be on the merits of this bill is on GATT. Section 801 is a minor provision of a very large public policy decision made by the House of Representatives.

By tacking 801 onto the GATT, it prohibits any amendments. No serious public debate can be made over whether or not some of the provisions are wise or not. Total debate as a ceiling is 20 hours, and that I think raises some doubt as to whether or not this is the best way to go about deciding how to treat these pioneer preferences.

Lastly, let me just make a couple of comments with regard to the formula in section 801 and why I think that it is surely less preferable to a fair market standard, once you do equity to the companies, give them back the investment they made in reliance upon the FCC decision, give them a fair rate of return on that investment, but then make them enter the market like everyone else.

Under section 801, you take 85 percent is calculated with respect to what is defined as fair market value for the three pioneer preference markets; that is, the New York market, the Los Angeles market and Washington, DC market.

The reason why that standard I think is flawed is that the markets are not fungible in terms of the value per population. A person in New York City is far more likely to use a personal communication service intensely and bring up more revenues for the provider than one who is a subscriber in Tucson or who is a subscriber in Kansas City. That is known through the use of our cellular experience.

The same is true with Los Angeles and Washington, DC; they are more lucrative markets per capita than they would be if they were marketing their services to subscribers in these other areas,

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which through experience indicates subscriber use will not be as intense, will not be as revenue rewarding.

Second, the cost of serving the subscriber by the provider falls according to the density of the population. That is why you can serve at less cost a higher number of people in New York City than in a more sparsely populated area. When you apply the standard in section 801 then to the three pioneer preference markets, I think there is a consensus that substantially understates what the true fair market value is in those markets.

Now, there will be a debate about the degree of undervalue, but I think it clearly is an undervaluing. That means if we really cannot forecast with much certainty and we have billions of dollars at stake here, why don't we do equity for the American people; equity for the pioneer preference licensees, give them their investment back, give them a fair return on their investment based upon ultimate uses and a interest rate, and then everybody comes in on the same playing field bidding in open markets, in open auctions and enter on a par.

I am very grateful for this opportunity. Thank you, Mr. Chairman. That completes my statement.

[The letter from Bruce Fein follows:]

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October 5, 1994

Honorable Robert L. Livingston
2368 Rayburn HOB
Washington, D.C. 20515

Dear Congressman Livingston:

This letter elaborates on the media steal of the century smuggled into section 801 of the implementing legislation for the Uruguay Round GATT Agreement.

In December 1993, the Federal Communications Commission issued three broadband (pioneer preference) licenses for personal communications service (PCS) in the New York City, Los Angeles, and Washington, D.C. markets to Omnipoint, Cox Enterprises, and APC (70 percent owned by The Washington Post), respectively. The licenses were issued in comparative administrative proceedings involving approximately 200 applicants, and no spectrum fee was initially contemplated for the winners.

The PCS licenses are virtual gold mines. New York and Los Angeles are the top two markets, and Washington D.C. is tenth. Further, PCS licenses enable the subscribers to enjoy cellular voice, facsimile, and data transmission, whereas it's chief competitor, cellular licenses, offers only voice communications. In addition, FCC rules permit only two licenses per market, and all licensees under its rules, but for Omnipoint, Cox, and The Washington Post, will pay full market value through competitive auction.

In response to congressional pressure, the FCC reconsidered its December 1993 pioneer preference awards to determine whether a spectrum fee should be paid by the licensees as every other broadband PCS licensee must do through competitive bidding. Last August, the FCC issued an order setting the fees at approximately 90 percent of fair market value determined by the highest bid received for the one non-preference PCS license in the New York, Los Angeles, and Washington, D.C. markets.

That August ruling, however, is not final, and is still open to reconsideration by the FCC and to judicial review in the U.S. Court of Appeals for the district of Columbia Circuit.

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Section 801 of the GATT Bill would short-circuit the FCC proceedings. It would make the tentative PCS licenses for Omnipoint, Cox, and The Washington Post final and permanent with no opportunity for FCC reconsideration or judicial review. Further, it dictates a spectrum price for the three robber baron licensees scandalously below fair market value.

Based on the best estimates of knowledgeable investment bankers, of sophisticated communications companies such as the Bell Regional Holding Companies, and of Congressional Budget Office experts, the attached chart shows the probable fair market values of PCS licenses for the New York, Los Angeles and Washington, D.C. markets at approximately $3 billion in aggregate: $1.5 billion for New York, $1 billion for Los Angeles, and $351 million for Washington, D.C. Those figures are educated estimates because no competitive auctions in those markets have yet been held by the FCC, but the value of cellular licenses in these markets is one good indicia.

Section 801 of the GATT legislation, however, sets a formula for calculating the spectrum fee miles below any non-hallucinogenic estimate of fair market value: namely, the average PCS license value per capita in the top twenty markets as determined by competitive bidding, but excluding the lucrative New York, Los Angeles, and Washington, D.C. markets in the formula. The consequence are values stupendously below market, and even those depressed levels are further slashed by 15 percent by section 801. The end result is that Omnipoint will receive an approximate $1 billion discount from the true value of its New York PCS license, Cox's corresponding colossal subsidy will be approximately $730 million, and The Washington Post's PCS pork will approach a fat $220 million if section 801 is enacted by Congress.

In sum, the gold-plated federal subsidies to Omnipoint, Cox, and The Washington Post make the oil concessions of Teapot Dome notoriety pale in comparison.

For your information, I was General Counsel of the FCC, 1983-84.

Sincerely,

BRUCE FEIN

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The Steal of the Century

Scenario	MTA	Pop	Value per Pop ($)	License Value ($/M)	Estimated Value of Pioneer Preference Discount ($/M)
1	NY	24.4	60	1,464	1,049
2			50	1,200	785
3			40	976	561
			17*	415	
1	LA	19.1	55	1,051	726
2			45	860	535
3			35	669	344
			17*	325	
1	WAS	7.8	45	351	218
2			35	273	140
3			25	195	62
			17*	133	
1	Total				1,993
2	Total				1,460
3	Total				967

* Estimated average value per pop for top 23 markets excluding NY, LA, WAS is $20, according to CBO staff. $20 x .85 = 17.

- NY, LA are top two markets and WAS is tenth.
- License values increase with population density.

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Mr. DINGELL. Thank you, Mr. Fein.
Ms. Claybrook.

STATEMENT OF JOAN CLAYBROOK

Ms. CLAYBROOK. Thank you, Mr. Chairman, for the opportunity to testify this afternoon.

We are very concerned about back-room deals in legislation of this sort. I think that the first issue that I would raise is the secrecy, that this was put in the bill only to be discovered, and of course a lot more fuss raised when it was discovered, with the concern raised that while there is a use of the funds from this for GATT and to compensate for the lowering of tariffs, that nevertheless it is an irrelevant provision otherwise to this legislation and done secretly.

Second, we are concerned about the regulatory process and circumventing the FCC. We feel that that causes people to lose confidence in the regulatory process itself, which you have been a major defender of over many years, and we feel that the lack of consultation and doing this behind their back was very——

Mr. DINGELL. Whose back?

Ms. CLAYBROOK. The FCC, as we understand it, was not consulted in the process and the decision to do this.

Third, we are concerned about the taxpayer funds that have been lost by this. We believe this should be done through an open-bidding process with the highest amount awarded the license, and that would be available for the taxpayer. So the taxpayer has been hurt by this.

Fourth, we believe that the competitors have been harmed. They have testified today to that effect. The way this has happened, it appears to competitors that unless they are able to cut their own deals, there is not an open process for them in the Federal Government.

Fifth, we are concerned about judicial review, the fact that judicial review was knocked out by this legislation. It appears arbitrary and it in many ways mimics the concerns that we have about the GATT itself, where there is a secret and not open process with no judicial review when trade barrier issues are raised.

Then, we believe it also hurts Members of Congress themselves because some Members favor GATT who are upset about having to vote for this particular provision and there is nothing they can do about it, and then there are other Members of Congress who don't favor GATT but think that they are going to be judged as well on this particular provision in the legislation.

We believe that this hearing is very appropriate and we appreciate that it has been held. We are concerned that because the committee was involved in it that it may not be as thorough a review of this issue as might be done by a committee not involved.

Second, we are concerned that the—because this pork barrel, as we call it, deal has come out in press reports and lurked undiscovered, that there may be other items in this legislation yet to be discovered, and there has not been much forthcoming either from the USTR, the Trade Representative, or from the Ways and Means Committee on what other special items are in this legislation.

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Finally, we believe that the GATT should be, the GATT legislation should have this provision excised. I think that Bruce Fein has given a fairly effective presention on how this kind of a license should be handled. We believe that Members of Congress should not have to vote on it in this legislation.

That concludes my testimony.

Mr. DINGELL. The Chair recognizes the gentleman from Ohio.

Mr. OXLEY. Ms. Claybrook, what committee would you recommend of the House to review this if not the Telecommunications Committee, the Agriculture Committee?

Ms. CLAYBROOK. No; the Government Operations Committee.

Mr. OXLEY. Why is that?

Ms. CLAYBROOK. I think that people will have greater faith in the committee that has not been involved in the arrangement of this provision in the legislation.

Mr. OXLEY. What does that mean?

Ms. CLAYBROOK. Independent review.

Mr. OXLEY. Do you think the members of this committee are somehow involved in some plot to rip off the taxpayers?

Ms. CLAYBROOK. You said that; I didn't, Congressman. I didn't say that. What I said was, my understanding is that this committee has been involved in putting this provision in this legislation.

Mr. OXLEY. Do you know that was my bill that set up the auction?

Ms. CLAYBROOK. No, I didn't know that.

Mr. DINGELL. Would the gentleman yield?

Are you aware of the fact that before this committee interested itself in this matter, these would have gone for nothing?

Ms. CLAYBROOK. That is my understanding, that originally——

Mr. DINGELL. Did you come to that understanding or have you known that for some time?

Ms. CLAYBROOK. I read that in the newspaper.

Mr. DINGELL. I thank the gentleman.

Mr. OXLEY. So you were aware of my legislation that essentially created this opportunity for the taxpayers to recoup this large amount of money that heretofore had been given away?

Ms. CLAYBROOK. I think that is very admirable and don't dispute that.

Mr. OXLEY. Did your group support that effort when the issue was before this committee? We didn't have hearings in the Government Operations Committee; we had hearings in this committee on that issue.

Ms. CLAYBROOK. No. We were not involved in that legislation. We have been working on GATT. That has been our involvement in this issue, and the reason that I am testifying today is because this is a provision that must be voted on by members who are going to vote on GATT one way or the other. And that is the reason that I am testifying.

Mr. DINGELL. Will the gentleman yield?

You have indicated that this committee, because of its experience in this matter, has some kind of bias in its views?

Ms. CLAYBROOK. I didn't say that. I said I thought that the public would have greater confidence if the committee reviewing this issue was one that was not involved in the issue.

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Mr. DINGELL. What are you telling me? What are you saying to me? Are you saying the public won't have confidence in this committee being involved in this issue?

Ms. CLAYBROOK. I think that the public would have greater confidence, is what I said, if the committee having hearings to evaluate whether or not this is appropriate was a committee that was not involved in the arranging for the provision in the legislation.

Mr. DINGELL. What provision in the legislation?

Ms. CLAYBROOK. The provision dealing with——

Mr. DINGELL. You are suggesting then that the committee of jurisdiction which writes the legislation ought never inquire into what it is going to do?

Ms. CLAYBROOK. No, I didn't say that whatsoever.

Mr. DINGELL. You are saying the public won't have confidence because this committee is essentially the originator of the legislation, and we are the originator of the legislation. The legislation which we originated is that which has changed the structure of things so that now the pioneer preference people are going to pay for this instead of getting it for nothing. Do you quarrel with that or not?

Ms. CLAYBROOK. What I quarrel with, Mr. Chairman, is putting provisions into legislation that is unamendable——

Mr. DINGELL. This is not this committee's doing. This committee is interested solely in the question of whether or not these licenses should be given away for nothing or whether there should be a charge, and if so, what should be the charge. And you are essentially attacking the good faith of this committee by saying that the public will have no confidence in the work product of this committee because we take the position that something should be paid for it instead of nothing being paid for it.

Am I fair in that analysis?

Ms. CLAYBROOK. No. You are unfair.

Mr. DINGELL. Why am I unfair?

Ms. CLAYBROOK. Because the question that is being raised at this hearing, it is my understanding——

Mr. DINGELL. The question being raised is, what does this legislation do in terms of the public interest with regard to the payment of fees for the receipt of a valuable license. That is the question.

Ms. CLAYBROOK. In this particular case.

Mr. DINGELL. In this particular case you say the public won't have confidence in this committee. Now I remind you, and you have already agreed, that this committee is the reason that there is a charge for these licenses at all.

Ms. CLAYBROOK. I think that is admirable. I compliment the committee for doing that.

Mr. DINGELL. What then is your objection?

Ms. CLAYBROOK. My concern is the method by which this legislation includes——

Mr. DINGELL. This committee had nothing to do with the inclusion or exclusion of this provision in the GATT legislation.

Ms. CLAYBROOK. Then you are getting credit that you don't deserve.

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Mr. DINGELL. We have an interest only in seeing to it that these things are priced at a level which is fair with the public. Do you have a criticism of that?

Ms. CLAYBROOK. No. I understand that this committee was a party in arranging for this provision to be put in this legislation——

Mr. DINGELL. This was put in by the administration so that they would have a mechanism for financing GATT. That is why it is there. I suggest that you inform yourself better before coming before this committee.

Mr. OXLEY. I would admonish you—I assume this is your press release that we have before us here where you talk about big corporate giveaways and how concerned you are about Congress' low public opinion ratings, pork-barrel giveaway and all the buzz words. I assume that press release has already been sent out.

I suggest that your problem is with the administration in determining what went into the GATT and what did not under the fast-track procedure, not with this committee.

Ms. CLAYBROOK. We certainly have a problem with the administration, believe me. You can ask the administration.

Mr. OXLEY. Your press release doesn't mention that.

Ms. CLAYBROOK. This deals with this hearing, and as I understand the implementing legislation, the implementing legislation is shown to and negotiated with the committees of relevant jurisdiction before the legislation is sent forward. So I presumed that you were informed of, knowledgable of and aware that this was going to be included in this legislation and it is included for a few particular parties who will benefit from it.

And according to my understanding of what Bruce Fein says, the value of these is very valuable and there is no judicial review, there is no amendment of the legislation, and it is a process that I think the public finds upsetting, because it looks like a back-room deal.

Mr. OXLEY. You used that term several times. Where did the back-room deal take place?

Ms. CLAYBROOK. Well, I don't know.

Mr. DINGELL. If you don't know it took place and you don't know where it took place, by what august, grand brazenness do you say that there is a back-room deal here?

Ms. CLAYBROOK. Well, it wasn't public.

Mr. DINGELL. As a matter of fact, on September 12 the Chair announced the contents of the provisions of this legislation. The legislation has been pending publicly in this committee for some while and we have been working to get a price paid for this legislation instead of giving it away for nothing.

You are charging us with bad faith and misbehavior when in fact it is this committee that has been responsible for the collection of the money that will be collected, if any is collected at all.

Now, what do you have to say to that, Ms. Claybrook?

Ms. CLAYBROOK. I appreciate, Mr. Chairman, your——

Mr. DINGELL. Your comment talks about a back-room deal for a big corporate giveaway. Your comments talked about the bad news about the so-called pioneer preference provisions slipped into the

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last seven pages of GATT. You say the democratic process was circumvented. It was not.

Ms. CLAYBROOK. Was there a hearing where anyone could testify, including the people who are the competitors, before the legislation was sent forward so that people could argue about whether this was the appropriate mechanism——

Mr. DINGELL. Let me ask you a question. We have been fighting around on this question of payment for these licenses now for the best part of—since early May. When did you first interest yourself in it?

Ms. CLAYBROOK. When I found out about this.

Mr. DINGELL. You never interested yourself in payment for the pioneer preference until that time, did you?

Ms. CLAYBROOK. No, I am interested in the GATT legislation.

Mr. DINGELL. When did you interest yourself, Mr. Fein.

Mr. FEIN. I follow Federal Communications issues.

Mr. DINGELL. When did you first interest yourself and when was your first public pronouncement?

Mr. FEIN. With regard to the pioneer preference into GATT?

Mr. DINGELL. When it was put into GATT, but you never said a peep before, did you?

Did you say anything about this before it got put in GATT, Ms. Claybrook?

Ms. CLAYBROOK. I didn't know about it until it went in GATT.

Mr. DINGELL. When was your first public pronouncement on this issue, Mr. Choate?

Mr. CHOATE. When I discovered it in GATT, Mr. Chairman.

Mr. DINGELL. And you had never interested yourself in the payment prior to that time, had you?

Mr. CHOATE. I had not.

Mr. DINGELL. We will adjourn for a little bit and go vote and come back and continue this discussion.

[Brief recess.]

Mr. DINGELL. The subcommittee will come to order. The Chair apologizes for the delay. There were a series of votes that had to be addressed on the House Floor.

Let us proceed here further, if you please. Mr. Choate, what is the value of each of these three licenses; do you know?

Mr. CHOATE. No one knows, sir, and that is why the point is made we can take the OMB numbers——

Mr. DINGELL. Let me proceed here. Mr. Fein, do you know what the value is, sir?

Mr. FEIN. Until there is a competitive bid, no one knows.

Mr. DINGELL. Ms. Claybrook, do you know?

Ms. CLAYBROOK. I would say the same as Mr. Fein, until there is a competitive bid.

Mr. DINGELL. Now, the bidding mechanism requires that the price be fixed according to the bids in the other markets; isn't that right?

Mr. FEIN. In some of the markets, that is correct, Mr. Chairman. It is not correct insofar as the Los Angeles, New York, and Washington markets are excluded from the formula, and they are very lucrative markets.

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Mr. DINGELL. Can you tell me what would be the impact in including or excluding those from the market?

Mr. FEIN. The impact, I think is fair to say, would clearly increase the amount of money that would have to be paid because those——

Mr. DINGELL. How do you know that?

Mr. FEIN. Based upon the experience of cellular service in those markets, which show that the subscriber of the kind of PCS that would be offered with the pioneer preferences is a more intense and valuable subscriber in those markets than in, say, a market in Tucson.

And based upon the population densities, because the value of the license increases in proportion to population density. Because more subscribers can be served with less equipment and cost, it is clear those markets would be above the average of the other markets that were included in the formula.

Mr. DINGELL. How do you know that?

Mr. FEIN. Because based upon what we know is subscriber use in cellular markets.

Mr. DINGELL. Have you performed studies in the matter?

Mr. FEIN. Studies have been performed by PacTel and others who actually serve cellular clients.

Mr. DINGELL. Well, when we asked PacTel to tell us about that, they could not.

Mr. FEIN. I don't think—PacTel did not say the cellular subscriber in New York City was not more valuable than the cellular subscriber in Tucson. All you have to do is look at the cellular service that is now in operation in New York City and compare the subscriber value there as opposed to the cellular user in Kansas City and you will find a clear discrepancy.

Mr. DINGELL. Well, very well.

Now, when did you first interest yourself in this matter, Mr. Choate?

Mr. CHOATE. When I learned of it in section 801 of the GATT legislation last Wednesday.

Mr. DINGELL. And you, Mr. Fein?

Mr. FEIN. When I first saw section 801 in the printed bill.

Mr. DINGELL. And you, Ms. Claybrook?

Ms. CLAYBROOK. The same.

Mr. DINGELL. Did any of you interest yourself in these matters at the time that the first rulemaking commenced at the commission? Did any of you interest yourself in it at the time that the Chair introduced the first legislation on this matter to require there be payment for it? No?

Mr. FEIN. I was generally aware of the provision. The commission's proceedings, in fact, are ongoing. I had not taken any public position on it, but certainly I was of the view that it is a good idea to charge spectrum fees for what I consider a public resource.

Mr. DINGELL. Are you for or against GATT, Mr. Choate, Mr. Fein, and Ms. Claybrook?

Mr. CHOATE. I am against GATT.

Mr. DINGELL. Pardon?

Mr. CHOATE. I am against GATT.

Mr. DINGELL. Mr. Fein?

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Mr. FEIN. I am opposed to GATT for reasons relating to the WTO organization and relating to extraneous provisions like 801..

Mr. DINGELL. Ms. Claybrook?

Ms. CLAYBROOK. We have taken an opposition against based on its antidemocracy provisions and the WTO, and our concern that health and safety in trade and environmental standards in the United States will be challenged as trade barriers and unfair labor adjudicated.

Mr. DINGELL. Have any of you performed any econometric studies on the prices that will be received on the sale of these licenses?

Mr. CHOATE. No, but, Mr. Chairman, the point I made in my earlier testimony is all of the estimates and all of the studies and all of the formulas are merely conjecture. The truth in the value lies in what independent bidders are willing to pay in an open market. At the same time, inside this bill we find an estimate and we have heard testimony today that the value, the base value is somewhere between $548 and $568 million dollars. And what we have seen here——

Mr. DINGELL. No, no, no. Now, isn't it fair to say that the committee has fixed that as the minimum price at which these may be sold?

Mr. CHOATE. That is correct.

Mr. DINGELL. So we have not made—the legislation does not make a judgment as to the value of these, it simply says that is the minimum price at which these shall be sold.

Mr. CHOATE. That is correct.

Mr. DINGELL. Right. OK.

Mr. CHOATE. But the point I am making, Mr. Chairman, is that an open market value, if it is greater than that, we have an individual that will guarantee that base price, whatever the committee determines is a base price, and then the public will have that great a pricing. It guarantees the public will have no less than your minimum base price of $568 million.

Mr. DINGELL. It is interesting to note prior to the time the committee interested itself in this matter these things would have gone for nothing, isn't that right?

Mr. CHOATE. That is correct, and the committee is to be commended for getting money, and what we are urging is that the government get the maximum amount of money.

Mr. DINGELL. Very well. You were kind enough to see to it we received a letter from Mr. Perot. I have, in the midst of other business, dictated a response which I will deliver to you to return to Mr. Perot. And the Chair thanks you all for your testimony and the committee stands adjourned, subject to the call of the Chair.

[Whereupon, at 7:10 p.m., the hearing was adjourned.]

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