

BEFORE THE

ORIGINAL

Federal Communications Commission

WASHINGTON, D.C. 20554

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APR - 8 1992

Federal Communications Commission
Office of the Secretary

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| In the Matter of |) | |
| |) | |
| Amendment of Section 2.106 of the |) | |
| Commission's Rules to Allocate |) | ET Docket No. 92-28 |
| Spectrum to the Mobile-Satellite |) | |
| Service above 1 GHz for |) | PP-29 |
| Low-Earth Orbit Satellites -- |) | PP-30 |
| Requests for Pioneer's Preference by |) | PP-31 |
| Constellation, Ellipsat, Loral, |) | PP-32 |
| Motorola, and TRW. |) | PP-33 |

To: The Chief Engineer

**OPPOSITION TO PIONEER'S PREFERENCE
REQUEST OF MOTOROLA SATELLITE COMMUNICATIONS, INC.**

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April 8, 1992

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Summary

TRW Inc. opposes the pioneer's preference request for the RDSS band filed by Motorola Satellite Communications, Inc. ("Motorola"). Not only has Motorola failed to prove that it deserves the guaranteed satellite system license that grant of its request would entail, such a grant also would disserve the policy underlying the establishment of the pioneer's preference rule, and would unalterably prejudice the outcome of the statutorily-required comparative hearing process among the mutually exclusive applicants for authority to establish satellite systems in the 1610-1626.5 MHz and 2483.5-2500 MHz bands.

Motorola's request ought to be summarily rejected as contradictory to the Commission's purposes in establishing the pioneer's preference rule. Specifically, the Commission has unambiguously stated that it does not intend to create service monopolies through preference grants. Motorola seeks just such a monopoly, which would foreclose all of the other parties from offering competing service in the RDSS bands, contrary to the RDSS rules.

Not only is Motorola's proposal contrary to the Commission's long-standing policy of encouraging competition, it also fails to promote spectrum sharing and low-cost service to the public. Moreover, Motorola is not even the innovator of the technologies its system incorporates, nor has it proven that its system is feasible. In fact, it has admitted that

experiments not intended to begin until 1995 are critical to demonstrating Iridium's viability.

Finally, Motorola cannot lawfully be granted a preference because it would deny the other RDSS-band applicants their statutory rights to full comparative consideration. Because the Iridium monopoly proposal is mutually exclusive with the proposals of all of the other RDSS-band applicants, the tentative selection of Motorola as the preferred applicant would entail the tentative rejection of all of the other applications. Such prejudgment prior to comparative evaluation is impermissible under the Communications Act and the Ashbacker doctrine. For this reason alone, Motorola's request for a pioneer's preference must be rejected.

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To: The Chief Engineer

**OPPOSITION TO PIONEER'S PREFERENCE
REQUEST OF MOTOROLA SATELLITE COMMUNICATIONS, INC.**

TRW Inc. ("TRW"), by its attorneys, hereby opposes the request for pioneer's preference filed by Motorola Satellite Communications, Inc. ("Motorola"). As demonstrated herein, grant of this request would be contrary to the Commission's pioneer's preference policy and would unalterably prejudice the statutorily-required comparative hearing process. Moreover, Motorola clearly is not eligible to receive a guarantee of a license under Section 1.402 of the Commission's rules.

I. **Introduction**

TRW is an applicant, along with Motorola, Constellation Communications, Inc. ("Constellation"), Ellipsat Corporation ("Ellipsat"), and Loral Qualcomm Satellite Systems, Inc. ("LQSS"), for authorization to provide both

radiodetermination satellite service ("RDSS") and mobile satellite services ("MSS") in the 1610-1626.5 MHz and 2483.5-2500 MHz bands (the "RDSS bands").^{1/} All five of these applicants have filed petitions requesting pioneer's preferences under Section 1.402 of the Commission's Rules, adopted last May. See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Order"), recon. in part, FCC 92-57 (released February 26, 1992) ("Pioneer's Preference Recon. Order"); 47 C.F.R. § 1.402.

Motorola's proposed Iridium system would consist of 77 low-Earth orbit ("LEO") satellites, eleven in each of seven orbital planes. Motorola seeks authority to operate this system in the upper two-thirds of the RDSS L-band spectrum (1610-1626.5 MHz), utilizing Ka-band frequencies for feeder and inter-satellite links. TRW and others have previously documented the numerous deficiencies inherent in the Iridium proposal in Petitions and Comments responding to Motorola's application. See File Nos. 9-DSS-P-91(87) and CSS-91-010. Chief among these deficiencies is Iridium's inherent inability to share spectrum with the proposals advanced by Constellation, Ellipsat, LQSS and TRW, as required by the RDSS rules.

^{1/} AMSC Subsidiary Corporation ("AMSC") is also an applicant for these frequency bands. AMSC, however, seeks to use the RDSS spectrum to expand its long proposed mobile satellite service system, and has not sought a pioneer's preference.

Motorola wishes to plunder the RDSS allocation, reserving for its sole use the prime portion of the L-band, while leaving to the other applicants remaining pieces of the allotment -- pieces that will not be sufficient either for the type of multiple provider RDSS service originally envisioned by the Commission or for the establishment of the particular systems separately proposed by the other RDSS-band applicants. For this "different use of the spectrum," Motorola seeks a nationwide pioneer's preference.

In the Pioneer's Preference Order, the Commission emphasized that it did "not intend to bestow preferences casually," and it made clear that "an applicant for a pioneer's preference will have a significant burden to persuade the Commission that its proposal has sufficient merit." 6 FCC Rcd at 3494 (¶48). See also Tentative Decision (VITA), ET Docket No. 91-280 (released February 11, 1992), slip op. at 6 (¶13) ("VITA Tentative Decision"). This is a burden that Motorola cannot meet. As explained below, it is clear that a grant of a pioneer's preference to Motorola would be inconsistent with both the Commission's decisions in the Pioneer's Preference proceeding and the comparative hearing requirements of the Communications Act of 1934.

II. Grant of Motorola's Preference Request Would Be Inappropriate Under The Policies And Rules Established In The Pioneer's Preference Proceeding.

A. Grant Of A Pioneer's Preference To An Applicant Proposing A Single Provider Service Is At Odds With The Commission's Purpose In Establishing The Pioneer's Preference.

The Commission has made clear since its initial Notice of Proposed Rule Making in the Pioneer's Preference proceeding that the intent of the preference is merely to guarantee an innovator "an opportunity to participate in the new service." Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 5 FCC Rcd 2766, 2767 (¶7) (1990) ("Pioneer's Preference NPRM"). By granting the first company to develop a new service such a guarantee, the Commission hoped to "foster the development of new services . . . by reducing for innovators the delays and risks associated with the Commission's allocation and licensing processes," thereby making it easier for innovators to secure funding. Id. at 2766.

Implicit in the Commission's decision to grant pioneers merely a preference is the underlying assumption that it would be inappropriate to bestow an advantage broader in scope. This limitation has been demonstrated by the Commission in its use of the cellular service model to describe the application of the pioneer's preference. See, e.g., Pioneer's Preference Order, 6 FCC Rcd at 3494 (¶53). Specifically, the Commission has expressed the belief that guarantee of a single

license in one market should constitute a sufficient advantage to an innovator. Id. See also Pioneer's Preference Recon. Order, slip op. at 12 (¶¶ 28-29).^{2/} The Commission unequivocally stated that each "preference holder will face competition from other service providers." Pioneer's Preference Recon. Order, slip op. at 4 (¶8).

The Commission's commitment to the establishment of new competitive services is clear from the nature of the "guarantee" that a pioneer's preference provides. In rejecting its initial proposal to give pioneers a six month "head start" on system development, the Commission stated that it would be inappropriate for the Commission to do more than guarantee a pioneer a license. Pioneer's Preference Order, 6 FCC Rcd at 3492 (¶34). The Commission explained that it would not be justifiable for the Commission to guarantee a pioneer even a temporary service monopoly. Id.

Thus, the Commission stated definitively at every stage of the rulemaking process that it will not "award a pioneer preference that would bestow a nationwide monopoly." VITA Tentative Decision at 6 (¶13) (emphasis added). See also Pioneer's Preference Order, 6 FCC Rcd at 3490 (¶19) ("[W]e do not intend to award a pioneer a nationwide monopoly on a

^{2/} In the cellular service, of course, such a preference would allow for others to apply for the one remaining license in that market, plus two licenses in the other 700+ markets nationwide.

service and thereby exclude others from providing that service."); Pioneer's Preference Recon. Order, slip op. at 3 (¶4). Indeed, the Commission has stated that it is generally not inclined to grant even a nationwide preference, unless one clearly is shown to be warranted. See Pioneer's Preference Order, 6 FCC Rcd at 3495 (¶54).

On the basis of these clearly expressed limitations on the scope of the pioneer's preference, it would be inappropriate for the Commission to guarantee a license to Motorola, which proposes a nationwide monopoly system that would necessarily foreclose all other parties from ever offering their proposed RDSS and MSS services in the RDSS bands. The Commission has emphasized more than once that the desire to promote innovation must be balanced against its "long-standing desire to encourage diversity and competition in communications services." Pioneer's Preference Order, 6 FCC Rcd at 3495 (¶54); Pioneer's Preference Recon. Order, slip op. at 12 (¶29).

In this proceeding, rather than being faced with one service concept and five requests for a pioneer's preference, the Commission is faced with two fundamentally distinct and mutually exclusive service concepts: the monopoly approach advanced by Motorola, which is directly contrary to the Commission's RDSS rules, and the varying, but compatible, approaches advanced separately by TRW, Ellipsat, Constellation,

and LQSS. Under these circumstances, where the Iridium system is inherently incompatible with any of the other service models proposed, guarantee of a license to Motorola would have a devastating impact on the Commission's policies for the RDSS service and frequency bands. Unlike the Iridium proposal, the system specified by TRW fulfills the Commission's original goals for RDSS, particularly the requirement that users of the RDSS bands operate on a non-exclusive basis and utilize spectrum sharing techniques to facilitate multiple entry. See 47 C.F.R. § 25.141(e) & (f). See also Amendment To The Commission's Rules To Allocate Spectrum For, And To Establish Other Rules And Policies Pertaining To, A Radiodetermination Satellite Service, 104 F.C.C.2d 650, 660-61 (1986) ("RDSS Licensing Order").^{3/}

In its original NPRM, the Commission recognized the potential problem of having multiple, overlapping, and inconsistent service proposals. At that time, the Commission indicated that it "could simply decline to award the 'pioneer's preference,' if there are more innovators than there are opportunities for service providers." Pioneer's Preference NPRM, 5 FCC Rcd at 2767 (¶11). Subsequently, the Commission stated that "in some instances where multiple preference requests are filed, it may better serve the public not to grant any of

^{3/} The systems proposed by Constellation, Ellipsat, and LQSS are also compatible with this goal.

them." Pioneer's Preference Order, 6 FCC Rcd at 3495 (¶57). TRW continues to believe that its particular contributions to the development of new satellite technology make it the most deserving applicant for an RDSS-band pioneer's preference. Nevertheless, it appears that this may be an instance where the appropriateness of a preference is so intimately connected to the outcome of the rulemaking and licensing processes that the public interest is better served by declining to grant any of the requests. See also Section III.A, infra. In any case, of the pioneer's preference applicants in this processing group, Motorola's request, if granted, would clearly have the greatest negative impact.^{4/} Iridium, if licensed, is the only one of these proposed systems that is inconsistent with the RDSS competitive baseline, necessarily precluding the implementation of all the other proposals.

B. Motorola Is Not Deserving Of A Preference Under The Criteria Established By The Commission.

Even if the grant of a pioneer's preference to a monopolist were consistent with the Commission's clearly enunciated policy, Motorola has failed to demonstrate that its system deserves to be favored with the guarantee of a system

^{4/} An equally objectionable rulemaking proposal and pioneer's preference request were recently filed with the Commission by CELSAT, Inc. However, these filings, unaccompanied by a specific system application, were submitted long after the cut-off deadline for RDSS-band applications, and are therefore ineligible for consideration here. See TRW Petition to Dismiss CELSAT Petition (filed April 8, 1992).

license. Motorola has not demonstrated that its Iridium proposal possesses the characteristics required for a preference, that its efforts were significant in developing the technology utilized, or even that all of the elements incorporated in its application are technologically feasible.

Indeed, much of Motorola's pioneer's preference request is devoted to Motorola's defense of its failure to file a petition for rule making. See Motorola Request for Pioneer's Preference at 3-5. The only specific "innovations" Motorola mentions in its Pioneer's Preference Request are its intended use of intersatellite links, its alleged bi-directional capabilities, and its spot beam technology. None of these elements rises to the level of a pioneering accomplishment. Indeed, it is far from certain that bi-directional use of the RDSS bands can be accomplished without causing substantial self-interference, and it is far more certain that, with the new coordination requirements imposed as a result of WARC-92, bi-directional use of L-Band will be impossible to implement. Similar defects pervade other aspects of the request.

1. Iridium Does Not Possess The Characteristics That The Commission Indicated Would Warrant A Pioneer's Preference.

When the pioneer's preference rule was established, the Commission made known a general, non-exhaustive list of criteria that it would evaluate in its consideration of pioneer's preference requests. These elements included an

added "functionality," a different use of spectrum than previously available, a change in operating or technical characteristics of a service, efficient spectrum use, spectrum sharing, speed or quality of information transfer, and reduced costs to the public. Pioneer's Preference Order, 6 FCC Rcd at 3494 (¶48).

Although Motorola's Iridium system proposes -- as do all of the other pending RDSS applicants -- a different use of spectrum, a change in operating and technical characteristics, and the promise of new services, these potential advantages are nullified by the aspects that Iridium fails to provide. In particular, as noted, Motorola's plan is fundamentally inconsistent with spectrum sharing. It is also less efficient than the other options advanced.^{5/} Even though Motorola currently proposes to use only 10 MHz of the 33 MHz RDSS allocation, it would do so on an exclusive basis, thereby preventing implementation of the other service proposals altogether.

The Commission could not have intended to credit an applicant for its proposed "different use of the spectrum," when such a proposal flouts rather than facilitates the objective of spectrum sharing. In addition, Motorola's proposed RDSS band monopoly, coupled with its unnecessarily

^{5/} For example, in addition to using the L-Band frequencies, Motorola requires the assignment of an additional 400 MHz of spectrum for intersatellite and feeder links.

complex attempt to provide universal coverage, would assuredly not produce reduced costs to the public, even assuming that a system costing in excess of \$3.5 billion can be financed in the first instance.^{6/} In short, while Iridium superficially meets some of the general pioneer's preference criteria, its design is actually inimical to achievement of several of the most significant benefits sought from innovative technology -- spectrum sharing, spectrum efficiency, and reduced user costs.

2. Motorola is Not an Innovator.

In addition to the deficiencies highlighted in the foregoing section, Motorola is not the innovator that it claims to be. Most of the technologies that its Iridium system would utilize were developed by other entities, including TRW.

In the only decision to date that has announced award of a pioneer's preference, the Commission based the grant upon its determination that the applicant had been the first to develop and test several of the technologies employed. See VITA Tentative Decision, slip op. at 7 (¶15). In contrast, Motorola was not the pioneering developer of the technologies its Iridium system would use. The low-Earth orbit ("LEO") satellite technology that is the central element of Motorola's proposal, as well as the proposals advanced by the majority of

^{6/} See TRW Consolidated Opposition to Petitions to Deny and/or Dismiss and Reply Comments (filed January 31, 1992) at 31-32.

the other MSS/RDSS applicants, was not developed or even substantially contributed to by Motorola. Although several different entities, particularly TRW and the Department of Defense, were contributors to the body of knowledge that produced the concept of LEO satellites, Motorola was not one of these pioneers.^{7/}

Moreover, Motorola did not even develop the technology for the intersatellite cross-links that are specifically referred to in its preference request. See Motorola Request for Pioneer's Preference at 3. Intersatellite cross-link technology was developed principally by NASA and TRW in conjunction with the Tracking Data and Relay Satellite System, which is now in operation. See TRW Odyssey Application, Appendix A.^{8/} In any event, the inter-satellite links feature of the Iridium system has no bearing on Motorola's request for a pioneer's preference in the RDSS bands. Motorola would operate its cross-links in the Ka-band; therefore, this claim cannot legally give rise to a preference over other applicants for the RDSS bands.

^{7/} Indeed, Globesat Express, one of the original applicants in the generic mobile satellite service, proposed LEO technology in its 1985 application. See Application of Globesat Express, GEN Docket No. 84-1234 (filed April 30, 1985) at 2.

^{8/} The first unmanned satellite-to-satellite communication occurred between TRW-manufactured TDRS-1 and the Earth-scanning satellite Landsat 4 on August 12, 1983.

Because Motorola has not proven the workability of its proposed bi-directional use of the RDSS L-band spectrum, this claimed feature also provides no basis for grant of a preference. As further discussed below, if a system proposal's technical capability has not been demonstrated, it cannot be awarded a pioneer's preference under established Commission policy.

In sum, Motorola seeks a preference for an amalgamation of advances pioneered by others, which has produced a grandiose scheme that is spectrally inefficient, monopolistic, and too expensive to provide reasonably priced service to the public. Because Motorola is not the "developer or proponent" of the "innovations" it claims, it is not entitled to a pioneer's preference. See VITA Tentative Decision at 6 (¶ 13).

3. Motorola Has Failed To Even Show That Its Iridium System Is Technically Feasible.

In addition to meeting the general criteria discussed above, an applicant for a pioneer's preference is required either to perform an experiment demonstrating the capabilities of its system proposal, or to accompany its preference request with a demonstration of the feasibility of the new service or technology. See Pioneer's Preference Order, 6 FCC Rcd at 3493 (¶39). In this regard, the Commission recently reaffirmed that "a preference applicant relying upon an experiment . . . at

least must have commenced its experiment and reported to [the Commission] its preliminary results in order to be eligible for a conditional preference." Pioneer's Preference Recon. Order, slip op. at 5 (¶11). Thus, the Commission continued, "a tentative preference will not be awarded to an applicant that has not submitted a demonstration of technical feasibility nor commenced an experiment and reported to us at least preliminary results." Id. (emphasis added).

In this instance, Motorola has provided the Commission with no feasibility showing in its initial preference request and, although it has applied to the Commission for experimental authorizations, these applications remain ungranted. In any event, these applications contemplate experiments that won't get under way until 1995, and which Motorola claims are critical to establishing "the viability of its system design." See Motorola Opposition to Petition to Deny, File Nos. 2303-EX-PL-91 et seq. (filed March 18, 1992), at 2 and 5. Motorola has acknowledged that one of the purposes of its request for experimental authorization is the furtherance of its pioneer's preference request. Id. at 2. Thus, by its own admission Motorola will be unable to provide the required experimental results to demonstrate the viability of the Iridium proposal until the mid-1990s. See Pioneer's Preference Recon. Order, slip op. at 3 (¶4). Because Motorola's system

concept remains unproven, grant of a pioneer's preference, even if otherwise appropriate, would be grossly premature, at best.

Motorola's failure to provide any definitive data that would help to confirm the workability of its system concept is exacerbated by persistent indications that the Iridium system design has major technical flaws. To find evidence of these shortcomings, one need look no further than Motorola's own filings with the Commission, which reveal that the on-board computer processing capability that is claimed as a distinguishing central feature of that system may be years from actual development. See Motorola Opposition and Reply Comments, File Nos. 9-DSS-P-91(87) and CSS-91-010 (filed July 5, 1991), at 34 n.82.

As far as Motorola's proposal to operate bi-directionally in the 1616-1626.5 MHz band is concerned, the recently-concluded World Administrative Radio Conference did allocate the band to MSS space-to-Earth transmissions on a secondary basis. However, Motorola has yet to support its purely subjective contention that it could utilize the band in this fashion without (i) causing any harmful interference to operators employing the band in the intended co-primary manner; or (ii) overwhelming its own system with self-generated interference. Irrespective of the other shortcomings of Motorola's request, no pioneer's preference could be granted to

Motorola until it has supported its claims of the feasibility of bi-directional operations with objective data.

In light of these severe technical questions, and Motorola's inability to conduct a timely experiment, the Commission must conclude that Motorola has not demonstrated the technical feasibility of the proposed Iridium system. Without such a demonstration, Motorola's request for pioneer's preference must be rejected.^{9/}

^{9/} As it did in its recent response in the service licensing proceeding, TRW again suggests that it may be beneficial for the Commission to consult leading experts in the field to determine whether there is any merit whatsoever to Motorola's fantastic claims. TRW has already called for a more general symposium on the overall technical issues raised in the licensing proceeding. Indeed, the Commission itself stated in the Pioneer's Preference Order that "in the context of the Comment process on the request for a pioneer's preference," it might wish to "seek the opinion of specific individuals -- recognized experts in scientific disciplines that are relevant to proposals before the Commission." Pioneer's Preference Order, 6 FCC Rcd at 3494 (¶50). Such learned input may be helpful here to separate technological fact from Motorola fiction.

III. Regardless Of The Commission's Intent And Specific Criteria, Grant of Motorola's Pioneer's Preference Request Would Be Prejudicial To All Of The Other Applicants, Denying Them Statutorily Guaranteed Rights.

Despite the evident intent of the Commission to limit the scope of a pioneer's preference, it has indicated that in unusual circumstances it might consider granting a preference for a proposed service that would result in a nationwide licensee. Pioneer's Preference NPRM, 5 FCC Rcd at 2767 (¶11). Regardless of this intimation, however, a preference clearly cannot be granted to Motorola. Such a grant would deny TRW and the other RDSS-band applicants their statutory rights to full comparative consideration, as the principal focus of the Commission would be on the "innovativeness" of Motorola's proposal rather than on the relative technical merits of all of the pending proposals. This result is contrary to law, and precludes a grant of a pioneer's preference to Motorola. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"); 47 U.S.C. § 309.

The Commission recently observed that "the issues in the [RDSS band] licensing and rulemaking proceedings to a significant degree are analogous to the issues raised by their associated pioneer's preference requests. . . ." Order Denying Extension of Time For Comments and Replies, ET Docket No. 92-28, (released March 27, 1992), at 2 (¶4). Because Motorola's proposal is mutually exclusive with the proposals all of the other applicants whose preference requests have

been consolidated into ET Docket No. 92-28, the tentative selection of Motorola as the preferred applicant would entail the tentative rejection of all of the other applicants. Under these circumstances, if the Commission were even tentatively to determine at the outset of the rulemaking process that Motorola's proposal is to be preferred, the effect of that decision would be to prejudice the outcome of both the pending licensing inquiry and the forthcoming RDSS-band rulemaking proceeding.

Instead of conducting a proceeding in which the Commission evaluated fully all matters bearing on the public interest, convenience, and necessity as required by the Communications Act, the Commission would elevate the newly-established criterion of "innovativeness" to a position of supreme importance, with the consequent effect of depriving all of the applicants -- except Motorola -- of their right to complete and objective comparative consideration with the "pioneer." The other applicants would not receive the full and meaningful comparison they are guaranteed by Section 309 of the Communications Act and the courts. In addition, the public at large would be disserved by the fact that the Commission would be reduced to making a public interest determination on the basis of an artificially skewed record.

The Commission may not lawfully exclude particular mutually exclusive applicants from full comparative

consideration. As the Supreme Court's venerable decision in Ashbacker makes clear, the Communications Act requires that all such bona fide applicants be considered on an equal footing once accepted for filing.^{10/} The post-acceptance imposition of a "threshold" eligibility criterion operates to deprive the non-"preferenced" applicants of Ashbacker rights -- rights that attached in this proceeding before any request for pioneer's preference had been filed.^{11/}

In its original NPRM in the Pioneer's Preference proceeding, the Commission stated that it could "establish threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration. In some instances, the operation of non-administratively determined factors may limit eligibility "to a class of one." See Pioneer's Preference NPRM, 5 FCC Rcd at 2767 (¶9). It ratified this statement in the Pioneer's Preference Order, 6 FCC Rcd at 3492.

An objective threshold standard (i.e., a cut-off date or financial qualification requirement), applied before Ashbacker rights attach, may have the ultimate effect of

^{10/} The issue of the Ashbacker doctrine's overall impact on the pioneer's preference rule was addressed in greater detail in TRW's "Petition for Further Reconsideration" in GEN Docket No. 90-217, filed April 6, 1992.

^{11/} All of the pioneer's preference requests in ET Docket No. 92-28 were filed subsequent to the filing of the related applications.

limiting consideration to one applicant. Once mutually exclusive applications have been accepted, however, and parties become entitled to full consideration under Ashbacker, the Commission may not deprive any applicant of its right to a statutorily-required comparative evaluation by imposing a new criterion that focuses the entire proceeding on the "innovations" of one proposal.^{12/}

It is plain in this instance that no articulated threshold standards relating to the pioneer's preference were in existence at the close of the cut-off window for MSS/RDSS applications on June 3, 1991. At that time, what is now Section 1.402 of the Commission's rules was not yet in effect, and the Pioneer's Preference Order was still subject to

^{12/} In particular, the rules which apply to space station applications provide as follows:

An application will be entitled to comparative consideration with one or more conflicting applications only if:

(1) The application is mutually exclusive with another application; and

(2) the application is received by the Commission in a condition acceptable for filing . . . by the "cut-off" date specified in a public notice

47 C.F.R. § 25.155(b). Under Section 25.155(a), two applications will be considered mutually exclusive "if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more other applications." 47 C.F.R. § 25.155(a). See also Reuters, Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986) (Ashbacker applies to parties whose applications have been declared mutually exclusive).

Commission reconsideration.^{13/} The issue of preference criteria specific to the MSS/RDSS licensing proceeding has remained unaddressed until now, long after the applications themselves were accepted for filing.

It cannot be credibly asserted that a de facto award of an RDSS license to Motorola, through grant of a pioneer's preference, would be consistent with Section 309 of the Communications Act, as interpreted in Ashbacker. A grant to Motorola for its sole provider system would effectively deny TRW's application, as well as those filed by Constellation, Ellipsat, and LQSS, all of which can co-exist in a spectrum-shared environment.

Thus, even if the Commission decided to ignore the pro-competitive policies endorsed in both the RDSS Licensing Order and the Pioneer's Preference Order, and even if it did not apply the general standards discussed in the latter decision, a preference grant to Motorola would still be at odds with the statutory requirement that bona fide applicants be given full and fair consideration.

^{13/} In its Pioneer's Preference Recon. Order, the Commission explicitly rejected a request by the National Association of Broadcasters that it enunciate more specific standards for consideration of preference requests. Pioneer's Preference Recon. Order, slip op. at 4 (¶7).