

National Association of Broadcasters ("NAB") that it clarify both the criteria by which an applicant's eligibility for a preference is to be gauged and the nature of the preference itself. Pioneer's Preference Recon. Order, FCC 92-57, slip op. at ¶¶ 7-8.^{5/} Second, the Commission established a deadline for the submission of pioneer's preference requests that will fall on a date fixed by public notice "prior to the time the Commission adopts an NPRM." Id. at ¶ 26. Thus, preference requests will now be permitted to be made after the submission of applications for a newly-proposed service, and up to a date certain that will occur just prior to the issuance of a notice of proposed rule making that addresses the rulemaking petitions to which the pioneer's preference requests and associated pending service applications correspond.

In this Petition, TRW shows that the Commission's refusal to denominate the pioneer's preference as a comparative factor, combined with its decision to establish a filing deadline for pioneer's preference requests that comes well after most applications for licenses in the services proposed

^{5/} The Commission concluded that "[t]o enunciate an inflexible standard would narrow the scope of the preference to such an extent that some genuinely innovative proposals would not qualify." FCC 92-57, slip op. at ¶ 7. It also rejected NAB's request that the pioneer's preference be made a comparative one rather than a guarantee of a license, finding that "[a] weighted preference would provide no assurance to the innovative party that it would, in fact, receive a license." Id. at ¶ 8.

in the associated petitions for rule making have been accepted for filing, greatly prejudices the service applicants' rights to meaningful comparative consideration. The Commission's determination that it is permitted to impose "innovativeness" as a threshold eligibility criterion on a case by case basis after otherwise compliant applications have been accepted for filing, and to make that previously unknown criterion the determinative factor in the comparison of mutually exclusive applications that is required by Section 309 of the Communications Act, is not supported by Ashbacker or its progeny. The Commission should reverse its determination now, before any permanent damage is caused to an applicant whose service proposal would be entitled to complete and meaningful comparative consideration but for the award of a guarantee of a license to an "innovator" under Section 1.402 of the Commission's rules.

II. The Commission Has Failed To Explain How The Pioneer's Preference Procedure Is Compliant With The Ashbacker Doctrine.

The Commission provided only a very limited discussion of the compliance of the pioneer's preference procedure with the Ashbacker doctrine's requirement that all bona fide competing applications are entitled to comparative consideration. The discussion of this issue was limited to two

sentences in the Pioneer's Preference Order.^{6/} The most the Commission did was state that it is entitled to establish threshold eligibility criteria that limit the class of eligibles to the innovator.^{7/}

In its Pioneer's Preference Recon. Order, the Commission did not even directly address Ashbacker. Nevertheless, it proceeded to take several actions that undercut that doctrine. First, the Commission refused to reduce the pioneer's preference to a factor to be considered in a comparative hearing or articulate more objectively clear standards as to when a preference may be granted. Second, it established a deadline for the submission of pioneer's preference requests that will require it to deny complete and meaningful comparative consideration to one or more mutually exclusive applications it had previously accepted for filing. See Pioneer's Preference Recon. Order, FCC 92-57, slip op. at ¶¶ 7-8, 26. These aspects of the decision on reconsideration, when combined with the Commission's earlier determination that it is authorized to limit the "class of eligibles" to "innovators," will have a tremendous impact on parallel rulemaking and application proceedings where parties seek to

^{6/} 6 FCC Rcd at 3492. Even in the NPRM in the Pioneer's Preference proceeding, the discussion of Ashbacker issues was limited to one brief paragraph. See 5 FCC Rcd at 2767 & n.10.

^{7/} Id.

establish and implement new high-technology communications services.^{8/}

Consider, for purposes of illustration, the situation where two or more mutually exclusive service applications are filed for the same frequencies (whether pursuant to a cut-off deadline announced by public notice or otherwise), and all of the applications are accepted for filing. Under the Court's decision in Ashbacker, all of the timely-filed applications would be entitled to comparative consideration under Section 309 of the Communications Act, and as of the time of filing, all known threshold eligibility criteria for the submission of the applications would have been satisfied.

Prior to the promulgation of Section 1.402 of the Commission's rules, the proposals of all of the applicants would have been evaluated for their compliance with Commission policies. Those applicants who were found to be basically qualified and whose proposals were compliant with the public interest (as ascertained by the Commission on the basis of all

^{8/} The impact of the actions on reconsideration on the Ashbacker rights of mutually exclusive applicants who do not seek or are not awarded pioneer's preferences, combined with the very limited discussion of Ashbacker that is contained in the record to date, makes it appropriate for TRW to address these issues in this Petition for Further Reconsideration. To the extent necessary, TRW hereby seeks a waiver of Section 1.429(i) of the Commission's rules, and urges the Commission to reconsider its Ashbacker conclusions notwithstanding the absence of any express Ashbacker discussion in the Pioneer's Preference Recon. Order.

of the pending proposals) would have their applications granted.^{2/} No proposal was subject to less than full comparative consideration or eventual dismissal merely because a mutually exclusive proposal was more "innovative."

Now, with the prospect of a pioneer's preference looming, the nature of the analysis has changed at all levels. If one of the mutually exclusive applicants were subsequently or concurrently to request a pioneer's preference, as it is entitled and encouraged to do by the Commission's pioneer's preference rules, the Commission, pursuant to the combined thrust of its decisions in Pioneer's Preference proceeding, could establish a new "threshold eligibility criterion" for all of the applicants merely by granting the pioneer's preference request. Instead of conducting a proceeding in which the Commission evaluated fully all matters bearing on the public

^{2/} The Commission has, on numerous occasions, taken just such an open approach to mutually exclusive new service proposals that contemplate the use of different technologies. See, e.g., Amendment of 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 (1986); Establishment of Satellite Systems Providing International Services, 101 F.C.C.2d 1046 (1985). Because all of these applicants had the right to participate to the end of the proceeding without regard to the subjective innovativeness of any single proposal, the Commission was able to secure a full debate on the relative merits of all of the differing technological approaches. This unfettered debate encouraged the establishment of a full record, and assisted the Commission in making the decision that was the most consonant with the public interest.

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 the one "guaranteed" to be licensed as a result of the pioneer's preference determination -- of their right to complete and objective comparative consideration with the "pioneer." Non-"preferenced" applicants, with proposals that may be lacking in innovativeness but still have technical and commercial merit, will 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 will be disserved by the fact that the Commission will be reduced to making a public interest determination on the basis of an artificially skewed record.

This scenario is not hypothetical or farfetched. It was played out in connection with the so-called "little LEO" applicants for low-Earth orbit mobile satellite systems in the frequency bands below one gigahertz.^{10/} It also is poised to

^{10/} Three applicants -- STARSYS Global Positioning, Inc., Orbital Communications Corporation, and Volunteers in Technical Assistance, Inc. ("VITA") -- each applied for new satellite systems in frequency bands below one gigahertz, and petitioned the Commission to adopt such rules as were necessary to implement their proposals. All three applications were subsequently accepted for

(Footnote continued on next page)

arise in connection with the six pending mutually exclusive applications for authority to establish satellite systems using some or all of the frequency bands allocated to the radiodetermination satellite service ("RDSS") -- including TRW's "Odyssey" application.^{11/}

The post-acceptance imposition of a "threshold" eligibility criterion operates to deprive the non-"preferenced" applicants of their Ashbacker rights -- rights that attached

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^{10/} filing. Some time later, all three applicants requested pioneer's preferences pursuant to new Section 1.402 of the Commission's rules. In Request for Pioneer's Preference in Proceeding to Allocate Spectrum for Fixed and Mobile Satellite Services for Low-Earth Orbit Satellites, FCC 92-21 (released February 11, 1992), the Commission tentatively granted the pioneer's preference request of VITA, and denied the requests of the other two applicants. Only the fact that VITA's proposal is not mutually exclusive with the other two applications saves these applicants from being denied their rights to comparative consideration with VITA as a result of the proposed grant of a pioneer's preference to VITA.

^{11/} Applications were filed by TRW, Ellipsat Corporation, Motorola Satellite Communications, Inc., AMSC Subsidiary Corporation, Constellation Communications, Inc., and Loral Qualcomm Satellite Services, Inc. All six applications have been accepted for filing. The pioneer's preference requests filed by five of the applicants, all of which requests were filed subsequent to the applications (and after the first two mutually exclusive applications were accepted for filing), were only first placed on public notice for comment on March 9, 1992. If a pioneer's preference is awarded to one of the applicants, that applicant would be guaranteed a license, and all applications mutually exclusive therewith would not receive the complete and meaningful comparative consideration that they are entitled to under the Communications Act.

before any request for pioneer's preference had been filed.^{12/}
The Commission has failed even to acknowledge the impact that the award of a pioneer's preference to one mutually exclusive applicant will have on the other applicants' rights to comparative consideration, and the cases cited by the Commission in its Pioneer's Preference Order do not support such an imposition. See Section III, infra.

It is this all-too-real scenario that must motivate the Commission to reconsider its determination that the Pioneer's Preference Order, as modified in the Pioneer's Preference Recon. Order, is not inconsistent with Ashbacker and

^{12/} See Reuters, Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986) (Ashbacker applies to parties whose applications have been declared mutually exclusive). See also Section 25.155(b) of the Commission's rules, which applies to applications for communications satellite space and earth stations. This section provides in pertinent part that:

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).

its progeny. Clearly, the Commission must acknowledge at the very least that its present policy is inadequately explained and therefore incapable of effectuation.

III. The Cases Relied Upon By The Commission Do Not Support The Commission's Determination That It Has The Authority To Award A "Dispositive" Pioneer's Preference.

In addition to Ashbacker, the Commission relied on the following decisions and actions in determining that it possessed the authority to award a dispositive pioneer's preference: United States v. Storer Broadcasting Co., 351 U.S. 192, 202-05 (1956) ("Storer"); Public Utilities Commission of California v. FERC, 900 F.2d 269 (D.C. Cir. 1990); and Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989) ("New Community Rule"). Close examination of these and other pertinent court and Commission decisions reveals a complete absence of support for the Commission's determination under Ashbacker. Indeed, it is clear that the Commission cannot use a pioneer's preference award to divest an actual applicant of vested Ashbacker rights.

In Storer the Court essentially held that the Commission does not have to provide an applicant with a hearing under Section 309 before denying its application if the Commission invokes a rule that is: (i) reconcilable with the Commission's duty to create regulation in the public interest;

(ii) promulgated after extensive administrative hearings; and (iii) known to the applicant before it filed the application. Storer, 351 U.S. at 202-05. None of the salient factors in Storer are at play in the Pioneer's Preference proceeding.

Here, the Commission has promulgated a rule that would subject mutually exclusive applications that have already been accepted for filing to a new, post-filing threshold eligibility criterion -- innovativeness -- if one of the applicants were to request a pioneer's preference for its proposal. What constitutes innovativeness will vary from case to case, and the Commission has expressly refused, in the interest of avoiding undue inflexibility, to articulate a specific standard. Pioneer's Preference Recon. Order, FCC 92-57, slip op. at ¶ 7. Furthermore, because pioneer's preference requests have typically been made long after the associated application was accepted for filing,^{13/} it is clear that not all applicants were aware that innovativeness would be an eligibility criterion at the time they filed their applications. The Supreme Court's decision in Storer does not support the Commission's action.

The Commission's own New Community Rule decision also fails to support the abridgement of Ashbacker rights inherent

^{13/} For example, the application of Constellation Communications, Inc. for a satellite system in the RDSS frequency bands was filed in June 1991, but its request for pioneer's preference was not filed until February 1992.

in the pioneer's preference rule. In that proceeding, the Commission concluded that Ashbacker did not pose a bar to the Commission's decision to allow FM and television station licensees to request changes in their stations' communities of license without subjecting such licensees to competing applications. The Commission stated that:

The Court of Appeals has noted that Ashbacker applies only to parties whose applications are mutually exclusive, and not to prospective applicants. A party seeking to amend the FM or television tables is a prospective applicant until its application is submitted and accepted pursuant to the Commission's Rules. "Only by compliance with such procedures may an application enter the ranks of 'bona fide applications' protected by Ashbacker."

New Community Rule, 4 FCC Rcd 4870, 4873 (1989) (quoting Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1561 (D.C. Cir. 1987), and citing Reuters, Ltd. v. FCC, 781 F.2d 946, 951 (D.C. Cir. 1986)).

It is difficult to fathom how the Commission could reconcile the above-quoted language with a determination that the application of its pioneer's preference rules to applicants in the proceedings described in notes 10 and 11, supra, is consistent with Ashbacker. All of those applicants submitted their applications pursuant to rules then in existence, the applications were all accepted for filing, and Ashbacker rights

then attached to each.^{14/} Thus, New Community Rules actually supports TRW's call for reconsideration of the Commission's Ashbacker determination.^{15/}

In short, the Commission has failed to support its contention that the procedures adopted in the Pioneer's Preference Order, and modified in the Pioneer's Preference Recon. Order, are consistent with Ashbacker. In fact, the cases cited by the Commission support a conclusion that the procedures are inconsistent with Ashbacker in circumstances where mutually exclusive applications are filed prior to or contemporaneously with requests for pioneer's preferences. In

^{14/} In this respect, the holding of the court in Public Utilities Commission of California v. FERC, 900 F.2d 269 (D.C. Cir. 1990), is inapplicable. There, the court did not address the issue of whether and when eligibility criteria may be imposed by an agency to avoid comparative consideration of two similarly-situated applicants. Instead, it held that the applicants involved were not similarly situated, as they were pursuing entirely different regulatory approaches. Id. at 277-78.

^{15/} This is especially true in the case of the two proceedings cited in notes 10 and 11 above, where several applications were filed in response to a Commission-established cut-off, and were thus consolidated for consideration as a de facto processing group. In Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1555 (D.C. Cir. 1987), one of the cases cited by the Commission in New Community Rule, the court stated that the Ashbacker doctrine requires it to "use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license." It would be inimical to this requirement for the Commission, using criteria established after all applicants became "similarly situated," to guarantee one applicant a license and deny complete comparative consideration in a manner that would eventually lead to the summary denial of all of the others.

those cases, the applicants have no knowledge that any additional eligibility criteria will be imposed -- much less one that is as ill-defined and fact specific as the dispositive pioneer's preference for "innovative" proposals.

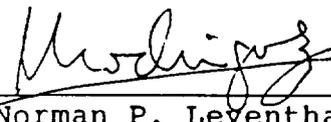
IV. Conclusion

On the basis of the foregoing discussion, TRW urges the Commission to reevaluate its determination that the pioneer's preference procedures it recently adopted are consistent with the requirement that all bona fide competing applicants be considered comparatively. The Commission has failed to explain how this requirement is satisfied in cases where mutually exclusive applications are pending at the time of the award of a pioneer's preference to one applicant, and the case law is clearly contrary to the Commission's conclusion. The Commission should take action on

reconsideration promptly, before any applicants are deprived of their rights to full comparative consideration as a result of Section 1.402 of the Commission's rules.

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