

BEFORE THE
Federal Communications Commission
 WASHINGTON, D.C. 20554

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 JUN - 2 1992

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

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

To: The Commission

REPLY OF TRW INC.

Norman P. Leventhal
 Raul R. Rodriguez
 Stephen D. Baruch

Leventhal, Senter & Lerman
 2000 K Street, N.W.
 Suite 600
 Washington, D.C. 20006-1809
 (202) 429-8970

June 2, 1992

Attorneys for TRW Inc. 0 of 4
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SUMMARY

In its Motion for Stay, TRW Inc. ("TRW") demonstrated why the Commission should grant a stay of its Pioneer's Preference procedure in the instant proceeding. In particular, TRW showed that it is likely to succeed on the merits of its assertion that the procedure, as applied in proceedings involving pioneer's preference requests from mutually exclusive applicants, violates the rights of those applicants to a "full hearing."

Five parties (including TRW) have requested pioneer's preferences for their system proposal, and these requests have been consolidated into ET Docket No. 92-28. Three of the other parties, notwithstanding their claims of entitlement to a preference for the "innovativeness" of their proposals, have filed comments supporting TRW's Motion. Only Motorola Satellite Communications, Inc. ("Motorola"), which attempts to rebut TRW's showing, has opposed the requested stay.

In this Reply, TRW points out the numerous flaws in Motorola's analysis. TRW also provides a detailed demonstration of how the Pioneer's Preference decision abridges the rights of applicants that are set forth in Section 309 of the Communications Act, and guaranteed by the Supreme Court's seminal decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker").

Section 309(a) of the Communications Act, read together with Section 308(b), states that the Commission will grant the radio station applications of parties that

demonstrate they are legally, technically, and financially (i.e., basically) qualified to become licensees, and that the approval of their applications will advance the public interest, convenience, and necessity. If an application presents a substantial and material question of fact, or the Commission is otherwise unable to make the findings required in Section 309(a), the Commission is required by Section 309(e) of the Act to resolve the dispute in a "full hearing" -- i.e., a proceeding that affords every party the right to present direct case and rebuttal evidence, and to conduct such cross-examination as may be necessary to elicit all of the facts.

In Ashbacker, the Supreme Court interpreted Sections 309(a) and 309(e) of the Act in a case involving mutually exclusive applications, and held that the grant of one such application without a hearing as to all violates Section 309 by depriving all other parties of their rights to a hearing on the merits of their applications. As the Court held in United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), the Commission may impose threshold eligibility criteria on applications, and employ those criteria in a way that denies a hearing to a nonconforming applicant. In order to be found consistent with Ashbacker, however, regulations imposing such criteria must have been promulgated in furtherance of the Commission's obligation to regulate communications in the public interest, and applicants must have been given adequate notice of the new requirement.

Under new Section 1.402 of its rules, a pioneer's preference is available to a party that has developed an "innovative" proposal that leads to the establishment of a new service or a substantial enhancement in an existing service. The determination of "innovativeness" is a factual determination that is to be made on a case-by-case basis in a rulemaking proceeding -- without the benefit of a "full" hearing, and on the basis of the parties' uncertified documents and filings in support of and opposition to the various requests. Any party that is awarded a pioneer's preference will, if it is otherwise basically qualified to be a licensee, be guaranteed a license in the applicable license proceeding.

The Commission's pioneer's preference procedure is impermissibly offensive to the Ashbacher doctrine in cases where the parties requesting pioneer's preferences also have mutually exclusive applications pending. In the instant proceeding, for example, the underlying service application of any party awarded a pioneer's preference will be mutually exclusive with at least one (and with as many as five) of the other applications in its processing group. As a result, the award of a preference to any party in ET Docket No. 92-28 means that as many as five applicants will have their applications automatically denied without ever receiving the comparison of public interest factors that is guaranteed them by Section 309 of the Act and the Supreme Court. The only way the Commission can correct this fatal flaw in its procedures is to make the ad

hoc factual determination called for under the articulated "pioneering" standard in a "full" hearing -- but the law requires that such a "full" hearing be held before even a tentative decision is reached on the pioneer's preference requests.

In the balance of its Reply, TRW shows that the cases cited by Motorola in support of its assertion that the pioneer's preference procedure is a legitimate threshold eligibility requirement are either completely distinguishable on their facts or inapposite. TRW also shows that the Commission would be elevating form over substance if it were to refuse on procedural grounds to address the underlying Petition for Further Reconsideration of the pioneer's preference rule. The public interest mandates consideration of TRW's Petition, as agency actions in contravention of their enabling statutes are, ipso facto, contrary to the public interest. Finally, TRW shows that Motorola's opposition to the three remaining components of the applicable "stay" test are completely unpersuasive. TRW's Motion for Stay should thus be granted immediately and in its entirety.

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To: The Commission

REPLY OF TRW INC.

TRW Inc. ("TRW"), by its attorneys and pursuant to Section 1.45(b) of the Commission's Rules, hereby replies to the opposition of Motorola Satellite Communications, Inc. ("Motorola") to TRW's May 5, 1992 Motion for Stay in the above-captioned proceeding ("Motion").^{1/}

As explained below, Motorola has failed to rebut TRW's persuasive showing that the Commission should stay action on the above-captioned pioneer's preference requests until there has been a final resolution of the issues raised in TRW's

^{1/} Motorola was the only party to oppose TRW's Motion for Stay. Comments in support of TRW's motion were filed by Constellation Communications, Inc., Loral Qualcomm Satellite Services, Inc., and Ellipsat Corporation. Moreover, CELSAT, Inc. ("Celsat") did not oppose TRW's substantively similar Motion for Stay in connection with Celsat's pioneer's preference request (PP-28). See TRW Motion for Stay, RM-7927 (PP-28) (filed May 5, 1992).

pending petition for further reconsideration in GEN Docket No. 90-217 (the rulemaking proceeding that established the pioneer's preference). Most particularly, Motorola has not countered TRW's showing that it is likely to prevail on the merits of its Petition for Further Reconsideration in the Commission's Pioneer's Preference proceeding.^{2/} TRW argues there that the award of a pioneer's preference in a proceeding with bona fide mutually exclusive applicants is contrary to the U.S. Supreme Court's seminal decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) ("Ashbacker"). Motorola's assertions under the other three prongs of the applicable "stay" test are completely unpersuasive, and should be rejected by the Commission.

TRW's Motion satisfies all of the requirements for the issuance of a stay, and Motorola's opposition presents no persuasive reason why the requested stay should not issue. As a result, TRW's Motion should be granted in its entirety.

^{2/} 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, 7 FCC Rcd 1808 (1992) ("Pioneer's Preference Recon. Order"), further recon. pending.

DISCUSSION

I. Motorola's Ashbacker Argument On The Likelihood Of Success On The Merits Prong Is Fundamentally Defective; The Pioneer's Preference Procedure, As Applied In Proceedings Involving Mutually Exclusive Applicants, Violates The Ashbacker Doctrine.

A. Introduction

In its Opposition, Motorola asserts that "the award of a pioneer's preference to Motorola would not deny any hearing rights associated with other pending applications." Motorola Opposition at 4. In support of this proposition, Motorola restates, but adds little to, the Commission's analysis of this issue that TRW criticized in its Petition for Further Reconsideration in the Pioneer's Preference proceeding ("Docket 90-217").

There is no doubt that the Commission has the authority, in connection with its statutory mandate to regulate radio services in a manner consistent with the public interest, convenience, and necessity, to establish threshold eligibility criteria that may be applied to applicants who seek radio station licenses. This power was verified by the United States Supreme Court in United States v. Storer Broadcasting Co., 351

U.S. 192 (1956) ("Storer"), and has been ratified in numerous subsequent cases.^{3/}

It is similarly beyond doubt, however, that the Commission also is statute-bound to hold a comparative hearing before granting any one application that is mutually exclusive with other bona fide applications. See Ashbacker, 326 U.S. at 333. The interrelationship between these two seminal rulings, and the fact that the Commission has the statutory authority (under Storer) to take actions that have the effect of rendering applicants ineligible for comparison (i.e., not sufficiently "bona fide" to have the rights guaranteed under Ashbacker attach), is what is at issue in the pioneer's preference procedure as applied in this case.

In Pioneer's Preference, the Commission has elevated the importance of the "innovativeness" of an applicant's proposal to a degree where any applicant who makes the showing in a given case will be guaranteed a license if otherwise qualified -- notwithstanding any other public interest attributes mutually exclusive applicants may possess or any other public interest negatives the proposal of the "innovator" may entail. The Commission, without observing the due process protections afforded in a "full hearing" under Section 309 of the Communications Act, is thus making factual determinations

^{3/} See, e.g., Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1561 (D.C. Cir. 1987) ("Maxcell"); Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 439 (D.C. Cir. 1991) ("Aeronautical Radio").

on the issue of the "innovativeness" of various proposals in the context of a rulemaking proceeding. Once a preference is awarded, the Commission, by guaranteeing a license to the "pioneer," will be in a position to use the innovativeness determination as a basis for denying all other mutually exclusive applications without any hearing at all on the merit of those applications.^{4/}

As shown below, nothing Motorola argues in its opposition even remotely supports the authority of the Commission to make such innovativeness determinations without conducting a "full hearing," and TRW has already demonstrated that the Commission's Pioneer's Preference Order and Pioneer's Preference Recon. Order fail satisfactorily to address this critical issue. TRW should be found likely to succeed on the merits of its claim that the pioneer's preference procedure, as applied to mutually exclusive applicants, is violative of those applicants' Ashbacker rights.

^{4/} If a preference is awarded to an applicant that is not mutually exclusive with any other applicants, such a grant would not necessarily prejudice the outcome of a subsequent licensing proceeding. As has been shown by TRW and most of the other parties that have pioneer's preference requests pending in ET Docket No. 92-28, however, and as TRW reiterates in this Reply, there is mutual exclusivity among the applicants for satellite systems in the radiodetermination satellite service frequency bands.

B. The Communications Act Guarantees All Applicants Certain Inviolable Rights.

Under Sections 308(b) and 309(a) of the Communications Act of 1934, as amended, the Commission will grant a radio station application where: (i) the applicant shows itself to be legally, financially, and technically qualified to be a Commission licensee (47 U.S.C. § 308(b)), and (ii) the grant of the application is found by the Commission to further the public interest, convenience, and necessity (47 U.S.C. § 309(a)).^{5/} Section 309(e) of the Act provides that, in the

^{5/} Section 308(b) provides in pertinent part that: "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, financial, technical, and other qualifications of the applicant to operate the station" 47 U.S.C. § 308(b). Section 309(a) provides in pertinent part that:

[T]he Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application . . . shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a). Section 309 applies to all of the applications filed by the parties (including TRW and Motorola) whose pioneer's preference requests are consolidated into the ET Docket No. 92-28 proceeding. See 47 C.F.R. § 25.101. In this regard, TRW also notes that the Commission expressly promulgated its pioneer's preference rules pursuant, inter alia, to Section 309(a) of the Communications Act. Pioneer's Preference Order, 6 FCC Rcd at 3498.

case of any application to which Section 309(a) applies, if "a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing" 47 U.S.C. § 309(e) (emphasis added). The section provides further that any hearing held pursuant to Section 309(e) "shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate." Id.^{6/}

The Supreme Court has made clear that, in cases where mutually exclusive applications have been filed and accepted, the grant of one application, without a full hearing as to all, deprives the non-granted applicant(s) of the right to the full hearing that is guaranteed by Section 309 of the Communications Act. Ashbacker, 326 U.S. at 330. In Aeronautical Radio, the court of appeals had the following to say about Ashbacker:

In Ashbacker, the Supreme Court considered the interrelationship of sections 309(a) and 309(e) where the Commission is presented with two mutually exclusive license applications. The Court recognized that, in such a situation, a section 309(a) grant of one application without a hearing effectively rendered any subsequent hearing on the second applicant's proposal a rehearing on the grant of its competitor's license, rather than a hearing on the merits of

^{6/} In Storer, the Court defined the term "full hearing" as follows: "[A] 'full hearing' under § 309 means that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Storer, 351 U.S. at 202 (citation omitted).

its own application. Such a procedure, the Court concluded, made the second applicant's section 309(e) right to a pre-dismissal hearing "an empty thing." The Court thus held that, "where two bona fide applications are mutually exclusive the grant of one without a hearing to both" is improper.

Aeronautical Radio, 928 F.2d at 438 (citing and quoting Ashbacker, 326 U.S. at 330, 333). The court went on to observe that "the causal link between the grant of one application without a hearing and the de facto denial of another prior to hearing is central to the Ashbacker holding." Id.

As noted above, the right to a hearing guaranteed mutually exclusive applicants by the Court in Ashbacker is not entirely without bounds. The Commission may, by exercise of its rulemaking power or through the establishment of cut-off deadlines for the submission of applications, impose threshold eligibility criteria for applicants that may render an application ineligible for grant and thus operate to deny a hearing to an applicant. See, e.g., Storer, 351 U.S. at 203-205 (Court upholds rule that limits number of radio stations an entity may own; holds that Commission may reject, without "full hearing" under Section 309, application of entity seeking station that would put it over the limit).

Any threshold eligibility criterion that the Commission imposes, however, must be reconcilable with the Communications Act as a whole, and be in furtherance of the Commission's obligation to regulate on the basis of the Act. Storer, 351 U.S. at 203-04. In addition, parties (i.e.,

applicants) must be given adequate notice of the new criterion and, by implication, a meaningful opportunity to conform their proposals to the new requirement. See, e.g., Hispanic Information and Telecommunications Network v. FCC, 865 F.2d 1289, 1295 (D.C. Cir. 1989) ("HITN") (citing Way of Life Television Network, Inc. v. FCC, 593 F.2d 1356 (D.C. Cir. 1979)). See also Kessler v. FCC, 326 F.2d 673, 686-88 (D.C. Cir. 1963) (Commission freeze on radio station licenses violated Ashbacker where, inter alia, effect would be to freeze new applicants permanently out of a right of substance -- the right to be compared with pending applications with which they were mutually exclusive).

In sum, the right of mutually exclusive applicants to a comparative hearing reflects "'the basic teaching' of Ashbacker . . . that 'comparative consideration . . . is the process most likely to serve the public.'" Aeronautical Radio, 928 F.2d at 450 (quoting Community Broadcasting Co. v. FCC, 274 F.2d 753, 759 (D.C. Cir. 1960)). It is also a right that the courts have "rigorously protected[.]" Id.

C. In Cases Where Mutually Exclusive Applicants Have Requested Pioneer's Preferences, The Commission Must Give All Applicants A Full Hearing Before Awarding A Pioneer's Preference To Any Of Them.

1. In Determining Whether To Award A Pioneer's Preference, The Commission Is Making A Fact-Intensive Inquiry Without The Benefit Of A Full Hearing.

In its Pioneer's Preference proceeding, the Commission determined that the question of the "innovativeness" of a particular spectrum allocation or spectrum use proposal is to be resolved in the course of an allocation rulemaking proceeding. See Pioneer's Preference Recon. Order, 7 FCC Rcd at 1812. Specifically, the Commission will entertain comments on pioneer's preference requests separately from the petitions for rulemaking with which they are associated by establishing cut-off deadlines for both comments on pending petitions and for the submission of mutually exclusive requests for pioneer's preferences. See 47 C.F.R. §§ 1.402(c) and (e).^{1/}

^{1/} In its Pioneer's Preference Order, the Commission articulated the following standard for when a pioneer's preference will issue:

The Commission, in its discretion, will award a pioneer's preference to an entity that demonstrates that it (or its predecessor-in-interest) has developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service, provided, that the rules adopted for the new or existing service are a reasonable outgrowth of the proposal and lend

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The notice of proposed rule making that is based on the rulemaking petition(s) is to include a tentative determination as to whether a pioneer's preference will be awarded. Pioneer's Preference Order, 6 FCC Rcd at 3496. Although the tentative preference award is theoretically subject to reversal or denial in the final report and order establishing the proposed new service, the Commission has indicated that it will not lightly reverse a tentative preference grant -- even if the final rules do not closely resemble the proposal for which a preference was initially granted. The Commission stated that "[o]ur general policy of awarding a preference even if the report and order modifies the proposed service to some extent . . . will tend to lessen the likelihood that an initial determination to grant a preference would mislead the pioneer and the financial community." Id.^{8/}

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^{7/} themselves to the grant of a preference and a license to the pioneer.

6 FCC Rcd at 3494. The Commission emphasized that "[a]pplication of this standard to any pioneer's preference request will, of course, be completed on a case-by-case basis based on a public interest determination." Id. It refused, in its Pioneer's Preference Recon. Order, a request that a more specific standard of "innovativeness" be specified. Pioneer's Preference Recon. Order, 7 FCC Rcd at 1809.

^{8/} Thus, the likely permanence of even a "tentative" pioneer's preference award operates to defeat Motorola's assertion that any harm from a Commission award of a tentative preference is nullified by the fact that the

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2. In Cases Where Pioneer's Preference Requests Are Filed By Parties With Mutually Exclusive Applications, The Guarantee Of A License To Any "Pioneer" Operates, Of Necessity, As A Denial Of The Rights Of All Mutually Exclusive Applicants To A Hearing On The Merits Of Their Own Applications.

Once a preference is awarded in or in conjunction with the rulemaking proceeding, the pioneer will be guaranteed a license in the new service, without being subject to competing applications. See Pioneer's Preference Order, 6 FCC Rcd at 3492 ("the most appropriate course of action is effectively to guarantee the innovating party a license in the new service (assuming it is otherwise qualified) by permitting the recipient of a pioneer's preference to file a license application without being subject to competing applications") (emphasis added); Pioneer's Preference Recon. Order, 7 FCC Rcd at 1809 (Commission denies request that pioneer's preference be made comparative rather than a guarantee of a license; states that "[a] weighted preference would provide no assurance to the innovative party that it would, in fact, receive a license.

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8/ other applicants would have an opportunity to comment on the tentative award before it is made final. See Motorola Opposition at 3. Clearly a "tentative" pioneer's preference award raises certain presumptions and expectations. It is most certainly not, as Motorola naively asserts, "inherently incapable of causing irreparable injury." See id.

. . . Consequently, we affirm that the preference will be dispositive").

It appears from a review of the Pioneer's Preference decisions that the Commission contemplated that applications would not be filed for proposed new radio services until after the report and order that established the service and awarded a final preference had been released.^{9/} Whether the preference determination is permissible in such a circumstance, however, is not at issue in either TRW's Petition for Further Reconsideration in Docket 90-217 or its Motion for Stay. Instead, TRW's Petition and Motion address the permissibility of applying the pioneer's preference procedures in cases where, as here in ET Docket No. 92-28, bona fide mutually exclusive applications are pending at the time the Commission is to award one of those applicants a guarantee of a license that necessitates the summary denial of the applications of one or more of the "pioneer's" competitors.^{10/}

^{9/} For example, in one of the passages quoted in the preceding paragraph, the Commission contemplates that once a pioneer's preference is awarded, the recipient will then file a license application without being subject to competing applications. See Pioneer's Preference Order, 6 FCC Rcd at 3492.

^{10/} Motorola's assertion that "the award of a preference to [Motorola] would not preclude the licensing of one or more other systems[]" (see Motorola Opposition at 9-10) is, as TRW has repeatedly pointed out, self-serving nonsense. Motorola has presently requested 10.5 MHz of the 1610-1626.5 MHz band, while all of the other applicants request all of that band and all 16.5 MHz of

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As TRW noted in its Petition, the Commission did not address this scenario. See TRW Petition for Further Reconsideration at 8-12. This oversight, although possibly inadvertent, is significant. As mutually exclusive applicants whose applications have all been accepted for filing by the Commission, the Supreme Court's decision in Ashbacker guarantees that the parties whose requests are consolidated into ET Docket No. 92-28 will have their applications considered in a comparative hearing (assuming such appropriate eligibility criteria as timely submission of applications and inclusion of required forms and materials are satisfied). Moreover, this guarantee requires that the comparative hearing occur before any of the mutually exclusive applications are

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10/ the 2483.5-2500 MHz band. If Motorola's application is granted, the other applications would have to be denied, as it is now clear from the record that Motorola is unable to share the 10.5 MHz of the 1610-1626.5 MHz band with any of its competitors. In Aeronautical Radio, the court found "disingenuous" a contention that there was no mutual exclusivity where competing applicants were offered the choice of compromising their technical proposals (by providing services through a mandatory consortium) or losing any opportunity to provide services in their applied-for frequency bands. The court stated that "[t]o the extent the consortium's . . . system differed from that which some applicants had envisioned, the individual proposals of those applicants were effectively denied." Aeronautical Radio, 928 F.2d at 451-52. Motorola's denial of the existence of mutual exclusivity in the instant proceeding is no less disingenuous than the contention rejected by the court in Aeronautical Radio, and should be treated accordingly.

either granted or denied in any sense -- on the issue of innovativeness or otherwise.

The pioneer's preference determination the Commission is to make in ET Docket No. 92-28 will likely result in the guarantee of a license to at least one of the applicants, and thus insulate that applicant from comparison with the pending competing applicants. As a result, the award of a pioneer's preference will determine the outcome of the licensing process for one or more of the mutually exclusive applications now pending before the Commission for low-Earth orbit satellite systems to operate in the 1610-1626.5 MHz and 2483.5-2500 MHz bands. Under Ashbacker, the Commission cannot make this determination without holding a "full hearing" on all relevant issues.^{11/}

Whether or not the Commission's pioneer's preference procedure was intended to substitute for the public interest

^{11/} Inasmuch as the recipient of a pioneer's preference grant is to be guaranteed a license if otherwise qualified to be a licensee under Section 308(b), it appears that the Commission's pioneer's preference determination serves as a substitute for the public interest finding the Commission is to make under Section 309(a) of the Communications Act. See Pioneer's Preference Order, 6 FCC Rcd at 3492 (Commission emphasizes "public interest purpose" of pioneer's preference); Pioneer's Preference Recon. Order, 7 FCC Rcd at 1809 (same). If this is the Commission's intent, it has effectively bifurcated the hearing process guaranteed by Section 309 by undertaking the public interest inquiry in the course of the rulemaking proceeding and relegating the inquiries as to the applicants' legal, technical, and financial qualifications to a subsequent or at best concurrent inquiry; neither of which provides the "full hearing" required by the statute.

analysis of Section 309(a), the fact remains that the pioneer's preference determination is now an integral component of the licensing process. The Commission has set up a procedure whereby it will make a dispositive factual determination as to the "innovativeness" of one or more proposals without the benefit of a "full hearing," and then use the result of that extra-hearing determination to insulate one mutually exclusive applicant from comparative consideration with its bona fide competitors. In such circumstances, the only way a non-pioneer can secure a license is to demonstrate that the pioneer is not basically qualified to be a licensee; the non-pioneer will never receive a "full hearing" on the merits of its own application -- i.e., it will not have a chance to address either the basic qualifications aspects of its own proposal as enumerated in Section 308(b) or the public interest inquiry mandated in Section 309(a).

3. The Award Of A Pioneer's Preference To Any Party With A Mutually Exclusive Application Causes Precisely The Sort Of Harm The Supreme Court Found Violative Of Section 309 Of The Communications Act In Ashbacker.

The scenario outlined in the preceding discussion is directly analogous to the fact pattern that the United States Supreme Court found impermissible in Ashbacker. In Ashbacker, the Commission had before it an application for a construction permit for a new AM station. Before it acted upon the first application, it had received a mutually exclusive application

from a second AM station. The Commission subsequently granted the first application without a hearing, and, simultaneously with this grant, designated the second application for hearing. After the Commission denied the second applicant's petition for reconsideration of the designation order, the applicant appealed the grant of the first application to the courts. Ashbacker, 326 U.S. at 328-29.

In addressing the facts of the case before it in Ashbacker, the Supreme Court found that because the two proposals were conceded by the Commission to be mutually exclusive, and one had been already granted, "the hearing accorded petitioner concerns a license facility no longer available for a grant unless the earlier grant is recalled." It went on to state that "[a] hearing designed as one for an available frequency becomes by the Commission's action in substance one for the revocation or modification of an outstanding license." Id. at 332-33. Noting that the burdens on an applicant challenging an established licensee were higher than the burden would have been if the second applicant's hearing had been held in conjunction with the application of the first broadcaster,^{12/} the Court ruled that "[w]hile the

^{12/} Indeed, the Court observed that under one of the designated issues, it was incumbent upon the second applicant to show what interference would result from the simultaneous operation of its station and the already-granted mutually exclusive facility. As the facilities were in fact mutually exclusive, it was

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statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the [first] application." *Id.* at 334. The Commission's action was reversed.

Here, the grant of a pioneer's preference in ET Docket No. 92-28 -- a grant which will guarantee the recipient a license if it is otherwise basically qualified -- is posturally the same as the extra-hearing grant of the first applicant's proposal in Ashbacker. As a result of such a grant, the competing applicants will, like the petitioner in Ashbacker, be left with the daunting and more onerous prospect of demonstrating the "pioneer's" lack of basic qualifications in order to be eligible for a license. In other words, they will have to seek the revocation of the pioneer's assured license, never having received a hearing of any kind on the merits of their own applications.

This treatment is violative of the hearing rights guaranteed the non-pioneer applicants under Section 309(e) of the Communications Act. The fact that the violation of Section

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^{12/} apparent to the Court "that petitioner carries a burden which cannot be met. To place that burden on it is in effect to make its hearing a rehearing on the grant of the competitor's license rather than a hearing on the merits of its own application. That may satisfy the strict letter of the law but certainly not its spirit or intent." 326 U.S. at 331 (footnote omitted).