

309(e) is causally related to the application of the pioneer's preference procedures in cases involving mutually exclusive applicants is what makes TRW likely to succeed on the merits of its Petition for Further Reconsideration in Docket 90-217.^{13/}

D. None Of The Cases Cited By Motorola Alters The Conclusion That The Pioneer's Preference Procedure, As Applied To Mutually Exclusive Applicants, Is Contrary To Section 309 Of The Communications Act.

Motorola cites Storer, HITN, and Maxcell as part of its argument that the pioneer's preference procedure is merely an instance where the Commission has exercised its rulemaking authority to impose a threshold eligibility criterion that it may apply retroactively to pending applications. See Motorola Opposition at 5-7. Unfortunately for Motorola, the cases it has cited fail to support its assertion that the award of a pioneer's preference to any party in ET Docket No. 92-28 would not deny any hearing rights associated with the pending

^{13/} The Commission can only correct this defect in its pioneer's preference procedures by making the entire analysis under the articulated "pioneering" standard subject to the crucible of a "full hearing" as contemplated in Storer. Whether that hearing is held in conjunction with the allocation rulemaking proceeding or as part of the comparative hearing that would normally occur subsequent to the rulemaking is of no consequence as far as Section 309 is concerned (although it may be of consequence in terms of time delays and the expenditure of Commission and applicant resources). The only requirement is that all mutually exclusive applicants receive a full hearing on all decisional aspects of their applications before any particular applicant may be awarded a license (tentatively or otherwise).

applications, and each of the cited cases is readily distinguishable on its facts. Indeed, the portion of Maxcell that is relied on by Motorola is completely inapposite.^{14/}

In Storer, as noted above, the Court upheld a Commission rule limiting the number of stations a single licensee could own. Although the Court upheld this rule -- and its disqualifying impact on the respondent in that case -- there was no question of fact for the Commission (or the Court) to decide; the respondent was undeniably seeking a station that would have placed it in excess of the Commission's limit. See Storer, 351 U.S. at 197.

In HITN, as correctly noted by Motorola, the court of appeals upheld the Commission's imposition of a rule, promulgated after mutually exclusive applications were filed, that operated to grant a dispositive preference to locally-owned applicants. See HITN, 865 F.2d at 1292-93. After the Commission employed its new rule to disqualify a non-local applicant that was mutually exclusive with a local applicant, the disqualified applicant argued on appeal that its Ashbacker rights had been violated.

^{14/} Curiously, Motorola fails to address the analysis TRW performed in its Petition for Further Reconsideration of the Commission's reliance (in the Pioneer's Preference Order) on Storer and Maxcell. See TRW Petition at 12-15. If Motorola were intent on responding to TRW's demonstration of likelihood of success on the merits, it would seem incumbent upon it, at a minimum, to address TRW's argument directly.

The court disagreed. Citing Storer for the proposition that Section 309(e) of the Act does not preclude the Commission from establishing threshold standards to identify qualified applicants and from excluding applicants who plainly fail to meet the standards, the court went on to note that there were no substantial or material questions of fact to be resolved in a hearing. Id. at 1294. Specifically, the parties agreed that the disqualified applicant was non-local and the other applicant was local, and that mutual exclusivity existed. The court stated that "[g]iven the absence of disputed factual issues, no Ashbacker hearing is necessary." Id.^{15/}

The portion of Maxcell that is quoted by Motorola has nothing to do with the issues concerning Section 309 of the Act that are presented in TRW's Petition or Motion. Instead, the passage deals with the courts' test for determining when it is permissible for an agency to apply a rule retroactively. See Maxcell, 815 F.2d at 1554-55, quoted in Motorola Opposition at 6. In any event, the court quickly dispatched a contention that the retroactive application of a lottery procedure to applicants who thought they would be considered in a comparative hearing violated Ashbacker. Since all of the

^{15/} Also of significance is the fact that after the rule favoring localism was adopted, the disqualified applicant was given an opportunity -- which it failed to take -- to amend its application to include a local entity within its ownership structure. See HITN, 865 F.2d at 1293-94.

mutually exclusive applicants became equally subject to the lottery procedure, the court found that the Commission's similar treatment of all applicants "fully satisfied the Ashbacker rule." Id. at 1555.

With the pioneer's preference procedure in Docket 90-217, the Commission is making fact-intensive inquiries as to the innovativeness of various proposals on an ad hoc basis.^{16/} Indeed, the parties in ET Docket No. 92-28 have each raised substantial and material questions of fact about virtually every other pending pioneer's preference request. The existence of these factual issues as to innovativeness and the parties' respective entitlement to preferences operates to render the present case completely distinguishable from Storer, HITN, and even Maxcell. Under Section 309(e) of the Communications Act, these issues are required to be resolved in a "full hearing."

Motorola's final substantive claim -- that the Commission has regularly adopted "qualifying" rules and applied them retroactively in satellite proceedings (see Motorola Opposition at 7) -- is a red herring. A pioneer's preference determination is not a rule that is being applied in a licensing context (like limits on station ownership or new financial standards). Instead, it is a licensing criterion that is being determined in a rulemaking forum, without the

^{16/} See note 10, supra.

formalities or due process protections of a "full" fact-finding hearing, for subsequent application in a licensing context involving mutually exclusive applications.

In any event, Motorola's reliance on several Commission satellite decisions as support for this proposition is completely misplaced. In 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 (1986) ("RDSS Licensing Order"), the Commission did establish a technical qualifications rule that precluded one of several mutually exclusive applicants from having its application granted. However, in stark contrast with the present situation, there was no question of fact that the affected applicant was not in compliance with the new rule as adopted, and the Commission provided all applicants -- including the noncomforming one -- an opportunity to amend their system proposals to comply with the new rules. Id. at 662.

Next, Motorola mischaracterizes the Commission's action in Licensing Space Stations in the Domestic Fixed-Satellite Services, 58 R.R.2d 1267 (1985). The Commission did not "establish" more stringent financial criteria and then apply them to pending applications. See Motorola Opposition at 7. Instead, the rules adopted by the Commission "merely restate[d] and clarifie[d] well established policies. Id. at 1280 (footnote omitted). The Commission also

gave applicants an opportunity to supplement their filings with any information that was necessary to meet the standards that were to be more strictly enforced. Id. at 1268.

Finally, the "mandatory consortium" rule cited by Motorola (Motorola Opposition at 7) is of little precedential weight at this juncture. The Commission's recent decision reimposing such a forced consortium followed the 1991 decision of the court of appeals in Aeronautical Radio, supra, that rejected the Commission's initial attempt to force a consortium as violative of the applicants' Ashbacker rights. The court expressed doubt that the Commission could satisfactorily justify the reimposition of a forced consortium (Aeronautical Radio, 928 F.2d at 452), and the matter is currently back before the court of appeals.

In short, none of the cases cited by Motorola alters in any way the conclusion that the pioneer's preference rule, as applied to mutually exclusive applicants, is violative of Ashbacker. TRW must therefore be found likely to succeed on the merits of its Petition for Further Reconsideration in Docket 90-217.

II. Motorola's Assertion Of Procedural Deficiency In TRW's Petition For Further Reconsideration In Docket 90-217 Is Incorrect.

Apparently (and rightfully) insecure about its allegations that TRW would not prevail on the merits, Motorola claims that TRW's Petition for Further Reconsideration in Docket 90-217 is procedurally defective. See Motorola Opposition at 8-9. Specifically, Motorola asserts that TRW has violated Section 1.429(i) of the Commission's rules by seeking reconsideration of the Ashbacker determination in the Pioneer's Preference Order, rather than of matters discussed in the Pioneer's Preference Recon. Order.^{17/}

In its Petition, TRW identified two areas where the Commission's action in the Pioneer's Preference Recon. Order had direct bearing on its prior determination of the procedure's consistency with Ashbacker. TRW showed that the Commission, for the first time, rejected a request that it clarify both the criteria by which an applicant's eligibility for a preference is to be gauged and the dispositive nature of the preference. TRW Petition at 4. This facet of the Pioneer's Preference Recon. Order is tremendously significant. In Maxcell, the court stated that:

^{17/} Interestingly, Motorola characterized TRW's argument as a request "that the Commission should once again revisit its unsupported Ashbacker arguments" Motorola Opposition at 8 (emphasis added). This is a concession by Motorola that the Commission's Ashbacker determination is defective, and renders Motorola's current procedural objection as an exercise in elevating form over substance.

The legal standard regarding the Commission's duty to provide license applicants adequate notice of requirements has been previously explained by this court:

It is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.

Maxcell, supra, 815 F.2d at 1558 (quoting Bamford v. FCC, 535 F.2d 78, 82 (D.C. Cir. 1976)). The Commission should now reconsider its failure to articulate objective criteria for ascertaining eligibility for a pioneer's preference.

TRW also showed in its Petition that the Commission specified, for the first time, that preference requests will be permitted to be filed after cut-off deadlines for mutually exclusive applications, and indeed up until 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. TRW Petition at 4 & n.5 (citing Pioneer's Preference Recon. Order, 7 FCC Rcd at 1809).^{18/}

^{18/} TRW argued that the impact of these two actions in the Pioneer's Preference Recon. Order made it appropriate for TRW to address the Ashbacker issues in its Petition for Further Reconsideration. To the extent that the Commission may view TRW's petition in the manner now

(Footnote continued on next page)

It was entirely proper for TRW, on further reconsideration, to ask the Commission to review its perhaps unintended application of the (1) now undeniably vague, and (2) now expressly dispositive pioneer's preference procedure in proceedings involving requests from mutually exclusive applicants. This is particularly so where the Commission has announced -- again, for the first time -- that pioneer's preference requests may be filed subsequent to the submission and acceptance for filing of the underlying applications themselves.^{19/}

Motorola disputes as untenable TRW's assertion that the public interest requires the Commission to revisit its sketchy and incorrect Ashbacher analysis. See Motorola

(Footnote continued from previous page)

^{18/} advocated by Motorola, TRW requested a waiver of Section 1.429(i). See TRW Petition at 7 n.8. The court's instructions in WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), mandate that such a waiver request be given thorough consideration, especially here, where denial of statutory rights of the most fundamental nature are involved.

^{19/} Ironically, the Commission also adopted rule provisions in its Pioneer's Preference Recon. Order that operate to make requests for pioneer's preferences more akin to applications for licenses. For example, the Commission revised Section 1.402(c), which now calls for the issuance of public notices that establish deadlines for comments and objections on pending preference requests (see 47 C.F.R. § 1.402(c)), and it adopted new Section 1.402(e), which calls for the issuance of a public notice that establishes a cut-off deadline for the submission of preference requests that are to be considered in conjunction with pending requests (see 47 C.F.R. § 1.402(e)).

Opposition at 9. It is Motorola's bald assertion that lacks credibility.

TRW's argument is that because the regulations adopted in the Pioneer's Preference rulemaking proceedings violate Section 309 of the Communications Act, they are ipso facto invalid and contrary to the public interest. In this regard, the Supreme Court has held that "regulations, in order to be valid must be consistent with the statute under which they are promulgated." United States v. Larionoff, 431 U.S. 864, 873 (1977). In a footnote, the Court stated that:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity."

Id. at 873 n.12 (quoting Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L.Ed. 528 (1936) (further citations omitted)).

Under these circumstances, it is appropriate, if not required, for the Commission to address TRW's Petition. It would be a travesty for the Commission to hide behind procedural formalities when the validity of a recently-promulgated rule of such far-reaching significance is placed squarely at issue. Motorola's claim of procedural deficiency should be rejected.

III. Motorola's Arguments Under The Remaining Elements Of The Applicable "Stay" Test Are Specious, And Need Not Long Delay The Commission.

A. Motorola's Denial Of Irreparable Harm Is Fatally Flawed.

In response to TRW's showing that a grant of a dispositive pioneer's preference to any of the mutually exclusive applicants in ET Docket No. 92-28 would cause irreparable harm to the remaining applicants (see TRW Motion at 7-10), Motorola asserts that the harm alleged by TRW is offset by the fact that parties will have an opportunity to comment on any tentative award of a preference and claims anew that grant of a preference to Motorola would not preclude the licensing of one or more of the mutually exclusive system proposals. Motorola Opposition at 9-10. Both of Motorola's assertions are defective, and neither is responsive to the detailed showing that TRW presented in its motion.

In Section I.C above, TRW showed that the instant proceeding to award a pioneer's preference must be conducted as a "full" hearing. The Communications Act and Ashbacker demand no less.

As for Motorola's claim that the fact that the Commission makes an initial "tentative" award is of some importance, TRW showed that the Commission's characterization of the tentative award as carrying with it certain rights and expectations belies this assertion. See supra at Section I.C.

In an observation that is relevant here, the Court in Ashbacker stated that with the Commission's grant of the first-filed application, "petitioner has been placed under a greater burden than if its hearing had been earlier. Legal theory is one thing. But the practicalities are different." Ashbacker, 326 U.S. at 332.

Finally, in note 10, supra, TRW demonstrated for once and for all that there is mutual exclusivity between Motorola's Iridium proposal on the one hand, and the proposals of TRW and several of the other applicants in the current processing round on the other. Motorola's claim to the contrary is both false and disingenuous.

In short, Motorola has offered nothing to counter TRW's showing that the Commission's refusal to reconsider its action in Docket 90-217 will cause irreparable harm. TRW's showing should therefore be credited.

B. Motorola Will Not Suffer Harm Upon Grant Of The Stay Requested By TRW.

Motorola asserts that it would be "seriously harmed" by a Commission grant of TRW's Motion. Motorola Opposition at 10. In support of this claim, Motorola alleges that it "is the only one that truly deserves a pioneer's preference for the innovations associated with its system design[,] . . . [and that] any delay in the award of a preference in this proceeding would directly work to Motorola's disadvantage." Id. (footnote

omitted). Neither of these assertions has any validity, nor does Motorola attempt to explain in what specific way it would be harmed irreparably.

Motorola's claim that it alone is entitled to a pioneer's preference is outrageous. The comment cycles on Motorola's request for a preference have not yet been completed, and already every other party in ET Docket No. 92-28 has raised a plethora of substantial questions about Motorola's claim of innovativeness and its alleged right to a preference -- questions that cannot be legally resolved outside the crucible of an evidentiary hearing.

As for Motorola's claim that delay in the award of a preference works to its disadvantage, TRW showed that a stay will actually avoid the inevitable litigation delays that a preference award will trigger. See TRW Motion at 11. Again, perhaps acknowledging that no applicant has a "right" to receive a pioneer's preference, Motorola offers no specifics of any kind as to how it will be disadvantaged by any such delay.^{20/}

^{20/} It is, of course, extremely arrogant of Motorola to claim that it alone is "entitled" to a preference. No party has a vested "right" to a pioneer's preference, as the Commission's obligation is to develop rules and regulations that are consistent with its public interest mandate. In this regard, TRW notes that it and the three other requestors of pioneer's preferences in ET Docket No. 92-28, while firm believers in their own claims of entitlement to a preference award, have agreed that the harms associated with the preference procedure outweigh their subjective desires for a preference grant at this time.

In addition, the award to Motorola of a pioneer's preference would not eliminate consideration of the many basic qualifications issues that must be addressed in the subsequent licensing proceeding. Under the Commission's rules and policies, and as Motorola itself has acknowledged, Motorola must not only demonstrate its financial and legal qualifications, it must also demonstrate that its technical proposal is "unquestionably superior" to the mutually exclusive proposals of TRW and others in order to be found basically qualified to be a Commission licensee.^{21/} As the pleadings and petitions to deny filed in response to Motorola's application demonstrate, the ability of Motorola to meet such a heavy burden is extremely doubtful. All of the applicants have raised substantial and material questions of fact about the feasibility of Motorola's proposed Iridium system, and these questions must, under Section 309(e), be addressed in a "full" hearing.

In short, there is no merit to Motorola's assertion that it will be harmed by a delay in the award of a

^{21/} As a putative user of the 1610-1626.5 MHz band that would be incapable of sharing the frequencies it uses with any other system, Motorola's application cannot be granted unless its technical proposal is "unquestionably superior" to that of all of the applicants that can share the frequency bands. See RDSS Licensing Order, 104 F.C.C.2d at 653-54. This is a threshold eligibility criterion that only Motorola and the American Mobile Satellite Corporation must meet before their applications can be granted. All of the other applicants can share the band.

preference. TRW's objective analysis on this prong of the "stay" test must be credited.

C. The Public Interest Will Be Served By The Grant Of The Stay Requested By TRW.

On this element of the stay test, Motorola asserts simply that the public interest would not be served by further delays in the inauguration of the services proposed by the applicants in ET Docket No. 92-28. Motorola Opposition at 11. TRW has no disagreement with Motorola's statement that the Commission established the pioneer's preference rules in order to create incentives for the early introduction of new and innovative services and technical proposals that would lead to better utilization of the limited frequency spectrum resource. See id. at 11.

The fact remains, however, that the Commission's goal of expedited introduction of new services is incapable of effectuation in cases involving mutually exclusive applicants who have separately requested pioneer's preferences. Instead, any attempt to award pioneer's preferences in such cases as the instant proceeding will be met with protracted litigation delays that will considerably complicate already complex proceedings. In any event, the delay forecast by Motorola need not come to pass if, as TRW has urged, the Commission proceeds with the rulemaking and application proceedings, exclusive of

extraneous matters related to the pending pioneer's preference requests. See TRW Petition at 2.

Finally, as TRW noted above, it is absolutely contrary to the public interest for an agency to adopt a rule or regulation that contravenes the limitations of its enabling statute. Inasmuch as TRW has shown that it is likely to prevail on the merits of its claim that the Pioneer's Preference procedures violate Section 309 of the Communications Act, the public interest clearly favors grant of TRW's Motion pending resolution of the reconsideration petitions in Docket 90-217.

CONCLUSION

In the foregoing discussion, TRW has demonstrated that Motorola's opposition poses no bar whatsoever to the grant of TRW's Motion for Stay. All of the other parties requesting pioneer's preferences in ET Docket No. 92-28, like Motorola, believe they are entitled to preferences for their proposals. However, each of those parties has sided with TRW and supported its Motion for Stay.

The issues involved are important, and the stakes are huge. Accordingly, TRW respectfully urges the Commission to

grant its Motion immediately, as any further delay in such a grant could result in a direct and subversive violation of the Communications Act in ET Docket No. 92-28.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Katharine K. Bryant, hereby certify that a copy of the foregoing "Reply of TRW Inc." was served by first-class mail, postage prepaid, this 2nd day of June 1992, on the following persons:

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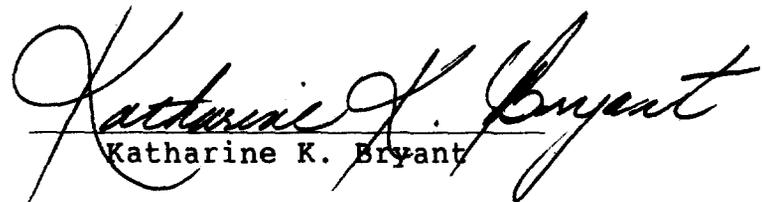
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