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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Review of the Pioneer's
Preference Rules

To: The Commission

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)

ET Docket No. 93-266

COMMENTS OF ARRAYCOMM, INC.

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November 15, 1993

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Summary

ArrayComm, Inc. ("ArrayComm"), through its attorney, hereby submits comments on the above-captioned notice of proposed rulemaking, entailing a review of the FCC's pioneer's preference rule structure, as it may be affected by Commission implementation of new competitive bidding policies. In its capacity as a small innovative telecommunications technology development company, ArrayComm is clearly among a class of companies that are uniquely qualified to offer informed insight as to the continued appropriateness of the pioneer's preference rules in a competitive bidding environment.

ArrayComm maintains that the Commission's current pioneer's preference rules are grounded on sound and important public policy objectives. These objectives are in no way negated or superseded by the Commission's proposed implementation of the new spectrum auction policies, or by the underlying legislative amendments to the Communications Act. In fact, the new competitive bidding policies only serve to underscore the public interest value of the Commission's pioneer's preference policies.

Accordingly, the Commission should affirm the validity of the existing pioneer's preference rule structure in the new competitive bidding environment. The Commission should also disregard proposals to assess charges for licenses obtained through the pioneer's preference process, and make appropriate administrative modifications to ensure the efficient adjudication of pending and future pioneer's preference requests.

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To: The Commission

COMMENTS OF ARRAYCOMM, INC.

ArrayComm, Inc. ("ArrayComm"), through its attorney, hereby submits comments in response to the above-captioned notice of proposed rulemaking.^{1/} By the Notice, the Commission proposes a review of the existing pioneer's preference rule structure, as it may be affected by Commission implementation of Congressionally mandated competitive bidding policies.^{2/} As discussed more fully below, the Commission's current pioneer's preference rules are grounded on sound and important public policy objectives. These objectives are in no way negated or superseded by the Commission's proposed implementation of the new spectrum auction policies, or by the underlying legislative amendments to the Communications Act. In fact, the new competitive bidding policies only serve to underscore the public interest value of the Commission's pioneer's preference policies. Accordingly, in

^{1/} See Review of the Pioneer's Preference Rules, ET Docket No. 93-266, FCC 93-477 (released October 21, 1993) (the "Notice").

^{2/} See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 387, enacted August 10, 1993 ("1993 Budget Reconciliation Act"); see also, Implementation of Section 309(j) of the Communications Act Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, FCC 93-455, (released October 12, 1993) ("Competitive Bidding NPRM").

resolving the instant rulemaking proceeding, the Commission should affirm the validity of the existing pioneer's preference rule structure in the new competitive bidding environment. The Commission should also dispel misguided attempts to justify the assessment of charges for licenses obtained through the pioneer's preference process, and make appropriate administrative modifications to ensure the efficient adjudication of pending and future pioneer's preference requests.

I. BACKGROUND

ArrayComm is a small Santa Clara, California-based telecommunications technology development company. ArrayComm was formed with the purpose of developing and commercializing Spatial Division Multiple Access ("SDMA") technology.^{3/} SDMA is a major breakthrough antenna technology that can cost-efficiently deliver a tenfold increase in the throughput capacity of a mobile communications network. SDMA combines phased array antenna technology, state-of-the-art digital signal processing equipment,

^{3/} ArrayComm is a parent company of Spatial Communications, Inc. ("SCI"). SCI filed a request for pioneer's preference in the Commission's Personal Communications Service ("PCS") rulemaking proceeding, in connection with SCI's efforts to develop SDMA in the PCS operating environment. See Request of Spatial Communications, Inc. for a Pioneer's Preference in the PCS Licensing Process, Gen. Docket No. 90-314, File No. PP-73, (filed May 4, 1992). The SCI Pioneer's Preference Request was subsequently tentatively dismissed. See Tentative Decision And Memorandum Opinion and Order, Gen. Docket No. 90-314, 7 FCC Rcd 7794 (1992) at para. 25.

and proprietary signal processing software to make possible for the first time dynamic exploitation of the spatial dimension in the channel assignment process of mobile communications systems.^{4/}

In its capacity as a small innovative telecommunications technology development company, ArrayComm is particularly well-suited to comment on the issues raised in the Notice. Through direct experience, ArrayComm has a clear understanding of the difficulties inherent in financing the development and commercialization of new high-risk telecommunications technology in today's tight capital markets. In addition, through ArrayComm's subsidiary SCI's participation in the pioneer's preference process, ArrayComm has first-hand knowledge of the value that a pioneer's preference and the attendant guarantee of a facility authorization can bring to capital formation efforts. ArrayComm is clearly among a class of companies that are uniquely qualified to offer informed insight as to the continued appropriateness of the pioneer's preference rules in a competitive bidding environment.

^{4/} SDMA is fully compatible with systems using all current spectrum access techniques (i.e., Frequency-Division Multiple Access ("FDMA"), Time-Division Multiple Access ("TDMA"), and Code-Division Multiple Access ("CDMA")). As such, the dramatic capacity increase afforded by SDMA is additive to any increases realized through the use of existing spectral efficiency techniques.

II. ARGUMENT

A. There Is No Valid Basis For Substantive Alteration Of The Pioneer's Preference Rules

The primary impetus for the review of the pioneer's preference rules proposed in the Notice is the establishment of new competitive bidding policies mandated by the recently adopted amendments to Section 309 of the Communications Act. The Commission notes that the competitive bidding process creates a "new dynamic" in the assignment of FCC licenses, and expresses concern that the new spectrum auction policies might somehow undermine the basis for the pioneer's preference rules.^{5/} In light of these and other related observations, the Commission seeks comment as to whether the pioneer's preference rules should be substantively altered or repealed.

Upon careful analysis of the Notice and the Competitive Bidding NPRM, ArrayComm respectfully submits that there is no valid basis at this time for substantive alteration or repeal of the pioneer's preference rules. To the contrary, ArrayComm maintains that the establishment of competitive bidding increases the need and provides further validation of the Commission's current pioneer's preference policies.

^{5/} Notice at para. 7.

1. The Existing Pioneer's Preference Rule Structure Is Grounded on Sound, Fundamental Public Policy Objectives

The pioneer's preference rules were promulgated to encourage the timely development and introduction of new telecommunications services and technologies in the United States.^{6/} The Pioneer's Preference Order provides a concise unambiguous statement of the public policy objectives underlying the preference rules and clearly defines the parameters of the significant reward to innovators deemed necessary to achieve these critical goals.

"Our objective in establishing a pioneer's preference is to reduce the risk and uncertainty innovating parties face in our existing rule making and licensing procedures, and therefore to encourage the development of new services and technologies. . . . The most workable action we can take to reduce this risk is effectively to guarantee an otherwise qualified innovating party that it will be able to operate in the new service by precluding competing applications. Any other approach that would maintain a significant potential that another party could be awarded the right to operate and the innovator could be foreclosed, would severely limit the value of the preference and undercut its public interest purpose."^{7/}

The critical need for a dispositive preference to ensure that the fundamental public interest goals underlying the Commission pioneer's preference rules can be practically achieved

^{6/} See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, Gen. Docket No. 90-217, Report and Order, 6 FCC Rcd 3488 (1991) ("Pioneer's Preference Order") at paras. 18-22.

^{7/} Id., at para. 32, (emphasis added).

has subsequently been reaffirmed by the Commission.^{8/} There is no valid justification for the Commission to abandon this view at this time.

The portions of the 1993 Budget Reconciliation Act that granted the Commission authority to issue licenses through the competitive bidding process do not prevent the Commission from awarding licenses to innovators.^{9/} Additionally, the auction legislation allows the Commission to promulgate licensing policies without basing public interest findings on the expectation of Federal revenues.^{10/} Furthermore, nothing in the Notice or the Competitive Bidding NPRM indicates any legitimate basis for a change in Commission views concerning the need to encourage the timely development and introduction of new telecommunications services and technologies. For these reasons, the important public policy objectives underlying the existing pioneer's preference rules remain valid in the context of the new competitive bidding rule structure.

^{8/} See Memorandum Opinion and Order, Gen. Docket No. 90-217 recon. granted in part, 7 FCC Rcd 1808 (1992), at para. 8. See also, Memorandum Opinion and Order, Gen. Docket No. 90-217 further recon. denied, 8 FCC Rcd 1659 (1993), at para 9.

^{9/} See 1993 Omnibus Reconciliation Act, at 30, Sec. 309(j)(6)(G).

^{10/} Id. Sec. 309(j)(7)(A).

2. The New Competitive Bidding Policies Do Not
Supplant The Need For the Pioneer's Preference

ArrayComm readily agrees that the competitive bidding policies add a new dynamic to the licensing process. ArrayComm strongly maintains, however, that the policies delineated in the Competitive Bidding NPRM, and summarized in the Notice, do little or nothing to replace the substantial financial incentives for innovators that are embodied in the Commission's pioneer's preference rules. The Commission has repeatedly affirmed that the substantial rewards inherent to the current pioneer's preference policy are critical to the timely introduction of new telecommunications technologies and services.^{11/}

It should be pointed out that spectrum auctions will markedly increase the cost of obtaining a Commission authorization by requiring payment for access to spectrum. The cost increase inherent in the new competitive bidding policies is not offset by any attendant provision for decreasing the substantial capital expenditures that an innovator must undertake in developing a new telecommunications technology. Similarly, there is no provision in the competitive bidding policies that will reduce the cost innovators must bear in prosecuting a rulemaking campaign to obtain a spectrum allocation and establish rules for a new radio service.

^{11/} Supra., at footnote 9.

In fact, recognition of innovation through financial offset in the competitive bidding process is given only passing attention in the Notice and in the Competitive Bidding NPRM.^{12/} The nominal "Innovator Preference" credits discussed in the Notice and the Competitive Bidding NPRM, ostensibly as a possible equitable replacement for the current pioneer's preference, provide virtually no incentive for innovators to participate in the bidding process. Moreover, these paltry credits offer absolutely no assurance whatsoever, that an innovator could assemble the funds necessary to actually win the bidding for a license.

Even when combined with the "incentives" afforded to small businesses, the competitive bidding policies fail to offer innovative telecommunications technology companies, such as ArrayComm, any reasonable expectation that a license could be obtained through a spectrum auction.^{13/} Furthermore, the

^{12/} Notice at para. 12. Competitive Bidding NPRM at para. 50 and at footnote 61. The Commission indicates in the Competitive Bidding NPRM that, if adopted an "Innovators Preference" would amount to a credit equal to 10% of an applicant's winning auction bid. In the Notice, however, without explanation as to the discrepancy, it is implied that, if adopted, a credit of this type might be 25%.

^{13/} ArrayComm does not understand what if any basis the Commission has for changing its previously announced standard for rewarding innovators from an unconditional guarantee of a license grant, to a reasonable expectation of obtaining a license. Compare, Pioneer's Preference Order, at para. 32, and Notice, at para. 11. The Commission provides no explanation or justification for this substantial departure from its established policies concerning the treatment of innovators in the licensing process.

provisions in the competitive bidding policies that distinguish small technology development companies from other small businesses with no R&D capability in no way reflect the vast differences in capital allocation and funding requirements characteristic of these two very different types of small companies.^{14/} For these reasons, the provisions for rewarding innovators alluded to in the competitive bidding policies in no way to negate or supersede the well-settled need for the benefits afforded innovators by the existing pioneer's preference rules.^{15/}

3. Substantive Alteration of the Pioneer's Preference Rules Will Threaten United States Leadership in Telecommunications Technology Innovation

The Commission has determined that the significant reward to innovators, inherent in the existing pioneer's preference rule

^{14/} The only discernible difference in treatment of small technology development companies vs. small companies with no R&D capability is the "Innovator's Preference". See supra, at footnote 11. A 10-25% discount on an auction bid does not reflect the attendant imbalance in capital requirements characteristic of these two respective types of companies.

^{15/} In the event the Commission decides in the instant rulemaking to alter the dispositive nature of the pioneer's preference, equity demands that the replacement policy entail substantial credits on winning auction bids (at least 85%, i.e., the innovator would pay no more than 15% of the winning bid), waiver of "up front" payment requirements, and liberal installment payment terms, e.g., no interest charges. These terms are necessary to offset the substantial above-described investments that innovators must make to facilitate the introduction of new telecommunications technologies and services.

structure, is the only practical way for the United States to maintain its leadership in the introduction of innovative new telecommunications technologies and services.^{16/} These objectives are clearly of the highest public interest concern. The ability of United States companies to compete in the world marketplace is closely tied to ready access to state-of-the-art telecommunications technologies and services. The Commission has observed, that when faced with the risks and uncertainties characteristic of the Commission's rulemaking and licensing process, innovators are likely to opt to pursue introduction of new technologies and services in markets outside of the United States.^{17/} This view is consistent with ArrayComm's experience in the field of telecommunications technology development.

The enactment of competitive bidding only serves to inject another set of new risks and uncertainties in the process of introducing new telecommunications technologies and services in the United States. Of equal importance, competitive bidding adds another substantial expense that must be considered by innovators in prioritizing and selecting markets in which to introduce their products. Maintaining the current pioneer's preference rules will ensure that the new competitive bidding policies do not erode this country's leadership in the introduction of innovative new telecommunications technologies and services.

^{16/} Pioneer's Preference Order, at para. 18.

^{17/} Id.

B. Spectrum Charges Should Not Be Assessed For Licenses Obtained Through Grant Of A Pioneer's Preference

In the Notice, the Commission renders the opinion that the applicable statutory language and the current pioneer's preference policies exempt parties receiving licenses through the pioneer's preference process from any payment associated with the new competitive bidding policies. The Commission is clearly correct in its analysis.^{18/}

The 1993 Omnibus Reconciliation Act is unambiguous in establishing that mutual exclusivity is a necessary prerequisite to Commission exercise of its new competitive bidding authority.^{19/} It is also well-settled that pioneer's preference designees are placed on a "separate track" that is not subject to competing applications.^{20/} Absent mutual exclusivity, the Commission has no legal basis to assess charges in issuing licenses, other than statutorily mandated application and user fees.

^{18/} In raising this issue, the Commission cites petitions for reconsideration and other filings in the 900 MHz Narrowband PCS proceeding. The petitioners maintain that Mtel, the pioneer's preference recipient in that proceeding, should pay a fee equivalent to the auction value of a similar Narrowband PCS license to prevent "anti-competitive" results. Notice at para. 10.

^{19/} 1993 Omnibus Reconciliation Act, at 24, Sec. 309(j)(1).

^{20/} See Memorandum Opinion and Order, Gen. Docket No. 90-217 further recon. denied, 8 FCC Rcd 1659 (1993), at paras 2 & 7.

Contrary to the positions taken by parties filing for reconsideration of the Mtel preference grant, there is no valid public interest basis for the formulation of rules that would compel payment from a pioneer's preference recipient. As discussed in detail above in Section II(A)(2), innovators such as Mtel undertake substantial capital expenditures in developing a new telecommunications technology, and in prosecuting a rulemaking campaign to obtain a spectrum allocation and establish rules for a new radio service. As such, if forced to pay for its license Mtel, or another similarly situated pioneer's preference grantee, would be the party suffering a financial disadvantage. The claims advanced in the petitions for reconsideration and associated filings in the alternative are simply misguided and self-serving. For this reason, Commission should disregard proposals to assess charges for licenses obtained through the pioneer's preference process

C. Appropriate Pioneer's Preference Administrative Policy Amendments Are In The Public Interest

ArrayComm supports Commission adoption of administrative amendments to the pioneer's preference rules that will streamline the process and thus ease burdens on the Commission staff and the public. This objective serves the interests of all affected parties. The changes to the pioneer's preference rules proposed in the Notice concerning the issuance of public notices, specification of filing deadlines, consideration of experimental

results, the timing of decisions regarding the disposition of pioneer's preference requests, and criteria for initial review of pioneer's preference requests all appear to comport with the Commission's stated objective.^{21/}

ArrayComm maintains, however, that all pending pioneer's preference requests should be exempt from the application of any modifications to the pioneer's preference rules adopted in the instant rulemaking. It would be inequitable to retroactively impose new rule changes on preference requests that were on file prior to the adoption of the Notice.

III. CONCLUSION

For the foregoing reasons, ArrayComm respectfully submits that there is no valid basis at this time for substantive alteration or repeal of the pioneer's preference rules. To the contrary, ArrayComm maintains that the establishment of competitive bidding for Commission licenses increases the need and provides further validation of the Commission's current pioneer's preference policies.

Accordingly, in resolving the instant rulemaking proceeding, the Commission should affirm the validity of the existing pioneer's preference rule structure in the new competitive bidding environment. The Commission should also disregard

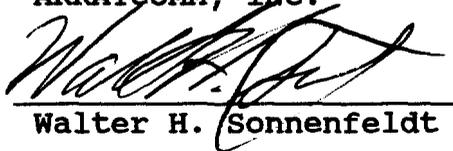
^{21/} Notice at paras. 13-17

proposals to assess charges for licenses obtained through the pioneer's preference process. Finally the Commission should adopt the above-described procedural modifications proposed in the Notice to ensure the efficient adjudication of pending and future pioneer's preference requests.

Respectfully submitted,

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November 15, 1993

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