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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

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)
)

ET Docket No. 93-266

To: The Commission

REPLY COMMENTS OF ARRAYCOMM, INC.

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November 22, 1993

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Summary

ArrayComm, Inc. ("ArrayComm"), through its attorney, hereby replies to comments responding to 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. ArrayComm's initial comments in this proceeding demonstrate fully that in implementing its new competitive bidding license assignment policies, the Commission must preserve the existing substantive attributes of the pioneer's preference rules. ArrayComm's comments also demonstrate that there is no underlying legal basis for Commission imposition of charges for licenses granted through the pioneer's preference process.

An overwhelming majority of the commenting parties support retention of the pioneer's preference. Moreover, arguments proffered by commentators advocating substantive alteration or repeal of the pioneer's preference rules are wholly without merit. Arguments advanced by parties seeking to justify the imposition of charges for licenses granted through the pioneer's preference process are similarly flawed. For these reasons, the Commission should retain the substantive components of the current pioneer's preference rule structure, and disregard proposals to assess charges for licenses obtained through the pioneer's preference process.

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To: The Commission

REPLY COMMENTS OF ARRAYCOMM, INC.

ArrayComm, Inc. ("ArrayComm"), through its attorney, hereby respectfully submits its reply to comments filed 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, ArrayComm's initial comments in this proceeding demonstrate fully that the Commission must preserve the existing substantive attributes of the pioneer's preference policies in implementing its new competitive bidding license assignment policies. ArrayComm's comments also demonstrate that there is no underlying legal basis for

^{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").

Commission imposition of charges for licenses granted through the pioneer's preference process.

An overwhelming majority of the commenting parties support retention of the pioneer's preference. Moreover, arguments proffered by commentors advocating substantive alteration or repeal of the pioneer's preference rules are wholly without merit. Arguments advanced by parties seeking to justify the imposition of charges for licenses granted through the pioneer's preference process fail to establish that the Commission has the requisite legal authority to enact such a provision. Accordingly, in resolving the instant rulemaking, the Commission should affirm the majority consensus of the commentors by retaining the substantive components of the current pioneer's preference rule structure. The Commission should also disregard proposals to assess charges for licenses obtained through the pioneer's preference process.

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

^{3/} ArrayComm is a parent company of Spatial Communications, Inc. ("SCI"). SCI filed a request for pioneer's preference in the
(continued...)

breakthrough antenna technology that can cost-efficiently deliver a tenfold increase in the throughput capacity of a mobile communications network.^{4/} 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's comments in response to the Notice fully demonstrate that the Commission must preserve the existing substantive attributes of the pioneer's preference rules in implementing its new competitive bidding license assignment policies. As explained in ArrayComm's comments, the existing pioneer's preference rules are grounded on sound fundamental public policy objectives that remain valid in the context of the new competitive bidding rule structure.^{5/} ArrayComm's comments

^{3/}(...continued)

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.

^{4/} For a more complete description of SDMA technology, see ArrayComm comments at 2-3; see also, SCI Pioneer's Preference Request.

^{5/} See Comments of ArrayComm, at 5-6. ArrayComm maintains that, in the event the Commission decides to alter the dispositive nature of the pioneer's preference, equity demands
(continued...)

also show that the proposed new competitive bidding policies, in and of themselves, fail to offer pioneering telecommunications technology companies with even a reasonable expectation that a license could be obtained through a spectrum auction.^{6/} Finally, ArrayComm shows that maintaining the current pioneer's preference rules will ensure that the new competitive bidding policies do not erode the leadership of the United States in introducing innovative new telecommunications technologies and services.^{7/}

ArrayComm's comments also fully demonstrate that there is no underlying legal basis for Commission imposition of charges for licenses granted through the pioneer's preference process.^{8/} As explained in ArrayComm's comments, mutual exclusivity between applicants is a necessary prerequisite to Commission exercise of

^{5/} (...continued)

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. Id., at footnote 15.

^{6/} See Comments of ArrayComm, at 7-9. ArrayComm's comments observe at footnote 13 that the Commission provides no explanation or justification in the Notice for changing its previously announced and well-substantiated standard for rewarding pioneers from an unconditional guarantee of a license grant, to a reasonable expectation of obtaining a license. Compare, 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 para. 32, and Notice, at para. 11. This change of the Commission's policy towards pioneers appears, at a minimum, to be arbitrary.

^{7/} See Comments of ArrayComm, at 9-10.

^{8/} Id., at 11-12.

its new authority to levy charges for licenses issued pursuant to its new competitive bidding procedures. Id. Because it is well-settled that applications filed by pioneer's preference designees are placed on a "separate [processing] track" that is not subject to competing applications, the Commission lacks the legal authority to assess charges on licenses issued through the current pioneer's preference process. Id.

II. AN OVERWHELMING MAJORITY OF COMMENTORS SUPPORT RETENTION OF THE PIONEER'S PREFERENCE

Based on ArrayComm's review of the comments submitted in response to the Notice, an overwhelming majority of commentors support retention of the pioneer's preference. Of the forty-seven parties that filed^{2/}, thirty-eight, including ArrayComm, advocate maintaining the pioneer's preference in the competitive bidding environment.^{10/} These thirty-eight entities represent a

^{2/} Nine companies filed joint comments as the "Appellant Parties." Pacific Bell and Nevada Bell also filed jointly, as did Advanced Mobilecomm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.

^{10/} See Comments of: Adams Telecom, Inc.; Advanced Cordless Technologies, Inc.; Advanced Mobilecomm Technologies, Inc.; Advanced Tel., Inc.; American Personal Communications; Ameritech; Associated Communications Corporation; Cablevision Systems Corporation; Celsat, Inc.; Columbia Wireless Limited Partnership; Corporate Technology Partners; Cox Enterprises, Inc.; Digital Spread Spectrum Technologies, Inc.; East Ascension Telephone Company, Inc.; Grand Broadcasting Corporation; Unterberg Harris; In-Flight Phone Corp.; Middle Georgia Personal Communications; Montgomery Securities; Motorola Satellite Communications, Inc.; Nevada Bell; Nynex Corporation; Omnipoint Corporation; Pacific Bell; Panhandle Telephone Cooperative, Inc.; Paramount Wireless
(continued...)

broad cross-section of the telecommunications industry, from regional bell operating companies, down to small start-up ventures. With the exception of one private party, those few entities advocating repeal of the pioneer's preference rules all have one common characteristic -- a firmly entrenched presence in the mobile communications industry, and a fear of impending competition. The broad-based support expressed by commentators must be acknowledged by the Commission as a clear indication that the proposed new competitive bidding policies do not negate the need for or the public interest value of the pioneer's preference.

III. ARGUMENTS ADVOCATING SUBSTANTIVE ALTERATION OR REPEAL OF THE PIONEER'S PREFERENCE RULES ARE WITHOUT MERIT AND MUST BE DISREGARDED

By ArrayComm's count, twelve commenting parties support some type of substantive alteration of the current pioneer's preference rules. Only eight commentators support a total repeal of the pioneer's preference. As ArrayComm will show, the supporting arguments advanced by the opponents of the existing

^{10/} (...continued)

Limited Partnership; PCN America; Qualcomm, Inc.; Personal Communications Network Services of New York, Inc.; Reserve Telephone Company, Inc.; Reserve Telecommunications and Computer Corp.; Rockwell International Corporation; Satellite CD Radio, Inc.; Suite 12 Group; Tri-Star Communications, Inc.; United Native American Telecommunications; and the United States Small Business Administration.

pioneer's preference rule structure are without merit and must be disregarded by the Commission.

A. Parties Advocating Substantive Modifications Fail to Refute The Validity Of The Public Policy Foundation For The Existing Pioneer's Preference Policies

The pioneer's preference rules were promulgated to encourage the timely development and introduction of new telecommunications services and technologies in the United States.^{11/}

"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."^{12/}

The central premise to the arguments favoring substantive alteration of the pioneer's preference rules is that the implementation of the Commission's new competitive bidding policies somehow remove the risks and uncertainties innovating parties face in the Commission's rulemaking and licensing

^{11/} See Pioneer's Preference Order, at paras. 18-22.

^{12/} Id., at para. 32, (emphasis added).

processes.^{13/} As demonstrated in ArrayComm's initial comments, this view has absolutely no basis.^{14/} In reality, it appears to be a thinly-veiled attempt by major deep-pocketed companies to further cement their domination in the control of FCC radio licenses. Accordingly, this argument must be disregarded.

The fact of the matter is that spectrum auctions will only serve to increase both the risk and required capital investment that pioneers will have to undertake in order to secure operating licenses in the new services they develop. Id. Parties maintaining that the new competitive bidding policies negate the basis for the pioneer's preference conveniently suppress the fact that it is the innovators who bear the risk and expense of developing the key technologies and initiating and prosecuting the rulemaking proceedings that must be completed before license opportunities can be brought to the Commission's new auction block. Id. Nothing in the provisions of the new competitive bidding policies concerning the treatment of innovators even comes close to taking account of this substantial commitment of resources that occurs long before the bidding floor door opens. Id. For these reasons, the Commission must disregard attempts to

^{13/} See, e.g., Comments of Southwestern Bell, at 3-5; Comments of Bell South Corporation, at 3-7; Comments of Nextel Communications, Inc., at 5-6; Comments of Paging Network, Inc. at 3; Comments of Pagemart, Inc., at 2; Comments of GTE Service Corp., at 2;

^{14/} See Comments of ArrayComm, at 5-9.

justify repeal or substantive alteration of the pioneer's preference rules.

B. The Financial Industry Confirms That the Pioneers Will Be Disadvantaged By The New Auction Process

Contrary to the claims made by parties advocating repeal or substantive alteration of the pioneer's preference, pioneers will realize no advantage in competing for scarce financing necessary to participate in spectrum auctions and to submit winning bids. The competitive bidding policies may unleash new market forces by injecting a new determiner of the value of radio licenses. It does not follow, however, that there is any correlation between the level of pioneering efforts and the ability of a company to attract funding to participate in a spectrum auction. The new market forces being unleashed simply have little if anything to do with innovation and the development of new telecommunications technologies and services. Not surprisingly, the comments in the instant rulemaking fail to establish anything to the contrary. In fact members of the financial community confirm that any alteration of the pioneer's preference rules will have a negative impact on the willingness of investors to fund pioneering telecommunications technology development companies.^{15/}

^{15/} See Comments of Montgomery Securities; Comments of Unterberg Harris.

C. Allegations That The Pioneer's Preference Rule Structure Is "Unworkable" Are Without Merit

Some of the parties advocating repeal of the pioneer's preference rules argue that the existing rule structure is "unworkable". While it may not be perfect, the existing pioneer's preference rule structure is far from unworkable.^{16/}

The principal premises of these arguments are: (1) that the Commission is not well-equipped to determine which innovative technologies and service concepts are deserving of pioneer's preference recognition; and (2) that the existing pioneer's preference rules somehow discourage true innovation and encourage abuse of the pioneer's preference system.^{17/} Neither of these lines of argument have any basis in fact.

The proponents of the view that the Commission is ill-equipped to adjudicate pioneer's preference request imply that the Commission operates in some kind of vacuum, oblivious to the forces of the marketplace. This could not be further from the truth.

The records of the pioneer's preference proceedings initiated to date have been replete with submissions detailing

^{16/} ArrayComm applauds the inclusion of proposals contained in the Notice that are intended to improve the administrative efficiency of the pioneer's preference rules. See Notice, at paras. 13-17; Comments of ArrayComm, at 12-13.

^{17/} See, e.g., Comments of Bell South Corporation, at 7-13; Comments of Paging Network, Inc., at 4-8.

the competitive issues affecting preference requests on file. In issuing the tentative decisions and the two final preference awards, the Commission has made a commendable attempt to take appropriate account of marketplace and other competitive factors.^{18/}

ArrayComm submits that the initiation of spectrum auctions will do nothing to detract from the Commission's ability to provide a forum in which market players can debate the merits of innovative technologies and service concepts. Furthermore, as discussed above, spectrum auctions will not replace this valuable service to the public that has been facilitated through the pioneer's preference rule structure.

With regard to the argument that the existing pioneer's preference rules somehow discourage true innovation and encourage abuse of the licensing preference system, proponents of this view fail to offer any credible supporting examples from pioneer's preference proceedings conducted to date. ArrayComm submits that this is a classic "Red Herring" argument. The Commission has been extremely conservative in handing out tentative preference rewards, and even more cautious in issuing final decisions. Nonetheless, the flow of pioneer's preference requests has been substantial, as has been level of innovation and creativity

^{18/} ArrayComm maintains this view, despite the fact that it opposes the Commission's tentative decision to dismiss the request for pioneer's preference filed by ArrayComm's subsidiary SCI. See supra, at Footnote 3.

underlying many of these proposals. There is simply no credible evidence to suggest that the existing pioneer's preference rules discourage innovation or encourage abuse of the licensing system.

IV. PROPONENTS FAIL TO ESTABLISH ANY LEGAL BASIS FOR COMMISSION IMPOSITION OF CHARGES FOR LICENSES GRANTED THROUGH THE PIONEER'S PREFERENCE PROCESS

Commentors addressing the issue fail to establish any legitimate policy justification or underlying legal basis for Commission imposition of charges for licenses granted through the pioneer's preference process. Contrary to the self-serving views of certain parties to the Narrowband PCS proceeding, if forced to pay an auction-equivalent fee for its license, a pioneer's preference grantee would suffer a significant financial disadvantage, as compared to other entities that would obtain licenses through the auction process.^{19/} Claims to the alternative are simply insupportable. As clearly demonstrated in ArrayComm's initial comments, 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.^{20/} It is also well-settled that pioneer's preference designees are placed on a "separate track"

^{19/} See Comments of ArrayComm, at 12.

^{20/} 1993 Omnibus Reconciliation Act, at 24, Sec. 309(j)(1).

that is not subject to competing applications.^{21/} Absent mutual exclusivity, the Commission has no legal basis to assess charges in issuing licenses, other than statutorily mandated application and user fees.^{22/} Nothing in the comments submitted in this rulemaking proceeding contradicts this conclusion. Accordingly, there is no valid legal basis to justify Commission imposition of charges for licenses obtained through the Pioneer's Preference process.

V. CONCLUSION

ArrayComm respectfully submits that the record in the instant rulemaking proceeding conclusively demonstrates that there is no valid basis at this time for substantive alteration or repeal of the pioneer's preference rules. Additionally, there is no legitimate policy justification for imposition of charges for licenses obtained through the pioneer's preference process. Assuming arguendo that there was a valid policy basis for assessing these charges, the Commission lacks the requisite legal authority to impose them. Accordingly, the Commission should affirm the majority consensus of the commentors in this proceeding by retaining the substantive components of the current

^{21/} See Memorandum Opinion and Order, Gen. Docket No. 90-217 further recon. denied, 8 FCC Rcd 1659 (1993), at paras 2 & 7.

^{22/} The Commission reached this same conclusion in the Notice, at para. 10.

pioneer's preference rule structure. The Commission should also disregard proposals to assess charges for licenses obtained through the pioneer's preference process.

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November 22, 1993

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I, Walter H. Sonnenfeldt, hereby certify that copies of the foregoing "Reply Comments of ArrayComm, Inc." were sent this 22nd day of November, 1993, by first-class United States mail, postage prepaid to:

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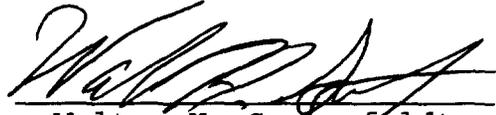
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