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GEN Docket No, 90-314

March 5, 1997

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, DC 20554

RE: QUALCOMM Incorporated, Application for  
a Pioneer's Preference, PP-68

Dear Mr. Caton:

QUALCOMM Incorporated, by its attorneys, hereby responds to the February 25, 1997 request of the Chief, Office of Engineering and Technology ("OET") and the General Counsel that QUALCOMM provide a brief summary of a meeting which took place on January 31, 1997.

The purpose of the meeting was to discuss the steps which the Commission should take in connection with the Court of Appeal's vacation and remand of the Commission's denial of QUALCOMM's PCS pioneer's preference request. See Freeman Engineering Associates v. FCC, Case No. 94-1779 et al. (D.C. Cir. January 7, 1997). Present at the meeting were representatives of QUALCOMM, GTE, OET, the General Counsel and the Wireless Telecommunications Bureau.

The Commission staff asked QUALCOMM what it sought from the Commission after the remand. QUALCOMM responded that its interest was in receiving a preference for its pioneering work in CDMA. QUALCOMM emphasized that a quick award of a preference was important since delay severely prejudices QUALCOMM in the marketplace. QUALCOMM further stated, in response to a

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Commission question, that the Commission should not reopen the proceeding for additional comment for the following reasons:

1. Three years have passed since the Commission denied QUALCOMM's request, which denial the Court has found to be arbitrary and capricious. Further delay only compounds the unfair treatment.
2. Additional comment is unnecessary. The vacation and remand is narrow, involving only the application of the Commission's rules to QUALCOMM's pioneer's preference request. No new evidence about QUALCOMM's CDMA system, no additional facts, are necessary in order for the Commission to develop a consistent interpretation of its own rules.
3. Section 402(h) would seem to weigh against reopening the record. Although the Commission has discretion to reopen a proceeding on remand, the Commission has found that 402(h) operates as a constraint on its ability to do so without leave of the court. See Eastern Carolinas Broadcasting v. FCC, 762 F.2d 95 (D.C. Cir. 1985); Absolutely Great Radio, 63 RR 2d 710 (1987); Cowles Broadcasting, 86 FCC 2d 993, n.127 (1981). Therefore an unrestrained solicitation of new parties and new issues against QUALCOMM would appear to be an abuse of discretion and a continuation of the unfair treatment found by the Court.

QUALCOMM recommended that the Commission issue an Order on Remand reconsidering its interpretation that adaptations are not innovative and considering QUALCOMM's request anew. In that Order the Commission should find that a number of aspects of QUALCOMM's proposal are truly innovative and should grant the preference request.

The Commission staff then asked what MTA QUALCOMM's request sought and what was its status. QUALCOMM informed the staff that it had sought the Miami MTA, that the A Block had been awarded to Sprint for \$131 million, that Sprint was using the QUALCOMM CDMA system, and that the Miami system would be operational very shortly.

QUALCOMM also reminded the staff that the Commission has often recognized that licensees take their licenses subject to pending litigation. See

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Auction of IVDS Licenses, 1997 FCC LEXIS 13, January 6, 1997; CCI RSA Inc., 8 FCC Rcd. 1183 (1993); ASDA Answer Service, 1 FCC Rcd. 753 (1986). See also, Alianza Federal de Mercedes v. FCC, 539 F.2d 732 (D.C. Cir. 1976). In this very case, the Wireless Bureau has come to the same conclusion, finding that the licensees purchased the A Block licenses with full knowledge that those licenses were subject to pending litigation and that the licensees presumably adjusted their bids to reflect the risk. See Wireless Co. L.P., 10 FCC Rcd. 13233 (1995).

The staff asked whether the Commission would be required to refund the auction price to Sprint if it granted QUALCOMM's pioneer's preference. QUALCOMM answered that as a legal matter, it had reached no conclusion. However, as a practical matter, the Commission should make a refund for at least two reasons. First, as an equitable matter, the Treasury should not be paid twice for the same license (once by Sprint and once by QUALCOMM). Second, if the Commission were to rescind the license and not refund the purchase price, it would have a serious chilling effect on future auctions.

In view of this turn in the discussion, the question was raised whether Sprint should be included in the presentation. The Commission staff responded that it did not seem necessary at this time since Sprint was not a party to QUALCOMM's pioneer's preference request.

QUALCOMM then informed the Commission that it had not discussed this matter formally with Sprint, but that it was willing to work with Sprint, and the Commission, to fashion an equitable remedy. Indeed, QUALCOMM stated that it would be pleased to work with the Commission on alternative remedies that did not require rescission of Sprint's Miami license. For example, there were some available C Block BTA licenses that QUALCOMM might consider instead of the A Block in the Miami MTA. In particular, the Phoenix BTA is available and QUALCOMM would be willing to consider a substitution of the Phoenix and other BTAs for the Miami MTA if such a solution would help the Commission avoid embarrassment.

QUALCOMM concluded by emphasizing that its principal interest was in getting its pioneer's preference quickly granted. It would be very happy to work with the Commission towards that end. Reopening the proceeding by an open solicitation of new parties and new issues would be contrary to this goal.

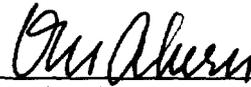
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The meeting ended after approximately one hour.

Respectfully submitted,

QUALCOMM Incorporated



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Its Attorney

cc: See attached  
Certificate of Service

CERTIFICATE OF SERVICE

I, Gail M. Mullen, do hereby certify that a copy of the foregoing Response of QUALCOMM Incorporated, was sent by first class United States mail, postage prepaid, or by hand delivery or facsimile where indicated by an asterisk (\*), this 5th day of March, 1997 to the following:

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Federal Communications Commission  
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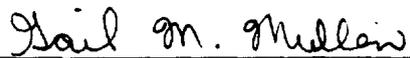
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