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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Dismissal of All Pending Pioneer's Preference Requests	)	CC Docket No. 92-297, RM-7872, PP-22
	)	ET Docket No. ~~94-124~~, RM-8784
	)	GEN Docket No. 90-314, PP-68
	)	GEN Docket No. 90-357, PP-25
	)	IB Docket No. 97-95, RM-8811
	)	RM-7784, PP-23
	)	RM-7912, PP-34 *et. al.*
	)	
Review of the Pioneer's Preference Rules	)	ET Docket No. 93-266
	)	(Docket Terminated)

PETITION FOR RECONSIDERATION
OF QUALCOMM INCORPORATED

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SUMMARY

On September 18, 1997, the Commission dismissed QUALCOMM's pioneer's preference application and terminated the pioneer's preference program. The Commission argued that the dismissal was mandated by language in the 1997 Budget Act that prohibited the FCC from providing preferential treatment to pioneer's preference winners by precluding the filing of mutually exclusive applications after August 5, 1997.

The Commission is wrong. The Budget Act did not mandate dismissal of QUALCOMM's application. First, the Commission's interpretation of the Budget Act violates the rule against retroactive application of the law. Except when expressly ordered by Congress, laws may not be applied retroactively to affect a party's substantive rights. QUALCOMM's right to a fair hearing on the merits of its pioneer's preference request vested in 1994. Absent express Congressional intent to the contrary, the Commission may not apply newly created laws or pioneer's preference rules to QUALCOMM's application.

Second, the FCC's interpretation of the limiting language of Section 309(j)(13) of the Communications Act and the Budget Act is flawed. The FCC's Order implies that the FCC does not have discretion regarding its decision to terminate the entire pioneer's preference program. A plain reading of the applicable language of the Budget Act and Section 309(j)(13) suggests that Congress intended

only to limit the Commission's authority to preclude the filing of mutually exclusive applications, not to terminate the entire program.

Third, the Commission's dismissal of QUALCOMM's applications violates QUALCOMM's right to due process of law. When the Commission created the pioneer's preference program, it created a government benefit that triggers due process protections. Because QUALCOMM satisfied all of the requirements for a pioneer's preference, QUALCOMM had a legitimate claim of entitlement to a pioneer's preference that cannot be dismissed without a fair hearing on the merits of QUALCOMM's application.

Finally, The Commission's actions in the Order violate the notice and comment requirements of the Administrative Procedures Act. The APA requires the Commission to seek notice and comment before altering its rules in a manner that affects the substantive rights or interests of parties before the FCC. The FCC did not seek comment on its decision to terminate the pioneer's preference program or dismiss QUALCOMM's application. Accordingly, the Commission's action is arbitrary and capricious and should be reconsidered.

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PETITION FOR RECONSIDERATION OF QUALCOMM INCORPORATED

QUALCOMM Incorporated ("QUALCOMM"), by its attorneys and pursuant to Section 1.106 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby petitions the Commission for reconsideration of its Order dismissing QUALCOMM's application for a pioneer's preference in the broadband Personal Communications Service ("PCS").[1] The Order maintains that, because of

[1] Dismissal of All Pending Pioneer's Preference Requests, FCC 97-309, 62 Fed. Reg. 48,951 (September 18, 1997) ("Order").

the Budget Act of 1997,[2] the Commission no longer has the authority to act on QUALCOMM's application.

The Commission is wrong. QUALCOMM is entitled to a fair hearing on its pioneer's preference application. The Commission deprived QUALCOMM of this entitlement three years before the passage of the Budget Act when it unfairly denied QUALCOMM's application.[3] The Budget Act does not alter the Commission's obligation to afford QUALCOMM fair consideration of its pioneer's preference application.

The Commission's dismissal is flawed in a number of serious ways. First, the FCC's application of the Budget Act violates the rule against retroactive application of the law. Absent express Congressional intent that a statute be applied retroactively, laws may not be so applied. Second, the FCC's interpretation of the limiting language contained in the Budget Act and Section 309(j)(13) of the Communications Act is flawed. The Order implies that the Commission is without discretion as to whether it must terminate the entire pioneer's preference program. However, the language of the Budget Act suggests that Congress intended to permit continuation of the program, while placing restrictions on the Commission's authority

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[2] Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997) ("Budget Act").

[3] In Freeman Engineering Associates v. FCC, 103 F.3d 169 (D.C. Cir. 1997) ("Freeman"), the Court of Appeals found that the Commission's denial of QUALCOMM's application in 1994 was arbitrary and capricious and remanded to the Commission for further proceedings. On October 4, 1997, QUALCOMM filed a Motion for Enforcement of Mandate with the Court requesting that the Court order the Commission to satisfy the Court's mandate.

to preclude the filing of mutually exclusive applications. The Commission's broad interpretation, without the benefit of notice and comment proceedings, is arbitrary and unsupported by the plain language of the applicable statute. Third, the Commission's action deprives QUALCOMM of its right to due process of law. The pioneer's preference in broadband PCS was a government benefit for which QUALCOMM satisfied all requirements and was denied by wrongful FCC action. The Commission must reverse its decision dismissing QUALCOMM's pioneer's preference application and conduct a fair hearing. Finally, the Commission's dismissal of QUALCOMM's application and termination of the pioneer's preference program violates the notice and comment requirements of the Administrative Procedure Act.

BACKGROUND

I. QUALCOMM'S PIONEER'S PREFERENCE APPLICATION

In 1992, QUALCOMM filed a pioneer's preference application with the FCC seeking a preference for its new Code Division Multiple Access ("CDMA") technology in Broadband PCS.[4] In February, 1994, the FCC granted preferences to American Personal Communications ("APC"), Cox Enterprises, Inc. ("Cox"), and Omnipoint Communications, Inc. ("Omnipoint"). The FCC denied QUALCOMM's application, claiming that QUALCOMM's work was an adaptation of existing

[4] Pioneer's Preference Application of QUALCOMM Incorporated, May 4, 1992, PP-68 in GEN Docket No. 90-314.

technology and that under the FCC's interpretation of its rules, adaptations are not eligible for a preference.[5]

However, the FCC did not apply this interpretation equally to all preference applicants. Omnipoint received a preference even though its work was an adaptation of existing technology. QUALCOMM pointed out this disparity to the FCC in asking for reconsideration of its denial of QUALCOMM's preference request. Nevertheless, the Commission affirmed its denial.[6] QUALCOMM appealed that FCC decision.

On January 7, 1997, United States Circuit Court for the District of Columbia decided Freeman. The Court held for QUALCOMM, finding that the FCC failed to apply its rules evenhandedly. The Court compared the treatment of QUALCOMM with the treatment of Omnipoint and found that the FCC had arbitrarily and capriciously applied a "newly developed (and questionable) interpretation of its pioneer's preference rules only to the merits of QUALCOMM's preference application."[7] The Court vacated the FCC's denial of QUALCOMM's application and remanded QUALCOMM's application to the FCC to remedy the inconsistency.

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[5] Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 FCC Rcd 1337 (1994) ("Third R&O").

[6] Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd 7805 (1994).

[7] Freeman, 103 F.3d at 180.

II. THE PIONEER'S PREFERENCE PROGRAM

In 1991, the FCC established the pioneer's preference program.[8] The purpose of the program was to encourage innovators by giving them a headstart in providing a new service. If an applicant received a preference, the applicant would be effectively guaranteed a license in the new service.

When the pioneer's preference program was initiated, radio licenses were granted by lottery or comparative hearing. In 1993, Congress changed the Commission's licensing process to permit spectrum auctions.[9] Auction authority raised the concern that granting preference winners a license without participation in auctions could affect the Government's ability to recover value from the use of public spectrum.

To address this concern, Congress amended the Communications Act to permit the pioneer's preference winners to receive licenses without participating in the auctions, and to allow the winners to pay a discounted amount for the licenses.[10]

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[8] Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Service, 6 FCC Rcd 3488 (1991), recon. granted in part, 7 FCC Rcd. 1808 (1992), further recon. denied, 8 FCC Rcd 1659 (1993).

[9] Omnibus Budget Reconciliation Act, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 312 (1993) (codified at 47 U.S.C. § 309 (j)(13)).

[10] Uruguay Round Agreements Act, Pub. L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994) (codified at 47 U.S.C. § 309(j)(13)). Congress also established a termination date for the Commission's authority to preclude mutually exclusive applications. That date was September 30, 1998. See 47 U.S.C. § 309(j)(13)(F).

Congress also precluded judicial review of the FCC's grant of the preferences or licenses awarded to APC, Cox, and Omnipoint.

However, Congress knew that QUALCOMM and others planned to appeal the FCC's denial of their preference requests. Accordingly, Congress stated that it did not intend to "affect the rights of persons who have been denied a pioneer's preference".[11] Congress assured the three broadband PCS pioneer's preference winners their licenses at a discounted price while preserving QUALCOMM's ability to seek redress from the courts.

III. THE COMMISSION'S ORDER

QUALCOMM did seek redress and the Freeman Court ordered the FCC to give QUALCOMM the fair hearing to which it was entitled. Unfortunately, rather than obey the Court's mandate, the FCC simply allowed QUALCOMM's pioneer's preference application to languish for seven months. The only action taken by the Commission staff was to seek public comment on the Court's decision. QUALCOMM repeatedly offered to discuss alternative remedies with the Commission and the parties and to take other action to ease the burden on the Commission and speed the

[11] Report to accompany H.R. 5110, 103 Cong. 2nd. House Rept. 103-826.

process of reconsidering QUALCOMM's preference application.[12] The Commission staff did nothing.

However, while QUALCOMM's preference request sat idle, Congress passed the 1997 Budget Act. The Budget Act, among other things, amended the Communications Act to change the deadline for the expiration of the FCC's authority to provide preferential treatment in licensing procedures by precluding the filing of mutually exclusive applications from September 30, 1998, to August 5, 1997.

On September 11, 1997, the FCC released its Order dismissing all pending pioneer's preference applications, including QUALCOMM's.[13] The Commission did not request public comment on the dismissal, as it had when the Freeman Court issued its decision. The FCC claimed that its termination of the pioneer's preference program was "mandated" by Congress and thus found there was good cause to proceed without notice and comment. Contrary to the FCC's assertion, Congress did not "mandate" the dismissal of QUALCOMM's application.

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[12] See, e.g., Letter of Irwin M. Jacobs, Chairman, QUALCOMM Incorporated, to Reed Hundt, Chairman, Federal Communications Commission, May 27, 1997. QUALCOMM has never received an acknowledgement of, much less response to, this request.

[13] Order at n.10.

ARGUMENT

I. THE BUDGET ACT DOES NOT REQUIRE DISMISSAL OF QUALCOMM'S APPLICATION

Prior to the passage of the Budget Act, there was no dispute that QUALCOMM was entitled to a fair hearing on its application for a pioneer's preference. However, the FCC delayed consideration of QUALCOMM's application for seven months after the Freeman decision. Now the FCC claims that it lacks the authority to act on the application. Nothing in the Budget Act justifies that conclusion.

In 1994, Congress amended the Communications Act so that the Commission's authority to reward pioneers by precluding the filing of mutually exclusive applications would expire on September 30, 1998. The 1997 Budget Act only moved expiration of this authority forward from September 30, 1998, to August 5, 1997. Nothing in the Budget Act or its legislative history shows any Congressional intent to affect the rights of those, such as QUALCOMM, who were challenging earlier denials of their applications for pioneer's preference licenses. Indeed, the legislative history shows the opposite.[14]

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[14] See note 11, above. Congressional Report language preserving the rights of persons who had been denied a preference is associated with Section 309(j)(13)(E) of the Uruguay Round Agreement Act amendments to the Communications Act, dealing specifically with the PCS proceeding. It is not reasonable to assume that Congress would intend to preserve those rights in one section and in the very next section, deny them. A more fair reading of the legislative history would interpret Congress' preservation of QUALCOMM's rights both to Section 309(j)(13)(E), concerning the PCS preferences, and to Section 309(j)(13)(F), concerning all preferences.

A. The 1997 Act Cannot Be Applied Retroactively

The FCC's interpretation of the Budget Act violates the rule against retroactive application. Absent clearly expressed Congressional intent that a statute be applied retroactively, the presumption must be that Congress did not intend that changes in the law operate retroactively, that is, to affect applications accepted for filing before the passage of the Act.[15] The Commission's obligation to consider the merits of QUALCOMM's application was mandated by the District of Columbia Court of Appeals long before August 5, 1997. There is no basis in the Budget Act, the Uruguay Round Agreement Act, or their legislative histories for the Commission to ignore that obligation. Absent express language requiring retroactive application, the FCC is wrong to interpret the Budget Act to apply retroactively to QUALCOMM.

The Order states that the Commission cannot consider QUALCOMM's application because it does not have authority to do so. However, the Commission wrongfully denied QUALCOMM's application in 1994, three years before passage of the Budget Act. At the time the Commission erred, it had ample authority to grant QUALCOMM a pioneer's preference. Indeed, had the Commission treated QUALCOMM fairly, QUALCOMM would be even now enjoying the fruits of its preference. The Freeman Court ordered the Commission to correct that error. The Commission is required to consider QUALCOMM's application using the rules and

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[15] Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("The presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic").

law that were in place when the Commission committed its legal errors.[16] The Commission may not apply newly formed pioneer's preference rules or new laws to QUALCOMM in the absence of express Congressional intent that the Commission do so. There is no evidence that Congress intended the Budget Act amendment to apply retroactively to QUALCOMM's claim. The Commission must reconsider its Order.

B. The Budget Act Does Not Prohibit The FCC From Granting Preferences, Only From Precluding Mutually Exclusive Licenses

Even if the Budget Act somehow limits the FCC's authority, the Act does not prohibit the Commission from granting QUALCOMM a pioneer's preference. Whatever limitation the Budget Act places, that limitation relates only to the Commission's power to preclude the filing of mutually exclusive applications. The Budget Act does not prohibit the Commission from giving QUALCOMM a fair hearing or an appropriate preference remedy.

The pioneer's preference program was intended to encourage the development of innovative services. The initial pioneer's preference program was developed by the Commission prior to Congress granting the Commission authority to auction licenses. Before auctions, the Commission granted licenses by lottery or comparative hearing when mutually exclusive applications were filed. Under these circumstances, it was appropriate for the Commission to reward pioneers by

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[16] See e.g. Landgraf, 511 U.S. at 280; Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

prohibiting mutually exclusive applications. Following the grant of auction authority, it became apparent that precluding mutually exclusive applications might prevent the public from recovering the value of licenses granted to pioneers.

To remedy this situation, Congress acted. Congress added to the Communications Act Section 309(j)(13), which provided for the recovery of spectrum value and placed restrictions on the Commission's ability to reward pioneers by precluding the filing of mutually exclusive applications. Section 309(j)(13) does not restrict the Commission's authority to grant pioneer's preferences or to reward pioneers by other means. Section 309(j)(13) also provided that the Commission's authority to give preferential treatment by precluding the filing of mutually exclusive applications was to expire on September 30, 1998. The Budget Act changed that date to August 5, 1997. It did nothing else.

In dismissing QUALCOMM's pioneer's preference request, the Commission did not consider the narrowly tailored language of Section 309(j)(13) limiting the expiration of authority to the preclusion of mutually exclusive applications or the effort and expense incurred by QUALCOMM in developing its pioneering technology and in prosecuting its request. The Commission did not even seek comment on the effect that the Budget Act might have on pending pioneer's preference applicants. Instead, the Commission arbitrarily and capriciously terminated the entire program. The Commission must reverse this action.

A reasoned interpretation of Section 309(j)(13) and the Budget Act would allow the Commission to continue to grant pioneer's preferences and reward

winners. Since Congress' intent in passing this legislation was to ensure that the public recover a portion of the value of any licenses granted to pioneers, it limited the Commission's ability to preclude the filing of mutually exclusive applications. However, there are other benefits that pioneers could receive that would not deprive the public and that are not based on the filing of mutually exclusive applications. For example, absent any specific reward from the Commission, there is value to preference winners in simply being recognized as a "Pioneer". In addition, preference winners could receive benefits such as bidding credits, extended payment terms, rights of first refusal, and a host of other benefits without implicating the language in 309(j)(13) and the Budget Act that might prevent the Commission from precluding the filing of mutually exclusive applications.

II. THE FCC'S DISMISSAL OF QUALCOMM'S PIONEER'S PREFERENCE APPLICATION CONSTITUTES A DENIAL OF DUE PROCESS

QUALCOMM has a protected interest in its application for a pioneer's preference. The application cannot be dismissed without due process of law. The Fifth Amendment's Due Process Clause prohibits the FCC from depriving persons of property without due process of law.[17] Property rights may be created by law or contract.[18]

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[17] Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32, 36 (D.C. Cir. 1997).

[18] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

To establish that it has been deprived of due process, QUALCOMM must show that it had a "legitimate claim of entitlement."[19] QUALCOMM must also show that it was deprived of a protected interest in that entitlement by governmental action.[20]

A. A Pioneer's Preference Is A Property Interest That Triggers Due Process Protections

When the Commission created the pioneer's preference program, it created a property interest. It is well established that government largesse creates property rights, such as "awards of money, benefits, services, contracts, franchises, and licenses," upon which a person can legally depend.[21]

The pioneer's preference program established numerous benefits for awardees. First, pioneer's applications for construction permits or licenses were not subject to mutually exclusive applications.[22] Accordingly, a pioneer was virtually guaranteed a license and a significant headstart in implementing service. In 1993, Congress expanded the scope of the pioneer's preference benefit allowing pioneer's preference winners to pay a discounted amount for their licenses in installments over

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[19] Id. at 576-79.

[20] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

[21] J. Barron, C. Dienes, W. McCormick, M. Redish, Constitutional Law: Principles and Policy at 344. See e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Mathews, 424 U.S. 319 (disability benefits).

[22] 47 C.F.R. § 1.402(c).

five years when the FCC auctioned other licenses in the service. Finally, of course, the pioneer received an FCC license. While it is clear that an FCC licensee's interest in its license "is not a full-fledged, indefeasible property interest . . . neither is it a non-protected interest, defeasible at will."[23]

The sum of these benefits clearly constitutes a very significant protected property interest. In fact, the broadband PCS pioneer's preferences that have been awarded have been worth millions of dollars in discounts, deferred payment plans, and commercial advantages independent from the value of the PCS license. As a qualified applicant for these benefits, QUALCOMM is entitled to due process in the disposition of its application, due process to which it has been once again deprived.[24]

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[23] Orange Park Florida T.V. v. FCC, 811 F.2d 664, 675 n.19 (D.C. Cir. 1987).

[24] The fact that QUALCOMM remains an applicant rather than a recipient of a government benefit does not affect due process analysis. The federal courts (including the D.C. Circuit) have long accorded due process rights (under either the Fifth or Fourteenth Amendments) to applicants for governmental benefits or privileges. See, e.g., Mallette v. Arlington County, 91 F.3d 630, 638 (4th Cir. 1996) ("As far as we can tell, every lower federal court that has considered the issue has rejected the 'application/revocation' distinction"); Nat'l Ass'n of Radiation Survivors v. Derwinski, 994 F.2d 583, 588 (9th Cir. 1993) ("both applicants for and recipients of ... benefits possess a constitutionally protected property interest in those benefits"); Holbrook v. Pitt, 643 F.2d 1261, 1278 n. 35 (7th Cir. 1981) ("Applicants who have met the objective eligibility criteria of a wide variety of governmental programs have been held to be entitled to protection under the due process clause"); Kelly v. Railroad Retirement Bd., 625 F.2d 486, 490 (3d Cir. 1980) ("due process must attach to the process of determining ineligibility, whether at the outset or after receipt of benefits"); Raper v. Lucey, 488 F.2d 748, 751-52 (1st Cir. 1973) (applicant for state driver's license had a constitutionally-protected right to procedural due process in the state application procedures whereby a determination of whether to issue such a license is made); Hornsby v. Allen, 326 F.2d 605, 610-12 (5th Cir. 1964) (applicant for retail liquor license had a constitutional right to a fair hearing); Homer v. Richmond, 292 F.2d 719, 724 (D.C. Cir. 1961) (applicants for radio-telegraph licenses entitled to due process).

B. QUALCOMM Has A Legitimate Claim Of Entitlement To A Pioneer's Preference

1. QUALCOMM Satisfied The Qualifications For A Pioneer's Preference

The Supreme Court recently defined a constitutionally-protected entitlement to include a benefit or right for which a person qualifies and satisfies the prerequisites attached to the right, regardless of whether the right has been acknowledged or adjudicated.[25]

QUALCOMM's pioneer's preference application satisfies the Supreme Court's definition. Unlike the other applications which have been dismissed for failure to comply with processing procedures, QUALCOMM's application met with FCC's standards and was accepted for filing.[26] Moreover, QUALCOMM's application met the pioneer's preference standards contained in the Commission's rules establishing the pioneer's preference program.[27] But for the FCC's arbitrary and disparate application of those standards when compared to Omnipoint, QUALCOMM would have been awarded a preference in 1994, and received the benefits to which QUALCOMM is entitled.

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[25] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477 (1992).

[26] Pioneer's Preference Requests Accepted in GEN Docket No. 90-314, Public Notice, FCC LEXIS 2500 (May 11, 1992). See also, Ranger v. FCC, 294 F.2d 240, 242 (D.C. Cir. 1961) (finding that the right to a hearing was intended to apply to questions that might arise after the Commission had all the required information before it); see also Jem Broadcasting Co. v. FCC, 22 F.3d 320 (D.C. Cir. 1994).

[27] See 47 C.F.R. § 1.402.

2. The FCC Does Not Have Unbridled Discretion

A legitimate claim of entitlement to a governmental benefit is also established when a claimant satisfies the qualifications for the benefit and the granting official or agency lacks the discretion to reject a qualified applicant. In other words, a constitutionally protected property interest is created when a statute or implementing regulations place substantive limitations on official discretion.[28]

In this case, there are substantial substantive limitations on the FCC's discretion to grant or deny QUALCOMM's pioneer's preference application. First, the Commission's discretion is limited by the power of the Court of Appeals for the District of Columbia Circuit to review the FCC's actions under the standards of the Administrative Procedure Act ("APA").[29] The District of Columbia Circuit Court has already held unlawful the FCC denial of QUALCOMM's application and remanded to the FCC to correct that error.

Second, the FCC's discretion to grant or deny pioneer's preference applications is bounded by its own rules. Section 1.402(a) establishes the requirements that an applicant must demonstrate to be eligible for a pioneer's

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[28] Washington Legal Clinic, 107 F.3d at 36; Goldberg v. Kelly, 397 U.S. 254 (1972). Due process rights exist even where a statute or rule gives the agency very broad discretion, so long as there are some limits on the discretion. In Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), the Court found a protected interest in parole release where the Nebraska parole statute "vest[ed] very broad discretion in the [Parole] Board." Id. at 13. Thus, the mandatory nature of the statutory language created the protected interest despite the existence of "very broad discretion" in the decisionmaker.

[29] 5 U.S.C. § 706.

preference. That section also circumscribes the discretionary factors that the Commission will consider in deciding whether to grant an application. These eligibility requirements and limits on discretion are precisely the elements that establish an entitlement that triggers due process protections.

Finally, as a general matter, the Supreme Court has recognized that Congress did not intend "to transfer its legislative power to the unbounded discretion of the [FCC]."[30]

The FCC's discretion to grant or deny preference applications is not unbridled. QUALCOMM is entitled to a government benefit that cannot be denied without due process. Due process, in this case, is a fair hearing.[31]

C. The FCC Has Denied QUALCOMM Due Process

The District of Columbia Court of Appeals has already held unlawful the FCC denial of QUALCOMM's application and remanded to the FCC to correct that error. In the purest sense, the FCC's initial, unlawful denial of QUALCOMM's application constituted denial of due process. Rather than correct that error as mandated by the Freeman Court, the Commission instead, in its Order, summarily

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[30] FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953). See also National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943).

[31] Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) ("fundamental fairness" is the "touchstone of due process"). QUALCOMM has already lived through one unfair hearing. It is now entitled to a fair one. Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (due process demands an opportunity to be heard "at a meaningful time and in a meaningful manner").

dismissed QUALCOMM's application without addressing its merits, which was a flagrant denial of due process.

D. Neither Congress Nor The FCC Can Deny QUALCOMM's Vested Right

QUALCOMM's right to a fair hearing vested long before Congress changed the law relating to pioneer's preferences on a going forward basis. It is well-settled that neither Congress nor the FCC is free retroactively to deny claimants rights that should already have vested.

This point is well illustrated by a line of cases involving attempted retroactive denials of social security benefits. While social security benefit applicants were challenging the denials of the benefits they sought, Congress changed the law to eliminate their entitlement to the benefits at issue. The Courts uniformly held that the claimants were entitled to the benefits that they were wrongfully denied and that accrued from date of their application until the date the entitlement was eliminated.[32]

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[32] See, e.g., Abreu v. Callahan, 1997 U.S. Dist. LEXIS 10676 at *84-85 (S.D.N.Y. July 24, 1997) ("An applicant ... is eligible for and paid benefits not from the date that his or her claim is adjudicated favorably, but from the date the circumstances giving rise to the claim first existed"); Miller v. Callahan, 964 F. Supp. 939, 1997 U.S. Dist. LEXIS 6520 (D. Md. 1997) ("It would work a manifest injustice to apply [the statute] for the first time on this appeal ... because it would retroactively deny a claimant benefits that should have already vested"); Teitelbaum v. Chater, 949 F. Supp. 1206, 1211 (E.D. Pa. 1996) ("if plaintiff was in fact entitled to receive disability payments for her past disability, her right to receive those payments exists independently of the Commissioner's determination of her right to those benefits and vests at the time of her alleged disability"); Santos v. Chater, 942 F. Supp. 57, 64 (D. Mass. 1996) (stating that had the "final, erroneous decision ... been correct, plaintiff would indisputably have received his benefits. The fact that the review process ran past March 1996 should not deprive plaintiff of benefits that a timely, correct decision

Similarly, in Utah Int'l, Inc. v. Andrus,[33] the plaintiff sought a coal lease based on a statute according a preference to those who first discover coal in commercial quantities on federal land, a type of pioneer's or discoverer's preference. While the plaintiff's application was under review, the Secretary of the Interior adopted a new federal coal leasing policy that changed the rules regarding preferences.

The district court was required to decide whether the plaintiff had a vested right to a preferential coal lease under the old standard or had to meet new or additional requirements that took effect after the plaintiff's right vested.[34] The court held that the government was not permitted to deny the issuance of the lease based on a policy that was adopted after the plaintiff had satisfied the old requirements and the plaintiff's rights had vested.[35] The court later noted that "[d]efendants have unlawfully withheld the issuance of plaintiff's lease and the decision to apply subsequent regulations to that lease is not legally tolerable."[36]

The Supreme Court has long "refused to apply an intervening change [in the law] to a pending action where it has concluded that to do so would infringe upon

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would have given him").

[33] 488 F. Supp. 976 (D. Colo. 1980).

[34] Id. at 979.

[35] Id. at 983-84.

[36] Id. at 987.

or deprive a person of a right that had matured."[37] Thus, the FCC's dismissal of QUALCOMM's pioneer's preference application, which occurred after QUALCOMM had established a legitimate claim to that preference, constitutes a denial of due process. The FCC is required to conduct a fair hearing on the merits of QUALCOMM's application.

III. THE COMMISSION'S DISMISSAL ORDER VIOLATES THE APA

While the FCC for good cause shown may act to change its rules without notice and comment, such action is not appropriate when the substantive rights and property interests of FCC applicants are at stake and when the nature of the affected proceedings is primarily adjudicatory in nature.

The APA requires that the Commission allow an opportunity for notice and comment before promulgating rules other than those "of agency organization, procedure, or practice."[38] The APA further requires that "substantive" rules should be made public at least 30 days before their effective date.[39] "A useful articulation of the exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the

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[37] Bradley v. Richmond Sch. Bd., 416 U.S. 696, 720 (1974).

[38] 5 U.S.C. § 553(b). The notice and comment procedures of the APA do not, except when required by statute, apply inter alia "to interpretive rules, general statements of agency policy, or rules of agency organization, procedure, or practice." Id.

[39] 5 U.S.C. § 553(d).

parties present themselves or their viewpoints to the agency."[40] In determining whether a rule is substantive, the FCC must look at its effect on those interests ultimately at stake in the agency proceeding.[41]

In its Order, the FCC has summarily dismissed QUALCOMM's pioneer's preference application without so much as a second glance. The Order is not some minor change in internal procedure. The Order is a major change in the FCC's substantive treatment of pioneers and directly and adversely affects QUALCOMM's interest in government benefits, worth potentially millions of dollars.

Moreover, the FCC's dismissal of QUALCOMM's application and termination of the pioneer's preference program is based on a questionable interpretation of Congressional action. This is precisely the type of substantive action to which the APA's notice and comment requirements are intended to apply. As such, the FCC's action constitutes an arbitrary and capricious violation of the APA and a gross violation of QUALCOMM's due process rights.

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[40] Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980). See also National Association of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982), cert. denied, 459 U.S. 1205 (1983) (APA exemption from the notice and comment requirement does not apply to agency action that has a substantial impact on substantive rights and interests).

[41] See, e.g., Pickus v. United States Board of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974) (parole board guidelines were substantive because they "were the kind calculated to have a substantial effect on the ultimate parole decisions").