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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)

REPLY OF QUALCOMM INCORPORATED

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REPLY OF QUALCOMM INCORPORATED

QUALCOMM Incorporated ("QUALCOMM"), by its attorneys, hereby submits its Reply to the Opposition ("Opposition") jointly filed by PrimeCo Personal Communications, L.P. and Sprint PCS (collectively "Sprint/PrimeCo") in the above-captioned proceeding.

In response to QUALCOMM's Petition, Sprint/PrimeCo argue that: (1) the Budget Act eliminated the FCC's authority to grant QUALCOMM a pioneer's preference, (2) the Commission gave prospective effect to the Budget Act, (3) the Commission did not violate QUALCOMM's right to due process or the requirements of the APA, and (4) the Commission did not reverse itself in deciding that the sunset date contained in Section 309(j)(13)(F) of the Communications Act applied to pioneer's preference requests filed before September 1, 1994.

The Commission should deny the Opposition and grant QUALCOMM's Petition.

I. THE BUDGET ACT DID NOT TERMINATE THE COMMISSION'S AUTHORITY TO GRANT QUALCOMM A PIONEER'S PREFERENCE

Sprint/PrimeCo argue that the Commission is prohibited from extending preferential treatment to pioneers except under certain narrowly drawn circumstances outlined in Section 309(j)(13).[1] According to Sprint/PrimeCo, when the Budget Act became law, the preference program was terminated and the Commission was no longer authorized to grant licenses based upon preferential treatment.[2] Thus, the Communications Act does not provide a basis for providing any preference to QUALCOMM.[3]

This argument presumes that Section 309(j)(13) of the Communications Act is the source of the Commission's authority to grant pioneer's preferences. It is not. The Commission's authority to grant pioneer's preferences stems from Section 7(a) of the Communications Act, which directs the FCC to "encourage the provision of new technologies and services to the public."[4] The Commission also cites as authority Section 303(g) of the Communications Act, which directs the Commission to "encourage the larger and more effective use of radio in the public interest."[5] Section 309(j)(13) merely established standards

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1/ Opposition at 6.

2/ *Id.*

3/ *Id.* at 6-7.

4/ *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488, 3492 (1991) ("*Pioneer's Preference Order*") *(citing 47 U.S.C. § 157(a))*.

5/ *Id.* (citing 47 U.S.C. § 303(g)).

relating to payment for licenses granted to pioneer's preference winners and restrictions on precluding the filing of mutually exclusive applications.[6] The limitations contained in Section 309(j)(13) are confined to the particular preference award of precluding the filing of mutually exclusive applications.

QUALCOMM recognizes that much of the rationale for the original proposal for pioneer's preferences centered on precluding mutually exclusive applications. However, there is nothing in Section 309(j)(13), or any other part of the Communications Act, that prohibits the Commission from awarding a pioneer's preference winner other benefits, particularly in the context of a court-ordered reconsideration. The proper reward for QUALCOMM, should the Commission grant its pioneer's preference request, is a question for another day.[7]

II. THE COMMISSION HAS PREVIOUSLY HELD THAT THE SUNSET DATE DOES NOT APPLY TO APPLICATIONS FILED BEFORE SEPTEMBER 1, 1994.

In its Comments, QUALCOMM alerts the Commission to a prior decision holding that the sunset date in Section 309(j)(13)(F) does not apply to applications filed before September

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[6] In enacting Section 309(j), two years after the Commission initiated the pioneer's preference program, Congress noted, "[t]he Commission has adopted and implemented this policy *sua sponte*." H.R. Rep. No. 103-111 at 541 (1993). It is clear, therefore, that Section 309(j)(13) is not the source of the FCC's authority.

[7] Sprint/PrimeCo argue also that the federal courts have recognized that the pioneer's preference program is "nothing more than 'the preference to file a license application without being subject to competing applications.'" Opposition at 8. This statement is not true. To the contrary, the Court of Appeals has held that a pioneer's preference proceeding is not a licensing proceeding. *Freeman Eng. Associates v. FCC*, 103 F.3d 169, 177 (D.C. Cir. 1997).

1, 1994.[8] Sprint/PrimeCo argue that the Commission has not reversed itself because in each instance cited by QUALCOMM the Commission decided to treat applications filed before September 1, 1994 the same as applications filed after that date.[9] Thus, because the Commission dismissed all pending pioneer's preference requests, including those filed before September 1, 1994, Sprint/PrimeCo believe the *Dismissal Order* is consistent with the *Second R&O*.[10]

Sprint/PrimeCo have confused the holding in the *Second R&O* with the outcome. True, the Commission did ultimately treat applications filed before September 1, 1994, the same as those filed after that date, but not because the law required it to do so. In the *Second R&O*, the Commission held that Section 309(j)(13) required the Commission to maintain the pioneer's preference program until the sunset date for preference requests accepted for filing *after* September 1, 1994.[11] In other words, the sunset date did *not* apply to preference requests accepted for filing *before* September 1, 1994. However, because the Commission thought that applying its new rules only to requests filed after September 1, 1994, would "accord inconsistent treatment" to requests filed before that date, it elected not to distinguish preference requests based on the date they were filed.[12] The reason for the outcome was the

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8/ QUALCOMM Comments at 1-5.

9/ Opposition at 13.

10/ *Id.*

11/ *Review of the Pioneer's Preference Rules, Second Report and Order*, 10 FCC Rcd 4523, 4526 (1995) ("*Second R&O*").

12/ *Id.*

Commission's concerns about "inconsistent treatment," not its holding regarding the sunset provision of Section 309(j)(13).[13/]

III. THE COMMISSION HAS APPLIED THE SUNSET PROVISIONS OF 309(j)(13)(F) AS AMENDED BY THE BUDGET ACT RETROACTIVELY TO QUALCOMM

Sprint/PrimeCo argue that the Commission's *Dismissal Order* is not a retroactive application of Section 309(j)(13)(F) because the decision does not impair rights QUALCOMM previously possessed.[14/] According to Sprint/PrimeCo, "[t]he simple filing of an application with the FCC creates no vested right in the applicant."[15/]

13/ Sprint/PrimeCo argue also that QUALCOMM's Comments are an impermissible supplement. Opposition at 12-13. However, the Commission's rules do not prohibit a party from filing comments on its own petition for reconsideration. Also, QUALCOMM did not raise any new issue in its Comments. In its Petition, QUALCOMM asks the Commission to reconsider its retroactive application of the sunset date contained in Section 309(j)(13)(F). Petition at 9-10. QUALCOMM's Comments merely alert the Commission to prior decisions that are inconsistent with its retroactive application of Section 309(j)(13)(F) in the *Dismissal Order*, an issue properly raised in QUALCOMM's Petition.

14/ Opposition at 9. In their Opposition, Sprint/PrimeCo rely on the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 US 244, 279-80 (1994). The *Landgraf* formulation describes conditions "sufficient" but not "necessary" to invoke the presumption against retroactivity and is not the exclusive definition of presumptively impermissible retroactive legislation. *Hughes Aircraft Company v. United States ex. rel. Schumer*, 138 L.Ed.2d 135, 144, 117 S.Ct. 1871, 65 U.S.L.W. 4447 (1997).

15/ Opposition at 10. Sprint/PrimeCo cite *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (D.C. Cir. 1997); *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519 (D.C. Cir. 1984) *cert. denied*, 469 U.S. 1017 (1984); and *DIRECTV, Inc. v. FCC and United States*, 110 F.3d 816, 826 (D.C. Cir. 1997) to support this proposition. Sprint/PrimeCo's reliance on these cases is misplaced.

Sprint/PrimeCo ignore the facts. At a minimum, QUALCOMM possessed a vested right to a fair hearing when the *Freeman* Court ordered the FCC to conduct further proceedings. The FCC is bound by the *Freeman* mandate and does not have discretion to deny QUALCOMM its right to a fair hearing:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter "*is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case.*" *These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.*[16/]

But for the Commission's retroactive application of the Budget Act, QUALCOMM would continue to have the right to have the Commission review its denial of QUALCOMM's pioneer's preference request, as granted by the *Freeman* Court.

Moreover, the authority cited by Sprint/PrimeCo is not persuasive. For example, in *Chadmoore*, the court found that the Commission's action denying a pending application was not retroactive because no right possessed by the applicant, "vested on the filing of its application."[17/] But QUALCOMM is not a mere FCC applicant, as was Chadmoore.

16/ *City of Cleveland, Ohio v. Federal Power Com'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (emphasis added) (internal citations omitted). *See also, FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940).

17/ 113 F.3d at 241. Chadmoore's application for SMR was filed almost two years *after* Congress amended the Communications Act to change the Commission's SMR/CMRS licensing procedure and seven months *after* the Commission had initiated a rulemaking proceeding to implement the changes. Upon its adoption of revised rules, the Commission dismissed Chadmoore's SMR application because grant of the application would conflict with the Commission's new rules. *Id.* at 239.

QUALCOMM's application was accepted and processed by the Commission, which granted similarly situated preference requests worth millions of dollars while denying QUALCOMM's meritorious request. On appeal, the *Freeman* Court ordered the FCC to correct its inconsistent treatment of QUALCOMM. All of these actions occurred well before Congress enacted the Budget Act.

Sprint/PrimeCo's reliance on *Multi-State* is also misplaced. *Multi-State* was not a retroactivity case. In *Multi-State*, there was no doubt that Congress intended the reach of the subject legislation to apply to Multi-State's application. Accordingly, there was no question of whether the applicable statute could be applied to Multi-State; the only issue was whether that application violated Multi-State's right to due process.[18/]

DIRECTV also is distinguishable from the present case. In *DIRECTV*, the Commission had stated originally that if it ever reclaimed certain Direct Broadcast Satellite Service ("DBS") channels it would distribute them pro rata among existing permittees. Years later, when the Commission did reclaim certain DBS channels, it distributed them to new permittees using its newly-acquired auction.

[18/] The *Multi-State* court found that Multi-State did not have a *constitutional* right to a hearing because Multi-State's hearing right was statutory, rather than constitutional, and hence subject to change by Congressional action. *MultiState*, 728 F.2d at 1525. In other words, the filing of an application did create a vested right, but not a constitutionally protected right. The *Landgraf* test requires only interference with a right previously possessed by a party. *Landgraf* does not require that the right at issue be constitutionally vested. In any event, QUALCOMM's right to a fair hearing on its pioneer's preference request is constitutionally vested.

The *DIRECTV* court rejected the permittees' claim that the Commission's decision to auction the channels was an impermissible retroactive action.[19] The court explained that, at the time the Commission said it would allocate reclaimed DBS channels among existing permittees, there was no guarantee that any such channels would ever be reclaimed.[20] Accordingly, no right to additional DBS channels had vested in the existing permittees.[21]

QUALCOMM had much more than an expectation, it had a vested right to have its preference request reconsidered by the Commission in accordance with the standard articulated in the *Freeman* decision.[22]

IV. THE COMMISSION'S DISMISSAL VIOLATED QUALCOMM'S DUE PROCESS RIGHTS AND THE REQUIREMENTS OF THE APA

Sprint/PrimeCo claim that the Budget Act terminated the Commission's pioneer's preference program effective August 5, 1997.[23] Thus, insofar as there was no longer a pioneer's preference program, QUALCOMM could have no entitlement to a benefit and no right to due process or APA protections.[24]

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[19] *DIRECTV*, 110 F.3d at 826.

[20] *Id.*

[21] *Id.*

[22] *See* page 6, above.

[23] Opposition at 11.

[24] *Id.*

This argument rests upon a flawed foundation. First, Section 309(j)(13), as amended by the Budget Act, does not prohibit the Commission from granting pioneer's preferences; it merely restricts the Commission's authority to preclude the filing of mutually exclusive applications. Even if the Budget Act does prohibit the Commission from granting pioneer's preferences in ordinary circumstances, that result does not extinguish QUALCOMM's right to due process.

Moreover, QUALCOMM has a constitutionally-vested property right in a pioneer's preference. Like it or not, when the Commission created the pioneer's preference program, it created a property interest. The broadband PCS pioneer's preferences that have been awarded are worth millions of dollars in discounts, deferred payment plans, and commercial advantages independent of 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.[25/]

Cases holding that an applicant for an FCC license does not have a constitutionally-protected property interest are not applicable to pioneer's preference applications.[26/] The rulings in these cases stem from Section 301 of the Communications Act, which limits the interest that can be held in an FCC license.[27/] Because of this limitation, *an applicant for a*

25/ *See* Petition at 13-17.

26/ *See Chadmoore*, 113 F.3d 235; *Multi-State*, 728 F.2d at 1525-26.

27/ *See Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 674 (a licensee's interest in an FCC license is not a full-fledged, indefeasible property interest).

FCC license does not necessarily have a property interest sufficient to trigger the due process clause, and the applicant's right to a hearing is purely statutory.[28]

But QUALCOMM did not apply for a license; it applied for a pioneer's preference. An application for a pioneer's preference is not an application for an FCC license.[29] The pioneer's preference *does* involve a protected property interest. QUALCOMM, having met the Commission's basic procedural and substantive requirements for a pioneer's preference gained a legitimate claim of entitlement that triggers due process protections. QUALCOMM therefore is entitled to due process, which in this case is a fair hearing.

Respectfully submitted,

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Dated: December 3, 1997

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[28] *Multi-State*, 728 F.2d at 1525

[29] *See* note 7, above.

CERTIFICATE OF SERVICE

I, Susanne M. Gyldenvand, certify that on this 3rd day of December, 1997, I caused copies of the foregoing Reply of QUALCOMM Incorporated to be served by hand delivery or United States mail, first-class postage prepaid, on the parties on the attached service list.

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