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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

December 21, 1999

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation
WT Docket No. 99-168, Service Rules for the 746-764 MHz and 776-794
MHz Bands

Dear Ms. Salas:

In accordance with Section 1.1206(b)(2) of the Commission's Rules, notice is hereby given of an *ex parte* meeting regarding the above-captioned proceeding. On Friday, December 17, 1999, representatives of QUALCOMM Incorporated, Kevin Kelley, Jennifer McCarthy, Jonas Neihardt and the undersigned, met with representatives of the Federal Communications Commission to discuss the Court's mandate in *QUALCOMM Incorporated v. FCC*, 181 F.2d 1370 (D.C. Cir. 1999). Present on behalf of the Commission were Ari Fitzgerald, Office of the Chairman; Christopher Wright and James Carr, Office of General Counsel; Julius Knapp, Office of Engineering and Technology; and Kathleen O'Brien Ham, Wireless Telecommunications Bureau.

At the meeting, QUALCOMM demonstrated its wireless High Data Rate ("HDR") technology and discussed the applicability of that technology for commercial licensing in the 746-764 MHz and 776-794 MHz bands. QUALCOMM also advocated the suitability of spectrum in those bands for satisfying the obligations of the Commission under the Court's order

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in *QUALCOMM v. FCC*. The attached materials were provided to the Commission representatives.

Respectfully submitted,



Veronica M. Ahern

Enclosures

cc: Ari Fitzgerald
Christopher Wright
James Carr
Julius Knapp
Kathleen O'Brien Ham

QUALCOMM and the FCC's Pioneer's Preference Program

1991 - The FCC instituted its pioneer's preference program to encourage the development of telecommunications services and technologies.

May 1992 - QUALCOMM filed a request for pioneer's preference in FCC's Personal Communications Services (PCS) proceeding. QUALCOMM based its preference request on its development of code division multiple access (CDMA) technology for PCS.

October 1992 - QUALCOMM delivered its first CDMA PCS system to American Personal Communications (APC) for experimental operation in Washington, DC.

November 1992 - The FCC tentatively awarded PCS pioneers preferences to APC, Cox and Omnipoint. It denied QUALCOMM's request based on its erroneous finding that QUALCOMM had not developed 1800 MHz PCS equipment. QUALCOMM filed comments in which it pointed out the FCC's error, noting that in granting APC's request the FCC had acknowledged that APC had used QUALCOMM's 1800 MHz PCS equipment to help it secure its preference.

December 1993 - The FCC, without acknowledging its earlier error, again denied QUALCOMM's preference request. The FCC concluded that QUALCOMM had developed its technology for 800 MHz cellular and not for PCS. In this Order, the FCC finalized the grants to APC, Cox and Omnipoint by awarding them the rights to PCS licenses in Washington, New York and Los Angeles respectively.

March 1994 - QUALCOMM filed a Petition for Reconsideration of the FCC's Order.

December 1994 - The President signed the GATT legislation, which provided that the three preferences winners should make discounted payments for their licenses and that the license grants were not subject to administrative or judicial review. The House Report on the GATT legislation stated that the intent of the legislation was not to "affect the rights of persons who have been denied a pioneer's preference."

The FCC denied QUALCOMM's Petition. The FCC concluded, for the first time, that QUALCOMM did not deserve a preference because its CDMA technology was not "developed specifically" for PCS.

January 1995 - QUALCOMM filed an appeal of the FCC's Order with the United States Court of Appeals.

January 1997 - The Court vacated the FCC's denial of QUALCOMM's request and remanded the case for further proceedings. The Court found that the FCC had denied QUALCOMM's preference using "a newly developed (and questionable) interpretation of its pioneer's preference rules." In the same order, the Court denied all other remaining (pending) PCS preference appeals.

August 1997 - The FCC had not acted on the Court's remand order as of August 5, 1997 when the President signed into law the Balanced Budget Act of 1997, which included a provision that changed the termination date of the FCC's authority to grant licenses pursuant to preferential treatment by precluding the filing of mutually exclusive applications.

September 1997 - On September 4, 1997, the FCC announced that it had dismissed all pending pioneer's preference applications in light of the Balanced Budget Act sunset date. The FCC claimed that the legislation deprived it of the authority to grant any preferences, despite ruling in 1995 that the GATT legislation only applied to preference applications filed after September 1, 1994.

October 1997 – QUALCOMM filed a petition for reconsideration of the FCC's dismissal of its pending pioneer's preference application, arguing that the Balanced Budget Act did not apply to its application.

April 1998 – The FCC denied QUALCOMM's petition for reconsideration of the decision to dismiss QUALCOMM's pioneer's preference application.

May 1998 – QUALCOMM filed an appeal of the FCC's dismissal of its pioneer's preference application with the U.S. Court of Appeals for the D.C. Circuit.

July 1999 – The U.S. Court of Appeals for the D.C. Circuit overturned the FCC's dismissal of QUALCOMM's application for a pioneer's preference and ordered the FCC “forthwith to grant a pioneer's preference to QUALCOMM and to take prompt action to identify a suitable spectrum and award QUALCOMM the license for it.”

August 1999 – The FCC granted QUALCOMM a pioneer's preference.

August-December 1999 – QUALCOMM and the FCC staff met four on four separate occasions to determine what spectrum is suitable and available to meet the Court's mandate. To this date, the FCC staff has made no offer of any spectrum.

WHAT IS SUITABLE SPECTRUM?

In *QUALCOMM Incorporated v. FCC*, the DC Circuit Court of Appeals ordered the FCC to "identify a suitable spectrum and award QUALCOMM the license for it." What did the Court mean when it said "suitable spectrum"?

The Court refers to QUALCOMM's award several times:

1. The Court described QUALCOMM's willingness "to discuss substitution of presently unlicensed service areas of *comparable significance* [to the MTA in South Florida]."
2. The Court ordered the FCC to award an "*appropriate* license to QUALCOMM, *commensurate with the spectrum it had requested in its application.*"
3. The Court noted QUALCOMM's willingness to accept relief "*comparable to the original license sought in its preference application.*"

In each case, the Court refers to QUALCOMM's original application for South Florida as the touchstone for "suitability". Suitable spectrum must be "comparable" or "commensurate" with the original Miami request.

The original Miami request was for a 30 MHz block of spectrum in a new service, one where a pioneer could bring its new technology to the market place before other competing systems. The Miami application was for spectrum that was, or would shortly be, available, so that a pioneer could put its technology to immediate use. These two criteria are paramount in determining whether the spectrum the FCC substitutes for the Miami MTA is in fact suitable:

1. Can it be awarded promptly?
2. Is it spectrum that affords QUALCOMM the opportunity to exploit its pioneering technology in a new service?

It appears that Channels 60-69 spectrum most closely meets these requirements and satisfies the Court Order that the Commission take "prompt action".

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1 Pamphlet.