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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
QUALCOMM INCORPORATED)
)
Petition for Declaratory Ruling)
Giving Effect to the Mandate)
of the District of Columbia)
Circuit Court of Appeals)
)
Service Rules for the 746-764 and)
776-794 MHz Bands and Revisions)
to Part 27 of the Commission's Rules)

File No.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT Docket No. 99-168

PETITION FOR DECLARATORY RULING

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Dated January 28, 2000

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SUMMARY

The Commission is required by the Court of Appeals decision in *QUALCOMM v. FCC* to identify “suitable spectrum” and award QUALCOMM the license for it. In this Petition, QUALCOMM requests that the Commission declare that frequencies identified in the recent *Channel 60-69 Proceeding*, 752-762 MHz and 782-792 MHz (Block D) in Economic Area Grouping 3, is that spectrum.

The Court ordered the Commission to find spectrum comparable to the spectrum which QUALCOMM should have been awarded in the PCS Pioneer’s Preference Proceeding (the Southern Florida Major Trading Area) and to take “prompt action” to grant QUALCOMM the license for that spectrum. After six months, the Commission has not satisfied the Court’s mandate. It is therefore necessary for QUALCOMM to take steps to insure that it is not once again deprived of the opportunity to deploy innovative technology.

Block D in EAG 3 is suitable spectrum because it is comparable to QUALCOMM’s original selection in value (as supported by a valuation made by PriceWaterhouseCoopers) and in essential characteristics, such as availability. No other suitable spectrum will become available in a time frame that will satisfy the Court’s mandate or QUALCOMM’s desire to use the spectrum to introduce its new Code Division Multiple Access system for wireless high speed Internet access, called HDR.

Therefore, consistent with Section 309 (j)(13)(E)(ii) of the Communications Act, QUALCOMM requests leave to withdraw its pending preference request for the Southern Florida Major Trading Area and substitutes Block D of EAG 3 therefor.

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PETITION FOR DECLARATORY RULING

I. INTRODUCTION

QUALCOMM Incorporated (“QUALCOMM”), by its attorneys, hereby submits this Petition for Declaratory Ruling (“Petition”) pursuant to Section 1.2 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”), 47 C.F.R. §1.2. In this Petition QUALCOMM requests that the Commission satisfy the obligation it has pursuant to Section 402(h) of the Communications Act of 1934, as amended, 47 U.S.C. §402(h), and the decision of the District of Columbia Court of Appeals in *QUALCOMM v. FCC*.¹ That Court directed the Commission to take prompt action to identify “suitable spectrum” and award QUALCOMM the license for it.

The spectrum identified in the above-captioned *Channel 60-69 Proceeding* is the only suitable spectrum available to be awarded to QUALCOMM “forthwith,” as required

¹ *QUALCOMM Incorporated v. FCC*, 181 F.3d 1370 (D.C. Cir. 1999) (“*QUALCOMM v. FCC*”).

by Section 402(h) of the Communications Act.² Therefore, QUALCOMM asks that the Commission declare that the Block D license in Economic Area Grouping 3 (“EAG 3”) is the suitable spectrum required by the Court to be awarded to QUALCOMM and that the Commission award QUALCOMM the Block D license in EAG 3, covering the Southeastern United States.³

II. BACKGROUND

A. The Pioneer’s Preference Proceeding

The history underlying the Commission’s obligation to QUALCOMM is a long and sorry one, involving almost seven years of controversy and litigation. It stems from the Commission’s 1991 Pioneer’s Preference Proceeding in which the Commission sought to reduce the risk and uncertainty pioneering parties faced in then existing rule making and licensing procedures. It also was intended to encourage the development of new services and technologies.⁴ In 1992, QUALCOMM applied for a preference in the Personal Communications Service (“PCS”) proceeding, basing its application on its development of Code Division Multiple Access (“CDMA”) technology for PCS.⁵

In November 1992, the FCC tentatively denied QUALCOMM’s pioneer’s preference request, and granted the requests of three other entities, American Personal Communications (“APC”), Cox Enterprises, Inc. (“Cox”) and Omnipoint

² *Service Rules for the 746-764 and 776-794 MHz Bands and Revisions to Part 27 of the Commission’s Rules*, WT Docket No. 99-168, FCC 00-5, released January 7, 2000 (“*Channel 60-69 Proceeding*”).

³ The Block D license is the 20 MHz license using 752-762 MHz and 782-792 MHz.

⁴ *See Establishment of Procedures to Provide a Preference to Applicants Proposing an Application for New Services*, 6 FCC Rcd 3488, 3492 (1991) (“*Pioneer’s Preference Order*”).

⁵ QUALCOMM Incorporated, Request for a Pioneer’s Preference for a Personal Communications Services System, Gen. Docket No. 90-314, May 4, 1992.

Communications, Inc. (“Omnipoint”). QUALCOMM protested, pointing out errors made by the Commission, but to no avail. In December 1993, the Commission finalized its tentative decision declaring APC, Cox and Omnipoint to be pioneers, and denying QUALCOMM’s request.⁶ QUALCOMM sought reconsideration, but again the Commission rebuffed QUALCOMM’s efforts.⁷

B. The *Freeman* Case

In 1995, QUALCOMM appealed to the U.S. Court of Appeals for the District of Columbia Circuit. Two years later – almost five years after QUALCOMM’s request for a preference – QUALCOMM was vindicated. The D.C. Circuit vacated the Commission’s denial of QUALCOMM’s request because the Court found that the FCC had acted arbitrarily by treating QUALCOMM and Omnipoint inconsistently, a fact QUALCOMM had been pointing out for almost 5 years. The Court ordered the Commission to “remedy the inconsistency.”⁸

As a practical and legal matter, the only way the Commission could remedy its inconsistent treatment of QUALCOMM would be to grant it a Pioneer’s Preference and award it a license.⁹ However, the Commission did not act quickly to satisfy the Court’s mandate, despite QUALCOMM’s efforts to gain prompt agency action. Instead, the Commission opened the remand proceeding for comment and specifically made Sprint

⁶ *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 9 FCC Rcd 1337 (1994).

⁷ *Amendment of the Commission’s Rules to Establish New Personal Communications Services*, 9 FCC Rcd 7805 (1994).

⁸ *Freeman Engineering Associates v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) (“*Freeman*”).

⁹ Congress had prohibited further agency or judicial review of the preference and license award to Omnipoint and the other two pioneers. Uruguay Round Agreements Act, Pub. L. No. 103-465 § 801, 108 Stat. 4809, 5051 (“GATT”) (codified at 47 U.S.C. § 309(j)(13)(E)(i)).

Spectrum L.P. (“Sprint”) and PrimeCo Personal Communications, L.P. (“PrimeCo”) parties to the proceeding. Sprint and PrimeCo had an interest in the proceeding, according to the Commission, because they were licensees of the two 30 MHz licenses in the Southern Florida Major Trading Area (“Miami MTA”), the MTA identified by QUALCOMM as its preferred service area in its original 1992 Pioneer’s Preference application.

QUALCOMM objected to the creation of a new proceeding and the inclusion of Sprint and PrimeCo, first, because of the delay this would cause in granting QUALCOMM a license. The PCS market was developing rapidly and QUALCOMM had already lost the competitive “headstart” other pioneers had enjoyed. Conducting a proceeding to consider the *Freeman* remand was, in QUALCOMM’s view, a deliberate effort to forestall finding a remedy for the inconsistent treatment the Commission had accorded QUALCOMM five years earlier.¹⁰

The second reason QUALCOMM objected to the proceeding was that it had already indicated its willingness to forego the Miami MTA and to work with the Commission to identify an alternative remedy.¹¹ The creation of a restricted proceeding made this process difficult, if not impossible.

Months passed with little discernible Commission action. QUALCOMM indicated its willingness to discuss “substitution of presently unlicensed service areas of

¹⁰ Delay was, of course, also inconsistent with Section 402(h) of the Communications Act which requires the Commission to give effect to a remand “forthwith” and to do so on the basis of the proceedings already had and the record upon which the appeal was heard and determined. *See* 47 U.S.C. § 402(h).

¹¹ QUALCOMM mentioned award of the Phoenix license, which at that point had been returned to the Commission as a result of a payment default.

comparable significance [to the Miami MTA].”¹² QUALCOMM continued to seek prompt action, all the while aware of continuing prejudice in the marketplace because of the Commission’s delay.

C. The Balanced Budget Act

Suddenly, in September 1997, the Commission acted, not to grant QUALCOMM a preference and award a license, but to dismiss its preference request!¹³ The Commission maintained that the Balanced Budget Act of 1997 withdrew the Commission’s authority to grant any preferences because it advanced the sunset of the Pioneer’s Preference program from September 30, 1998 to August 5, 1997.¹⁴

QUALCOMM requested, and was denied, reconsideration.¹⁵ Once again, almost seven years after QUALCOMM had filed its original Pioneer’s Preference request, it sought help from the D.C. Circuit Court of Appeals.

D. The *QUALCOMM v. FCC* Case

On July 23, 1999, the D.C. Circuit again addressed the Commission’s failure to award QUALCOMM a license for its pioneering work in CDMA and again vindicated QUALCOMM. The Court found that the Commission’s sole discretion on remand after *Freeman* had been to fashion an appropriate remedy for its unfair treatment of QUALCOMM.

¹² Letter of Irwin M. Jacobs, Chairman of QUALCOMM, to Reed M. Hundt, May 27, 1997.

¹³ *Dismissal of All Pending Pioneer’s Preference Requests*, 12 FCC Rcd 14006 (1997).

¹⁴ See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1)(F), 111 Stat. 251 (1997) (amending 47 U.S.C. § 309(j)(13)(F)) (“Balanced Budget Act”).

¹⁵ *Dismissal of All Pending Pioneer’s Preference Requests*, 13 FCC Rcd 11485 (1998).

The Court recognized that finding an appropriate remedy would be difficult. At oral argument the Court, sternly addressing counsel for the Commission, had expressed its frustration with the Commission's position, but offered sympathy on the difficulty of finding a remedy:

THE COURT: YOU FOLKS NEVER THINK YOU LOSE. YOU DO LOSE SOME CASES. NOW, THERE IS A DIFFICULT PROBLEM HERE AS TO WHETHER OR NOT A REMEDY CAN BE FOUND. I'M SYMPATHETIC ON THAT ONE. THATS HARD. BUT, I MEAN, I'M QUITE ASTONISHED THAT YOU FOLKS ACTUALLY WENT BACK AND SAID, "WELL, WE DIDN'T REALLY LOSE IT. LET'S KIND OF CLEAN UP THE LANGUAGE." THAT WAS A FLAT LOSS.¹⁶

Notwithstanding the difficulty of finding an appropriate remedy, that is exactly what the Court told the FCC to do. In language remarkable for its unusual precision, the Court ordered the Commission:

"forthwith" to grant QUALCOMM a pioneer's preference and to identify and *award an appropriate license to it commensurate with the spectrum it had requested in its application.*¹⁷

The Court also gave its views on how long the Commission had to provide QUALCOMM with "the fruits of its victory in court."¹⁸ Throughout the opinion, the Court relies on the language of 402(h), requiring Commission action "forthwith," meaning immediately. The Court implicitly criticized the Commission's reopening of the proceeding after *Freeman* because of the delay it would cause and recognized the prejudice delay caused QUALCOMM in the marketplace. Clearly, the Court's opinion in

¹⁶ Transcript of Proceedings, *QUALCOMM v. FCC*, No. 98-1246, April 22, 1999, p. 21.

¹⁷ *QUALCOMM v. FCC* at 1376 (emphasis added).

¹⁸ *QUALCOMM v. FCC* at 1378.

QUALCOMM v. FCC signals that it will not tolerate an FCC decision that keeps QUALCOMM out of the marketplace for years.

QUALCOMM had already missed a significant business opportunity because of its unfair treatment at the hands of the Commission. The Court in *QUALCOMM v. FCC* clearly did not intend for it to miss another.

E. Post Remand Discussions

After *QUALCOMM v. FCC*, the Commission found itself under a strongly-worded Court Order to “take prompt action to identify a suitable spectrum and award QUALCOMM the license for it”.¹⁹ The Commission did take prompt action in August 1999 when it granted QUALCOMM a pioneer’s preference – six years and nine months after it first denied a preference to QUALCOMM. But there has been little progress toward identifying “suitable spectrum” and awarding the license for it. QUALCOMM has met with the Commission staff five times since August 1999 and, while various possibilities have been raised, including the spectrum to be awarded in the *Channel 60-69 Proceeding*, no specific offer has been made by the Commission.

The *QUALCOMM v. FCC* Court scolded the Commission for failing to take action “forthwith” after the *Freeman* case. In that case, seven months had passed between the Court’s decision in *Freeman* and the passage of the Balanced Budget Act. In this case, six months have passed since the Court’s decision in *QUALCOMM v. FCC* and there is still no “prompt action”. If QUALCOMM waits for the Commission to follow the Court’s mandate, it may once again miss the chance to put pioneering technology into the marketplace – exactly the purpose of the Pioneer’s Preference Proceeding.

¹⁹ *Id. at 1381.*

F. The *Channel 60-69 Proceeding*

Among the possible spectrum awards discussed by QUALCOMM and the Commission in the past six months has been some portion of the 36 MHz that has been reallocated from the broadcasting service by Congress.²⁰ In the *Channel 60-69 Proceeding*, released three weeks ago, the Commission decided that 30 MHz of this spectrum should be used to create two license bands – one of 20 MHz and one of 10 MHz – that

address the increasing demand for broadband wireless access capacity, including both fixed and mobile next generation applications.²¹

The Commission also established six Economic Area Groupings (“EAG”) and proposed to auction 20 MHz and 10 MHz licenses in each of these large service areas. The auction is currently scheduled to begin on May 10, 2000.

It is clear to QUALCOMM that these unencumbered licenses are the most comparable to the original PCS MTA licenses that are likely to become available within any reasonable time frame. Unless the Commission sets aside one of these licenses for award to QUALCOMM, it will fail to satisfy the Court’s mandate.

Therefore, QUALCOMM respectfully requests that the Commission rule that the Block D license in EAG 3 is “suitable spectrum” satisfying the Court’s mandate in *QUALCOMM v. FCC*, and that the Commission award QUALCOMM the license for it.

²⁰ Balanced Budget Act, Section 3004 (codified at 47 U.S.C. § 337(a)).

²¹ *Channel 60-69 Proceeding*, ¶ 3.

III. PETITION: THE COMMISSION SHOULD DECLARE THE BLOCK D LICENSE IN EAG 3 TO BE SUITABLE SPECTRUM FOR AWARD TO QUALCOMM

A. What is Suitable Spectrum?

1. The Court's Guidance

The Court in *QUALCOMM v. FCC* provided the Commission with some guidance as to what spectrum would be suitable for award to QUALCOMM. The Court ordered the FCC to “award an appropriate license . . . commensurate with the spectrum it had requested in its application.”²² The Court mentioned QUALCOMM’s willingness “to accept relief comparable to the original license sought in its preference application.”²³

The touchstone, then, for determining whether spectrum is “suitable” is the original request for the Miami license. To satisfy the Court’s mandate, the Commission must first consider the value and characteristics of the Miami MTA in order to find a substitute that is “commensurate” and “comparable”.

2. Value of the Miami License

QUALCOMM has retained PricewaterhouseCoopers LLP (“PWC”) to estimate the present (December 31, 1999) value of the Miami PCS License that QUALCOMM would have been awarded in 1994, but for the Commission’s unfair and inconsistent treatment. PWC estimates that the fair market value of the Miami license is \$186,000,000.²⁴

²² *QUALCOMM v. FCC* at 1376.

²³ *Id.*

²⁴ See, *Fair Market Valuation Report*, January 18, 2000, p. 40 (Attachment A). Sprint and PrimeCo paid an average price of \$128,870,000 when they purchased their Miami licenses in 1995.

QUALCOMM believes it is critical to remember that this discussion relates to the value of the bare pioneer's license. PWC did not consider other valuable rights that QUALCOMM would have received had the Commission awarded it the Miami license in 1994.

Most important, QUALCOMM would have been able to use the Miami licenses to showcase its CDMA technology. At that time, CDMA had not been commercially deployed anywhere in the world and there were some who claimed that it would not work in a real world environment. Because QUALCOMM was not able to deploy its technology itself, it had to convince other operators to take a chance on it.

In addition, QUALCOMM believes that if it had been able to introduce its technology earlier, it would have led to the early adoption of a single worldwide CDMA-based 3rd generation wireless standard.

3. Characteristics of the Miami License

QUALCOMM's original request for the Miami MTA was for a 30 MHz Block of spectrum in a service area covering all of southern Florida. This license would allow QUALCOMM to provide Personal Communications Service ("PCS"), a family of mobile or portable wireless services. The particular advantage of a pioneer's license, in addition to the fact that pioneers were not required to compete for their licenses, was that the pioneer could be "first to the market." That gave a boost to the pioneers' business plans and provided a very important competitive edge. For example, the pioneer winning the Washington/Baltimore MTA, American Personal Communications, teamed with Sprint Spectrum L.P. to launch the first PCS offering in November 1995. It was over 18 months before its first PCS competitor, AT&T Wireless, entered the market.

Further, the QUALCOMM Miami application was for spectrum that was available to deploy the next generation of wireless technology, which at that time was PCS. That spectrum could give a pioneer a chance to showcase its pioneering wireless technology. The pioneer was not merely another service provider. Rather, it was an innovator, bringing to the public a pioneering technology in a new service. As described above, there are numerous advantages to being the pioneer in these markets.

Finally, the Miami license was unencumbered, except for some microwave licensees who recognized the need to relocate. It was not part of a complex legal proceeding, the outcome of which was unknown, and the fact of which could dishearten the most courageous financial backer.

B. EAG 3 is Suitable Spectrum

The Block D license in EAG 3 is “suitable spectrum” for award to QUALCOMM. First, with regard to value, the Congressional Budget Office has estimated the value of the full 36 MHz of spectrum in the *Channel 60-69 Proceeding* at \$2.1 billion.²⁵ Thus, the estimated value per unit population of a 20 MHz license is \$4.62 $[(\$2,100,000,000/252,546,667) \times (20/36)]$. The average population of an EAG is 42,091,111, making the average value of a Block D EAG \$194,460,933. Consequently, the average value of an EAG is comparable to the present value of the Miami MTA, \$186,000,000.

Further, the estimated value of the Block D EAG 3 is considerably less than the average value of the licenses given to the three PCS pioneers. The average value of the

²⁵ CBO Memorandum, “*Budgetary Implications of the Balanced Budget Act of 1997*,” December 1997, Table 4, p. 12 (The CBO did not rescure the auction when the date by which funds must be deposited in the Treasury was changed.)

PCS preference licenses was \$382,661,000 (New York - \$442,712,000; Los Angeles - \$493,500,000; Washington - \$211,711,000).²⁶ Thus, the average value of a preference license is almost twice the average value of a Block D EAG license.

Second, with regard to characteristics, award of the Block D EAG 3 license will allow QUALCOMM the opportunity to be “first to the market” with the advanced wireless services contemplated in the *Channel 60-69 Proceeding*. This was an extremely important competitive advantage for the PCS pioneers. If one asks whether a PCS license, awarded now, could be considered comparable to the Miami license, awarded in 1994, the answer is clearly no. The principle difference lies in the fact that at least two – and possibly more – companies are likely to be providing PCS in the metropolitan areas of the market. It is also likely that two additional companies provide digital cellular service, for which PCS is often considered a substitute. The years that have passed since QUALCOMM should have been awarded the Miami MTA have diminished the value of any PCS license to the point where the award of a 30 MHz block MTA could not be considered comparable to award of the spectrum QUALCOMM originally applied for. There is a big difference between being first to the market and being fifth.

Third, award of the EAG 3 license will allow QUALCOMM to bring a next generation technology to the market. QUALCOMM is prepared to use the Block D license in EAG 3 to introduce an exciting and innovative system for high speed wireless INTERNET access, based on its pioneering CDMA technology. The deployment of this new system in 2001 will be comparable, in terms of the development of technology, to the deployment of PCS in 1995.

²⁶ *Broadband PCS Payment Order*, 11 FCC Rcd 12384, 12386 (1996).

Finally, and most importantly, the Block D license in EAG 3 is unencumbered, except for some broadcast licensees who will be transitioning to digital service.²⁷ Even if QUALCOMM could introduce a new, “first to the market”, innovative service in another part of the spectrum, it would simply not be comparable to Miami if it were not available free of legal encumbrances.

C. No Other Suitable Spectrum is Likely to Become Available Forthwith

During the months of discussion with the FCC about what might constitute suitable spectrum, several possibilities were identified. None of these, with the exception of the spectrum allocated in the *Channel 60-69 Proceeding*, is likely to become available in any reasonable time frame. For example, QUALCOMM discussed with the Commission staff spectrum in the possible “3G” frequencies (1710-1755 MHz and 2110-2150 MHz). However, this spectrum is not scheduled for auction until 2001 and 2002, at the very earliest, and there has not yet been a Notice proposing service rules. Agreeing that such spectrum might be suitable is like agreeing to a very distant pig in a poke.²⁸

The Commission also suggested the possibility of returned PCS licenses.²⁹ The Commission stated that it expected to receive a number of C Block licenses from bankrupt entities and that these would be suitable spectrum for QUALCOMM. At one time – immediately after the *Freeman* victory – QUALCOMM had expressed interest in

²⁷ This, of course, is similar to the encumbrance found in the 2 GHz spectrum where microwave licensees needed to relocate.

²⁸ The prior adoption of service rules is a virtual *sine qua non* in order to determine if spectrum is suitable. Without knowing how the spectrum is to be used, it is very difficult to know whether it would be suitable for introduction of the pioneering technology.

²⁹ QUALCOMM mentioned the New York A Block license, should it be returned or revoked, but this matter was not actively discussed during the meetings.

the Phoenix C Block license. However, the Commission ignored QUALCOMM's suggestion at that time and re-auctioned the Phoenix license.

Now it appears that the Commission expects that some additional C Block licenses will become available. The Commission recently released a Public Notice announcing that the licenses it had awarded to NextWave Communications were automatically canceled and would be re-auctioned in July.³⁰ However, a day later NextWave issued a press release asserting that it would "take all legal steps necessary to protect its rights and those of the many people and companies who have invested in its licenses."³¹ A few days later the presiding judge in the NextWave bankruptcy proceeding ordered the FCC to show cause why its cancellation of the NextWave license is not null and void.³² Just a few days ago, the U.S. Court of Appeals for the Second Circuit denied the FCC's request for a stay of the bankruptcy proceedings.³³ It is apparent that these licenses will be the subject of complex and protracted litigation. It is unrealistic to imagine that they will be available "forthwith" for award to QUALCOMM.

Thus, the licenses in the *Channel 60-69 Proceeding* appear to be the only licenses that meet the Court's criteria: that the licenses be comparable to the license QUALCOMM should have been awarded, and that the Commission take "prompt action" to award the license.

³⁰ Public Notice, DA 00-49, January 12, 2000.

³¹ NextWave Telecom Inc. Press Release, January 13, 2000.

³² NextWave Telecom Inc. Press Release, January 18, 2000.

³³ NextWave Telecom Inc. Press Release, January 24, 2000.

D. Award of a License to QUALCOMM Would Be Consistent with Law and Policy

As *QUALCOMM v FCC* demonstrates, compliance with Section 402(h) of the Communications Act requires that the Commission give immediate effect to the mandate of a Court. The award to QUALCOMM of the Block D license in EAG 3 would satisfy that requirement and, as we have shown, is the only suitable spectrum available “forthwith”. Award of the Block D EAG 3 license would also be consistent with other law and policy, specifically the Commission’s goals in the *Channel 60-69 Proceeding* and Section 309(j)(13) of the Communications Act.

1. The Channel 60-69 Proceeding

The Commission’s vision for the newly-available spectrum in the 746-764 MHz and 776-794 MHz bands is the provision of a “wide range of advanced wireless services.”³⁴ There are, of course, many companies in the United States that will be capable of providing wireless services, but few with the track record of success that QUALCOMM has. QUALCOMM will use the EAG 3 spectrum to provide HDR, QUALCOMM’s High Data Rate technology system which provides the most efficient wireless Internet access solution available. HDR provides wireless Internet connectivity at 2.4 Mbps in either a fixed or mobile environment – providing consumers with a new conduit for high speed Internet access. Early entry into the marketplace will give QUALCOMM the chance to showcase HDR, thereby compensating for the chance to showcase CDMA that it was unfairly deprived of in 1994.

Not only will the spectrum be used consistently with the Commission’s vision in the *Channel 60-69 Proceeding* and compatibly with the original vision for pioneers, HDR

³⁴ *Channel 60-69 Proceeding*, ¶ 1.

is based on the CDMA technology for which QUALCOMM was awarded the pioneer's preference. Thus, use of HDR will be consistent with the Commission's requirement that pioneers actually use their pioneering technology when they provide service as licensees.

2. Section 309(j)(13)

Award of a license to QUALCOMM would also be consistent with Section 309(j)(13) of the Communications Act which requires that the Commission recover for the public a portion of the value of the spectrum awarded to pioneers.

In other words, QUALCOMM would not get a free license.

Under the terms of Section 309(j)(13)(B), QUALCOMM would receive a discount in the amount it would pay for EAG 3, based on a formula contained in the law and according to which APC, Cox and Omnipoint paid for their licenses. In addition, pursuant to Section 309(j)(13)(C), QUALCOMM would be permitted to pay according to an installment payment schedule over 5 years.

In this way, the award to QUALCOMM of the Block D EAG 3 license will replicate the award which should have been given to QUALCOMM in 1994, in connection with Gen. Docket 90-314.

IV. CONCLUSION

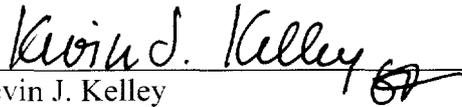
The Commission is under a Court order to award QUALCOMM a license comparable to the license it sought in the PCS Pioneer's Preference proceeding, and to do so "forthwith". QUALCOMM has identified suitable spectrum, 752-762 MHz and 782-792 MHz in Economic Area Grouping 3. This is the only spectrum suitable for deployment of CDMA-based wireless services which is available, free of legal encumbrances, in any reasonable time frame.

Therefore, QUALCOMM respectfully requests that the Commission declare that the EAG 3 Block D license is the "suitable spectrum" required to be awarded to QUALCOMM and that the Commission make such award "forthwith".

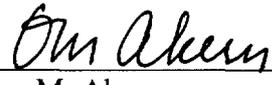
Pursuant to Section 309(j)(13)(E)(ii) of the Communications Act, the Commission ...shall not alter the bandwidth or service areas designated for [PCS pioneer's] licenses...³⁵

Consequently, by this Petition, QUALCOMM withdraws its pending preference request for the southern Florida Major Trading Area ("MTA") and substitutes Block D of EAG 3 therefor.

Respectfully submitted,



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Dated January 28, 2000

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³⁵ 47 U.S.C. § 309 (j) (B)(E)(ii)

