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March 24, 2000

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, TW-B204
445 12th Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Notification – WT Docket No. 99-168, DA 00-219

Dear Ms. Salas:

This letter is being filed on behalf of Motorola, Inc. (Motorola) to express its views that the Commission should satisfy QUALCOMM Incorporated's (QUALCOMM) Petition for Declaratory Ruling¹ by granting QUALCOMM a transferable bidding credit, which would be available for use during any auction in the next three years. The grant of such a bidding credit would facilitate the Commission's goal of harnessing market forces to determine the licensee for many commercial spectrum allocations. Such a credit must be conditioned on the same restrictions attached to the original pioneer's preference licenses, including build out of a system utilizing the CDMA technology for which the preference was granted. Satisfaction of the QUALCOMM Petition in this manner would also allow the Commission to give full effect to the rules it established in the 700 MHz band, providing viability to a large number of bidders with nationwide or regional business plans.

BACKGROUND

In its petition, QUALCOMM requests that it be awarded the 700 MHz Block D 20 MHz license in the Southeast Economic Area Grouping 3 ("EAG3") pursuant to its pioneer's preference for broadband PCS. QUALCOMM filed its petition for a declaratory ruling on January 28, 2000, comments were filed on February 18, 2000,² and QUALCOMM filed its reply on February 25, 2000.³ Commenters unanimously opposed QUALCOMM's petition. On March 14, 2000, QUALCOMM filed an *ex parte* presentation with the FCC, summarizing discussions with staff at the agency regarding QUALCOMM's request for the EAG 3 license.⁴ In addition to the proposal QUALCOMM presented in its petition, the staff discussed two other options with

¹ See *QUALCOMM Incorporated, Petition for Declaratory Ruling Giving Effect to the Mandate of the District of Columbia Circuit Court of Appeals* (filed Jan. 28, 2000) ("QUALCOMM Petition").

² The following entities filed comments in response to the Commission's public notice (DA 00-219) seeking comments on the QUALCOMM Petition: GTE Service Corporation; AT&T Corp.; Rig Telephones Inc. d/b/a Datacom; PSINet Inc.; SBC Wireless, Inc.; U S West Wireless, LLC; and BellSouth Corporation.

³ No other entity, besides QUALCOMM, filed a reply to the comments.

⁴ Letter from Veronica M. Ahern, Attorney for QUALCOMM, Incorporated to Magalie R. Salas, Secretary, Federal Communications Commission, March 14, 2000 ("QUALCOMM Ex Parte Letter").

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QUALCOMM, providing a bidding credit to QUALCOMM in lieu of a license, and providing a C block license to QUALCOMM.⁵

GRANT OF QUALCOMM'S PETITION WOULD UNDERCUT THE COMMISSION'S DECISIONS TO ENABLE A NATIONWIDE AGGREGATION AND REGIONAL BROADBAND SERVICE IN THE 700 MHz BAND

In establishing the service and auction rules for the 700 MHz band, the Commission went to great lengths to ensure that the greatest number of uses could be accommodated. The Commission's goal was to allow significant flexibility to bidders interested in providing expanded or new service to the public. For example, the Commission wanted to ensure that a new service provider could establish a nationwide footprint, either to provide CMRS or broadband service. In order to facilitate establishment of a nationwide service, the Commission established relatively large regional license areas, Economic Area Groupings (EAG), and provided for aggregation to a nationwide service area.⁶ In addition, the Commission, for the first time, directed the Wireless Telecommunications Bureau to adopt, if operationally feasible, a nationwide bid withdrawal procedure in order to limit the exposure of bidders seeking a 30 MHz nationwide aggregation.⁷ Grant of QUALCOMM's petition defeats the Commission's goal of allowing multiple potential nationwide providers to participate in this auction and may defeat the introduction of an additional nationwide service.

The Commission also sought to preserve the opportunity for wireless data service providers, providing high-speed broadband capability, to enter the marketplace using spectrum at 700 MHz. Certain of these providers have contended that 30 MHz of spectrum is necessary to support their service.⁸ A grant of QUALCOMM's petition would thwart attempts to aggregate 30 MHz in the southeast region in order to provide high-speed Internet access, and potentially deprives consumers of an alternative broadband service.

PROVIDING A BIDDING CREDIT ALLOWS MARKET FORCES TO DETERMINE THE USE OF PARTICULAR LICENSE

Allowing QUALCOMM a bidding credit would be preferable to granting QUALCOMM a license in any specific auction, including the 700 MHz auction and the C and F block reaction. Grant of a license to QUALCOMM in either auction, especially

⁵ *Id.* QUALCOMM had previously indicated its willingness to accept a C or F Block license. See QUALCOMM Petition at 13-14.

⁶ *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, First Report and Order*, WT Docket No. 99-168, FCC 00-5, ¶ 59, ¶ 60 (rel. Jan. 7, 2000) ("700 MHz First Report and Order").

⁷ 700 MHz First Report and Order ¶ 126

⁸ 700 MHz First Report and Order, ¶ 58.

in the comparatively little time left before the auctions are to begin, would introduce a great deal of uncertainty for any bidder planning to participate in the auction and would, as discussed above, defeat certain business plans. Potential bidders planning on entering the auction could not be certain whether they whether they could ultimately gain QUALCOMM's license, and under what conditions. In contrast, providing a transferable credit to QUALCOMM would allow market forces to determine what party received a particular license within the parameters for use of the spectrum specific by the FCC. Any bidder wishing to gain a particular license would know that it would have to purchase QUALCOMM's credit or outbid QUALCOMM, should QUALCOMM be interested in that license. Thus, the use of a bidding credit is most consistent with the Commission's goal of using the auction process to determine the highest, best use for the spectrum, once the allocation decision has been made and service rules established.

THE BIDDING CREDIT SHOULD BE CONDITIONED BY THE SAME RESTRICTIONS AS THE ORIGINAL PIONEER LICENSES

The conditions under which the credit be used should be further examined. QUALCOMM states that the valuation of the bidding credit should "put QUALCOMM in the position it should have been had the Commission acted fairly in 1994."⁹ In this regard, it is necessary to keep the D.C.Circuit's mandate, to provide QUALCOMM with "suitable spectrum," similar to that granted to the other pioneers, in mind.¹⁰ As parties who have opposed QUALCOMM's Petition have pointed out, "the D.C. Circuit ordered the Commission to grant QUALCOMM its pioneer's preference for CDMA technology, suitable spectrum, and nothing moreQUALCOMM's petition makes the unsubstantiated presumption that the Court's mandate was intended to secure for the company "backdated" benefits extending to when the original pioneer's preference recipients obtained their authorizations. Nothing in the Court's mandate supports this notion."¹¹ The Court did not intend for QUALCOMM to receive damages, or to make QUALCOMM whole in the "lost value" sense.

In addition, as QUALCOMM is aware, the original pioneer's preference license awards were subject to substantial conditions and restrictions, including build out of a system utilizing the design for which the preference was granted, in this case, CDMA. Indeed, QUALCOMM challenged the Voicestream-Omnipoint transfer of control application based on QUALCOMM's assertion that Omnipoint had not "substantially used" the CDMA technology for which the pioneer's preference was granted. Use of QUALCOMM's high data rate technology, as proposed in its petition, would be prohibited.¹² The pioneer was also required to hold the license for three years or until the five-year build out period construction requirements had been satisfied, whichever occurred first. If QUALCOMM is to be granted a transferable bidding credit, the same

⁹ QUALCOMM Ex Parte Letter at 2.

¹⁰ See QUALCOMM v. FCC, 181 F.3d 1370 at 1381 (D.C. Cir. 1999)

¹¹ GTE Opposition to QUALCOMM Petition for Declaratory Ruling, WT Docket No. 99-168, DA 00-219, at 3 (February 18, 2000).

¹² See QUALCOMM Petition at 15.

conditions must be imposed on its use as were imposed on the original pioneers' grants. Specifically, the credit must be conditioned by the requirement that CDMA technology be used and the license held for a minimum of three years or until the five-year build out period construction requirements have been satisfied.

IF QUALCOMM CANNOT BE AWARDED A BIDDING CREDIT, IT SHOULD RECEIVE A C OR F BLOCK LICENSE.

Motorola believes that providing QUALCOMM with a bidding credit is the option that is least disruptive to the auction process and bidders' business and auction planning. If this option cannot be implemented, award of a C and F block license to QUALCOMM would be the next viable alternative, given the legal and operational problems associated with grant of a license to QUALCOMM in the 700 MHz band.¹³ Such licenses are in the same band as the Miami license originally sought by QUALCOMM, they are thus more "comparable" than any other award of a license.

Respectfully Submitted,



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Vice President and Director
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cc:

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¹³ Several commenters have pointed out that the Commission is precluded from awarding the EAG 3 license to QUALCOMM given the specific Congressional mandate that licenses in 700 MHz be awarded through competitive bidding. *See, e.g.*, Opposition of US West Wireless to QUALCOMM Petition for Declaratory Ruling, WT Docket No. 99-168, DA 00-219, 7-11 (February 18, 2000); Opposition of BellSouth to QUALCOMM Petition for Declaratory Ruling, WT Docket No. 99-168, DA 00-219, 2-4 (February 18, 2000).