QUALCOMM Incorporated

2001 Pennsylvania Ave., NW■Suite 650■Washington, DC 20006■Tel: 202.263.0020 www.qualcomm.com

September 22, 2005

Via ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Written Ex Parte Presentation in WT Docket No. 05-7

Dear Ms. Dortch:

On behalf of QUALCOMM Incorporated ("QUALCOMM"), this is to provide the Commission, and specifically the Office of General Counsel, with additional information in the above-captioned proceeding relating to the Commission's authority to adopt streamlined processing procedures to govern engineering studies to be filed by QUALCOMM under Section 27.60 (b) (iii) of the Commission's Rules without completing a notice and comment rulemaking to adopt such procedures.

In its Petition for Declaratory Ruling in the above-referenced proceeding, QUALCOMM requested that the Commission establish a streamlined processing procedure for consideration of such engineering studies because a shortened public notice period, coupled with an automatic grant process, will accelerate the deployment of QUALCOMM's new MediaFLO service, while relieving the Commission of an unnecessary administrative burden. These benefits can be achieved without the notice and comment requirements of the Administrative Procedure Act ("APA") because streamlined procedures are "rules of agency organization, procedure or practice" exempt from those requirements under Section 553(b)(A) of the APA, 5 U.S.C. § 553 (b) (3) (A).

In *JEM Broadcasting Company, Inc. v. FCC,* 22 F.3d 320 (D.C. Cir. 1994), the U.S. Court of Appeals for the D.C. Circuit held that the Commission's "hard look" rules, permitting amendments to FM radio license applications only during a 30-day window, which were adopted to streamline the agency's review process, were procedural and, thus, exempt from the APA notice and comment requirement under Section 553 (b) (3) (A).[1] The D.C. Circuit

[1] *JEM Broadcasting* is often cited as the leading case in the D.C. Circuit on the distinction between substantive and procedural rules and is certainly good law. *See*, *e.g.*, KOCH, 1 ADMINISTRATIVE PRACTICE AND PROCEDURE § 4.13, p. 343. *JEM* is often cited by the FCC in support of its decision not to engage in notice and comment rulemaking. *See*, *e.g.*, *In the Matter of Federal State Joint Board on Universal Service*, 20 F.C.C.R. 5167, 5169 n.21 (2005) (adopting changes to the Form 499-A Instructions), *In the Matter of Amendment of Part 5 of the Commission's Rules to Require Electronic Filing of Applications for Experimental Radio Licenses and Authorizations*, 18 F.C.C.R. 16966, 16967 n.7 (2003) (requiring electronic filing

explained the distinction between procedural and substantive rules. The "critical feature" of a procedural rule, the court stated, "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 parties present themselves or their viewpoints to the agency." *Id*. (quoting *Batterson v. Marshall*, 208 U.S. App. D.C. 321, 648 F.2d 694, 707 (D.C. Cir. 1980) (internal quotations omitted)). The court in *JEM Broadcasting* balanced the impact of the streamlined procedures adopted by the FCC against the efficiency gains the FCC reaped as a result of the streamlined procedure. The court also took note that the revised procedures continued to provide a meaningful opportunity for compliance and did not represent an "extreme procedural hurdle." *Id*. Ultimately, however, the court concluded that the "critical fact" was that the FCC procedures in question "did not change the *substantive standards* by which the FCC evaluated license applications." *Id*. (emphasis in original).

The streamlined FCC procedures sought by QUALCOMM in its Petition for Declaratory Ruling are, as the *JEM Broadcasting* court put it, "comfortably within the realm of the procedural." *Id*. The proposed procedures themselves do not alter the substantive rights of the parties. Interested parties would still have ample opportunity to oppose FCC approval of any engineering study filed by QUALCOMM.[2] Once an opposition has been received, the streamlined processing procedures would no longer apply. *See* Reply Comments in Support of Petition for Declaratory Ruling (filed March 25, 2005) at Pgs 22-24. Thus, the basis upon which the FCC decides whether or not to approve an engineering study will not change after adoption of the streamlined procedures, and parties will not have been encouraged to alter their conduct (other than the way they present their views to the agency). This fact, as the *JEM Broadcasting* court stated twice, is "critical." *Id*.

In addition, the efficiency gains resulting from the adoption of the streamlined procedures are obvious. QUALCOMM expects that many of these engineering studies will be filed by QUALCOMM and other Lower 700 MHz licensees over the next few years. If the Commission were to consider each study without implementing some form of streamlined procedure, the administrative burden would be considerable, and there could well be substantial delays in deployment of valuable, innovative services on the Lower 700 MHz spectrum.

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of applications for Experimental Radio licenses), *In the Matter of Creation of a Low Power Radio Service*, 16 F.C.C.R. 8026, 8030-8031 n.23 (2003) (defining the scope of permissible minor amendments that may be filed by LPFM applicants outside window filing periods); *In the Matter of Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Fixed Microwave Radio Services*, 15 F.C.C.R. 3129, 3139-3140 (2000) (eliminating the thirty-day public notice period for private fixed point-to-point microwave service applications), *In the Matter of Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission*, 14 F.C.C.R. 20128, 20132 n.21 (1999) (adopting procedural amendments to confidentiality regulations).

[2] To be sure that affected stations have actual notice, the procedures could require that QUALCOMM would serve the TV stations that may be within the scope of the engineering study.

Under these circumstances, we urge the Commission to determine, under the standard set forth in *JEM Broadcasting,* and often cited by the Commission, that streamlined processing is appropriate for engineering studies filed under Section 27.60 using the OET 69 methodology proposed by QUALCOMM.

Respectfully submitted,

/s/ Dean R. Brenner

Dean R. Brenner
Senior Director, Government Affairs
QUALCOMM Incorporated

Cc: Samuel Feder, Esq.
Joel Kaufman, Esq.
David Senzel, Esq.